Vertical Agreements

In 34 jurisdictions worldwide

Contributing editor
Stephen Kinsella OBE

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GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Vertical Agreements 2015

Contributing editor
Stephen Kinsella OBE
Sidley Austin LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

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Vertical Agreements 2015

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Getting the Deal Through is delighted to publish the ninth edition of *Vertical Agreements*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 34 jurisdictions featured. Our coverage this year includes new chapters on Bulgaria, Latvia, Poland, Singapore and Turkey.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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, Stephen Kinsella OBE of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

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Increased Scrutiny of Most-Favoured-Nation Clauses in Vertical Agreements

Noëlle Lenoir, Marco Plankensteiner and Elise Créquer

Kramer Levin

Most-favoured-nation (MFN) clauses in the context of vertical agreements are, strictly speaking, most-favoured-customer clauses and consist essentially in arrangements between suppliers and distributors whereby the supplier grants the distributor a price that will not be less favourable than the prices granted to its other customers (eg, European Commission, *Hollywood film studios and digitisation of European cinemas*, IP/11/257, and *E.ON Ruhrgas Gazprom*, IP/05/710). From this concept different structures of MFN clauses have emerged.

MFN clauses can be reversed into 'most-favoured-supplier' clauses whereby a buyer will assure the seller that it will match the best price offered by one of its competitors disclosed to it by the seller (eg, European Commission, *Hollywood studios/European pay-TVs*, IP/04/1314 and *Universal Music Group/EMI*, COMP/M.6458). They also bear similarities to 'English clauses', which require buyers to report to their suppliers any better offers made by competing suppliers, and allowing them to accept such offers only if the initial suppliers do not match them (European Commission Guidelines on Vertical Restraints, OJ C 130 of 19 May 2010, p1, para. 129; European Court of Justice, judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76). These clauses are usually considered unlawful as they lead to artificially fixing prices.

During 2014, competition authorities have in particular developed their analysis of MFN clauses in the online sales sector. An overview of recent European cases provides clearer guidelines for assessing MFN clauses and their compatibility with competition law.

Recent case law concerning across-platform parity clauses

The use of sales platforms for e-commerce has triggered the development of 'retail-MFN' arrangements, which provide an assurance to the platform that the supplier will not sell its products or services at lower prices via another platform. These clauses have caught the attention of competition authorities in Europe in recent cases that provide guidance on the analysis that may be carried out in relation to such clauses.

E-books and online marketplaces

On 12 December 2012 and 25 July 2013, the European Commission adopted decisions accepting commitments from five major publishers and Apple providing for the termination of agency agreements with Apple, the prohibition of restrictions on retailers' ability to set prices and an explicit ban on retail-MFN clauses for a period of five years (*e-books* case, COMP/AT.39847). To counter Amazon's low e-book retail prices major publishers together with Apple had planned to jointly convert the sale of e-books from a wholesale model to an agency model and publishers were able to pressure Amazon into converting. Combining the agency model and the introduction of MFN clauses in contracts between Apple and the publishers, the latter retained control over retail prices, which could be maintained at a certain level and Apple was assured that if a retailer other than itself were to offer a lower price for an e-book, the publisher had to match that price in the iBookstore.

The European Commission considered that the MFN clauses had effects similar to resale price maintenance (RPM) clauses, namely facilitating collusion by increasing price transparency, softening competition between rivals, encouraging price increases and preventing the emergence of lower prices.

Another case was closed in 2013: that of Amazon's price parity policy. Amazon's policy restricted sellers' ability to offer lower prices on competing platforms. Amazon decided to end its Marketplace price parity in Europe after investigations were initiated by the OFT and the Bundeskartellamt.

Hotel booking platforms cases

To date, more than 10 European national competition authorities (NCAs) have taken up the battle against price parity clauses in online hotel booking platform contracts with hotels as a common cause within the European Competition Network (ECN), in coordination with the European Commission. In particular, the French, Swedish and Italian NCAs are piloting market tests in commitment procedures that could lead the way for other NCAs.

On 15 December 2014, the three aforementioned authorities simultaneously published commitments put forward by Booking.com after extensive pan-European negotiations, which were submitted to public consultation in each country until the end of January 2015.

In its contracts with hotels, Booking.com obliges them to always offer their best prices, maximum room capacity, best cancellation and booking conditions compared with what they offer on other platforms and through their direct booking channels, on or offline. Similar clauses exist with regard to other important platforms such as Expedia or HRS.

The proceedings were initiated in each country following complaints filed by the main hotel unions against Booking.com, Expedia and HRS. There are concerns that the MFN clauses may qualify as anti-competitive agreements prohibited under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and national equivalents. MFN clauses may result in a restriction of competition between platforms since the level of commissions applied to hotels by platforms cannot affect room rates applied to end-users, which incentivises platforms to raise commission rates. Furthermore, MFN clauses raise barriers to entry for new platforms and create eviction risks. These effects are amplified as it appears that similar clauses are applied by all of Booking.com's competitors on the market. The French NCA has also mentioned that Booking.com's practices risk qualifying as an abuse of dominant position, prohibited under article 102 of the TFEU and its national equivalents.

Booking.com's commitments offered in France, Sweden and Italy are identical and consist in the removal of 'wide MFN clauses' and equivalent measures, which means the removal of price parity clauses with respect to third-party booking service providers, on or offline ('indirect channels'). This should consequently stimulate competition between platforms and restore the hotels' ability to price-differentiate between platforms; however, Booking.com would be able to continue using 'narrow MFN clauses' preventing hotels from offering lower prices through their on and offline direct sales channels, with an exception left open for the hotels' closed networks, such as loyalty programmes. The three NCAs have admitted that allowing narrow MFNs may be necessary to prevent hotels from free-riding on the important investments made by the booking platforms, such as the cost of marketing and maximum visibility through search engines. Booking.com has proposed to enforce these commitments throughout the EEA.

Expedia and HRS have not yet offered commitments. Head of the French NCA, Bruno Lasserre, has explained that an agreement was first sought with Booking.com, the market leader. Once Booking.com's commitments are approved following their market test, it is expected that Expedia and HRS should offer similar commitments.

In France, on 18 November 2014, the Minister of Economy also referred to the competition authority for an opinion on the nature of contractual relations between hotels and online booking platforms requesting that it examine in particular the demands of the hotel industry to enforce a mandate contract model prohibiting the platforms from interfering in setting prices to end-customers. Parallel to competition authority proceedings, the

Minister of Economy has initiated civil proceedings against Expedia and Booking.com alleging breaches of article L442-6 of the French Commercial Code, which prohibits significant imbalances in contractual obligations and clauses enabling automatic alignment on favourable conditions granted to a competitor. A draft law was also put forward to amend article L442-6IId of the French Commercial Code in order to tackle price parity clauses more efficiently. While this project is still on standby, a working group within the French parliament is currently studying the issue.

In the United Kingdom, as a result of recent developments, investigations have taken a new turn. On 31 January 2014, the OFT had accepted commitments from Booking.com, Expedia and IHG to restore the ability of online travel agents (OTAs) to offer discounts enabling them to grant discounts to closed groups of customers without publicly disclosing their level (Decision OFT1514dec). While the OFT had identified MFN clauses in its statement of objection, the commitment decision focused on restrictions on OTAs' freedom to use discounts and contained no assessment of rate parity provisions. This decision was quashed by the Competition Appeal Tribunal (CAT) on 26 September 2014 following an appeal brought by Skyscanner, a price comparison website (CAT, *Skyscanner/CMA* [2014] CAT16). The CAT considered that the OFT had failed to properly take into consideration objections to the proposed commitments raised by Skyscanner and others, and failed to consider the possible impact on price transparency of a restriction on disclosure of price information. The case was referred back to the Competition and Markets Authority (CMA) (the OFT's successor), which has decided not to challenge the court ruling, but instead to reopen the investigation that will be led in light of recent market developments including the market tests launched by the French, Swedish and Italian NCAs.

In Germany, the investigations into online booking platforms have proceeded at a different pace. On 20 December 2013, the Bundeskartellamt prohibited HRS from using any MFN arrangements and ordered the removal of the clause from its contracts (Decision B9 – 66/10 *HRS-Hotel Reservation Services*). Making no distinction between wide and narrow MFN clauses, the Bundeskartellamt identified significant restrictions of competition by effect (removal of incentive by booking platforms to offer lower commissions or adopt new sales strategies, foreclosure of potential new entrants) that are strengthened by the presence of MFN clauses in contracts with other major platforms such as Booking.com or Expedia. It further rejected any potential positive effects, noting that a potential free-riding problem is at best minimal and any possible positive effects do not outweigh the negative effects on competition. On 9 January 2015, the Düsseldorf Higher Regional Court rejected HRS's appeal against the 20 December 2013 decision, thus confirming the prohibition of HRS's 'best-price' clauses (OLG Düsseldorf, VI – Kart 1/14 (V)). HRS can now appeal the judgment before the Federal Court of Justice. The ruling is a somewhat isolated decision adopted while a pan-European solution is being elaborated by other NCAs. HRS has declared it is considering further legal steps and considers itself at a competitive disadvantage since it is the only group in Europe that has stopped using MFN clauses. Proceedings are still ongoing in Germany against Booking.com and Expedia.

Private motor insurance in the United Kingdom

Following an investigation of the private motor insurance market by the UK Competition Commission, the CMA published on 24 September 2014 its final report containing measures it expects to increase competition in the car insurance market and on 7 January 2015 a Draft Order covering the remedies identified in the final report on competition concerns, which was recently undergoing consultation.

The final report had identified the presence of MFN clauses between major price comparison websites (PCWs) and car insurers that required parity between PCWs and the insurers' own direct channels. The CMA structured its analysis around the effects of wide and narrow MFN clauses. It considered that any anti-competitive effects of narrow MFN clauses were unlikely to be significant and that such clauses could ensure that PCWs maintain their credibility and continue to offer a time saving and search cost-reducing service that enhances inter-brand competition and consumer price sensitivity. On the contrary, wide MFN clauses have an adverse effect on competition as they reduce entry, innovation and competition between PCWs. Furthermore, they prevent price competition between PCWs and lead to higher commission fees and, ultimately, premiums. Drawing consequences from this report, the Draft Order proposes the prohibition of wide MFN clauses and equivalent measures while authorising narrow MFN clauses affecting the insurers' own websites only but not their offline direct channels. It must be noted that through its commitments, Booking.com is allowed to enforce narrow MFN clauses with respect to all of the hotels direct channels, on and offline.

Guidance: criteria for assessing MFN clauses

It is useful to recall that article 101(1) of the TFEU prohibits agreements between companies that have as their object or effect the restriction of competition. Article 101(3) of the TFEU exempts, under certain conditions, such agreements if they create efficiencies or promote technical or economic progress. Similar provisions exist at national level in Europe. Under EU competition law, vertical agreements may also be exempted under the vertical agreements block exemption regulation, if certain conditions are met and if the agreement does not contain hard-core restrictions (Commission Regulation No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices).

Potential anti-competitive object or effect of MFN clauses

In the European Commission Guidelines on vertical restraints, MFN arrangements are not analysed as a standalone restriction but only as a means to reinforce the effectiveness of RPM policies by reducing the buyer's incentive to lower the resale price (Guidelines on Vertical Restraints, cited above, para. 48). If they are used to create or facilitate RPM, MFN clauses are considered as having as object the restriction of competition and qualify as a hard-core restriction under article 4a) of Regulation No. 330/2010, preventing the agreement from benefiting from the block exemption. In other cases, MFN arrangements may be a way of carrying out a wider anti-competitive agreement, for example, when they are used to soften rivalries, facilitate collusion and increase price transparency between competitors.

Except in these cases, MFN clauses will generally not be considered anti-competitive by object, but may restrict competition by their effects.

A typical restrictive effect of MFN clauses is foreclosure of new entrants and raising barriers to entry. A retailer wishing to enter the market by offering lower prices to end users will try to negotiate lower prices with suppliers in order to reduce its costs. Such a strategy will not be successful if the existing retailers benefit from MFN clauses since the suppliers will grant the same prices to the existing retailers who will in turn be able to lower their prices to end-users, hampering competition through prices by the new entrant. This effect will be strengthened in a concentrated market where the new entrant has no opportunity to turn to other suppliers or where MFN clauses are generalised. Considering their exclusionary effects, MFN clauses may also help maintain or reinforce market positions and thus may qualify as an abuse under article 102 of the TFEU in a context of dominance.

In addition, MFN clauses typically restrict sellers in their ability to discriminate between customers, which is economically legitimate, except in a situation of dominance. Indeed, setting different prices for different sales channels is a legitimate way of reacting to differing distribution costs or levels of competitive pressure. Application of MFN clauses may result in uniform prices being applied to all customers, unless the seller retains the possibility to increase prices for certain customers by not agreeing to MFN clauses with them. This effect is strengthened where MFN clauses are generalised. A seller restricted in its freedom to discriminate will most probably lose the incentive to lower prices to buyers, and subsequently raise its prices.

In the hotel booking platforms cases in Europe, NCAs agree that MFN clauses are likely to have an anti-competitive effect through reducing competition between platforms or foreclosing entry of new platforms on the market that will not be able to attract hotels by offering lower commission rates. MFN clauses also have an overall commission-raising effect since raising commissions will not result in room rates being higher than the rates applied in other sales channels covered by price parity clauses.

In assessing potential anti-competitive effects of MFN clauses, it is always necessary to take into consideration the situation on the market. MFN clauses are more likely to lessen competition in a market where buyers or sellers, individually or collectively, have sufficient market power. Buyers who are able to use their negotiating strength to impose restrictions on a seller in order to ensure they are receiving the best terms available will in turn strengthen their market power.

MFN clauses are also more likely to be harmful in highly concentrated markets rather than in markets involving an important number of actors competing fiercely. Indeed, in a concentrated market, a seller using MFN clauses enabling it to increase its prices will have less risk of losing its customers to competing sellers. The cumulative effect of MFN clauses in a highly

concentrated market will increase such restrictive effect. Harmful effects of MFN clauses will be all the more likely if the market is riddled with them.

If MFN clauses appear to have restrictive effects on competition, their potential positive effects may allow them to be exempted under article 101(3) of the TFEU.

Potential positive effects of MFN clauses

The typical positive effect of MFN arrangements is to provide buyers with a certain protection against price increases by suppliers. They also allow buyers to reduce costs of frequent negotiations and market research to find out whether they are getting the best price available.

MFN clauses may also be a legitimate way of protecting specific investments incurred by buyers on request of the seller, as they provide such buyers with a further incentive to commit to investments by granting extra assurance of recouping costs over time.

In this respect, NCAs appear to be attempting to fine-tune their analyses of MFN clauses, differentiating between wide and narrow MFN, admitting that the latter may be necessary to protect the business model of online platforms such as hotel booking portals or price comparison websites. Such platforms invest significant amounts to offer high-quality services, such as attractive platforms, improved presentation of products and quality user comments.

In any case, if MFN clauses are scrutinised by European competition authorities and considered as potentially restrictive of competition, the onus lies upon the parties to prove that their pro-competitive effects outweigh such restrictive effects.

Conclusion

When concluding vertical agreements containing MFN clauses, parties must be cautious in assessing whether the efficiency gains that are sought sufficiently outweigh any potential anti-competitive effect of the MFN clause. Contracts containing MNF clauses therefore require a case-by-case analysis at an early stage by companies to avoid or at least anticipate scrutiny by competition authorities.

Guidance on assessing MFN clauses is currently emerging from coordinated efforts between NCAs. Diverging approaches seem to be gradually converging and have in common at least an effects-based approach taking into account the circumstances surrounding the use of MFN clauses. In the context of the hotel booking platforms in particular, regulators appear to be seeking a common approach, with the benefit that coordinated investigations should entail less of a burden for companies.

As the Head of the French NCA has explained, the advanced stages reached by national investigations and the expertise already built up by NCAs has led to an innovative form of decentralised cooperation rather than a reallocation of cases to the European Commission, despite the potentially pan-European effects of the investigated practices. This approach has been possible through a consistent substantive analysis that the ECN is developing (Lasserre, 'Dix ans après: Quel avenir pour le Réseau Européen de la Concurrence?', in *Concurrences*, No 4-2014, p74).

The outcome of the different ongoing market tests in the first few months of 2015 should shed further light on how NCAs are to assess MFN clauses in the future.

KRAMER LEVIN

Noëlle Lenoir **nlenoir@kramerlevin.com**
Marco Plankensteiner **mplankensteiner@kramerlevin.com**
Elise Créquer **ecrequer@kramerlevin.com**

47 avenue Hoche
75008 Paris
France

Tel: +33 1 44 09 46 00
Fax: +33 1 44 09 46 01
www.kramerlevin.com

Argentina

Julián Peña
Allende & Brea

Antitrust law

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

The legal sources that set out the antitrust law applicable to vertical restraints are Law 25,156 (Antitrust Law) of 1999 as modified in 2001 and 2014, and its regulatory Decree No. 89/2001. The Antitrust Law provides in its article 1 that acts and behaviours related to the production or trade of goods and services that limit, restrict or distort competition or constitute an abuse of a dominant position in a market in a manner that may result in a damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of this law.

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?

Neither the concept nor the types of vertical restraints are defined in the Antitrust Law. Article 2 of the Antitrust Law, however, contains a list of some of the anti-competitive practices that could be considered unlawful. This list includes some examples of vertical restraints, such as:

- '(a) fixing, imposing or manipulating, directly or indirectly, in agreement with competitors or individually, any form of price and purchase conditions or conditions relating to the sale of goods, furnishing of services or production';
- '(i) conditioning the sale of goods to the purchase of other goods or to the use of a service, or conditioning the furnishing of services to the use of other services or to the purchase of goods'; and
- '(g) subordinating the purchase or sale to the condition of not using, purchasing, selling or supplying goods or services produced, processed, distributed or marketed by a third party'.

Thus, the vertical restraints that are subject to the Antitrust Law include:

- resale price maintenance (setting either minimum, maximum or sometimes suggested resale prices);
- tying arrangements;
- exclusive dealing arrangements;
- exclusive distributorship arrangements; and
- customers and territorial restraints.

The list of anti-competitive conducts in article 2 of the Antitrust Law is not comprehensive. It merely sets out examples of some of the behaviours that could be prohibited if they fall under the general prohibition contained in article 1.

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?

The objective pursued by the Antitrust Law on vertical restraints is mainly to preserve the general economic interest. The Antitrust Law provides that anti-competitive practices, such as vertical restraints, with the purpose or effect of restricting or distorting competition in a manner which may be contrary to the general economic interest are prohibited. The general economic interest has been interpreted as comparable with the concept of economic efficiency, although more inclined to consumer surplus than to total surplus.

Responsible authorities

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

The agencies responsible for enforcing prohibitions on anti-competitive vertical restraints are the CNDC and the Secretary of Trade of the Ministry of Economy and Finance (the Secretary, together with the CNDC, are referred to as the authorities). The CNDC is the agency responsible for investigating anti-competitive behaviour and for recommending to the secretary the measures to be taken. The Secretary is the final governmental decision-maker. Resolutions issued by the Secretary may be appealed directly to the federal Court of Appeals. Neither the Minister of Economy and Finance nor any other governmental agency can formally intervene in antitrust cases.

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?

To be subject to the Antitrust Law, a vertical restraint must have an effect on the Argentine market. Article 3 of the Antitrust Law provides the following: 'all natural or legal, public or private, profit or non-profit persons performing economic activities in whole or part on the national territory and those performing economic activities outside the country are subject to the provisions of this law to the extent their acts, activities or agreements affect the national market'. Therefore, the Antitrust Law has adopted the effects doctrine, which could be enforced extraterritorially (that is, an act performed or an agreement signed abroad could be challenged by the authorities provided it has effects in the domestic market).

In practice, there have so far been no known vertical restraint cases in which such sanctions or remedies have been imposed.

Agreements concluded by public entities

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

According to article 3 of the Antitrust Law, there are no limitations on its enforcement with respect to vertical restraints occurring as a result of agreements concluded by public or state-owned entities. In fact, the authorities have investigated such conducts in the past. However, both the authorities and the courts have not considered practices unlawful if a vertical restraint agreed by the parties is adopted based on a federal or local governmental regulation. The rationale used by the authorities to sustain these criteria is that the goal of the Antitrust Law is not to judge other governmental decisions since these regulations are subject to the respective administrative or judicial review.

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.

The Patents for Inventions and Utility Models Law (Law No. 24,481, as amended by Laws No. 24,572 and 25,859, together the Patents Law) provides certain rules regarding anti-competitive practices. In connection with the total or partial licensing of patents, the Patents Law prohibits those restrictive trade clauses:

- affecting the production;
- restricting competition; or
- imposing any other procedure, such as:
- exclusive transfer-back requirements;
- requirements preventing any challenge to validity;
- mandatory joint licences; or
- any other of the practices specified in the Antitrust Law.

The Patents Law provides that compulsory licences shall be granted in case the patentee performs anti-competitive practices. It reads: 'the right to use a patent shall be granted without the patentee's authorisation if the competent authority has determined that the patentee has committed anti-competitive practices'. In such event, the authorisation shall be granted without the need for any special procedure.

For the purpose of the Patents Law, the following shall, among others, be considered as anti-competitive practices:

- the establishment of excessive or discriminatory prices of the patented products as compared to the average prices prevailing in the market, in particular, if prices offered on the market are significantly lower than those offered by the patentee for the same product;
- the refusal to supply the local market under reasonable commercial terms;
- the obstruction of commercial or production activities; and
- any other conducts punishable by the Antitrust Law.

The regulatory decree of the Patents Act provides that the antitrust authorities shall first determine if the practices are unlawful.

Another sector with particular regulation of vertical restraints is the distribution of newspapers and magazines. This sector has been regulated by the Ministry of Labour and the antitrust authorities rejected a claim on vertical restraints in 1992 because of the special regime this sector has.

General exceptions

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

Although the Antitrust Law does not specifically provide an exception for certain types of agreement containing vertical restraints, pursuant to the general principle set out in its article 1, the Antitrust Law does not prohibit those agreements containing vertical restraints when the parties do not have sufficient market power as to cause a damage to the general economic interest.

Agreements

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

There is no definition of 'agreement' or its equivalent in the Antitrust Law.

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?

In order to engage the Antitrust Law in relation to vertical restraints, it is not necessary for there to be a formal written agreement and the relevant rules can be engaged by an informal or unwritten understanding. Pursuant to article 1, the Antitrust Law will be applicable to anti-competitive acts or behaviour regardless of the way these are manifested, whereas article 3 of the Antitrust Law sets out the economic reality principle by which the Antitrust Law takes into consideration the true nature of the act or behaviour, regardless of how these are manifested.

Parent and related-company agreements

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

The Antitrust Law does not apply to agreements between a parent and a related company because the Antitrust Law establishes in its article 3 the principle of economic reality. Therefore, it considers companies controlled by the same parent company as belonging to the same economic group.

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?

The authorities have relied on both US and European law to distinguish between purchase-resale and agency relationships and their respective antitrust consequences. In light of those precedents, the authorities set out the criteria to distinguish a valid sales agency from a resale price maintenance (RPM) arrangement. The authorities held in *Trisa-TSCSA* (2002) that RPM exists when the following elements are present: transfer of the legal title to the product from the seller to the reseller, and the transfer of the entrepreneurial risks from the seller to the reseller (the *Trisa-TSCSA* standard). However, in order for the RPM to be sanctioned by the authorities, the parties must have enough economic power to be able to cause damage to the general economic interest.

Consequently, under the *Trisa-TSCSA* standard, setting the sales prices will be legal when provided in the context of a sales agency where the principal retains the legal title to the product and the entrepreneurial risks of the transaction. Conversely, in a principal–agent relationship where there is a transfer of title and of the entrepreneurial risks from the principal to the agent, an RPM arrangement would be unlawful depending on its competitive effects.

There are no known cases in which a vertical restraint in an agency agreement has been sanctioned by the authorities.

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?

There is no guidance on what constitutes an agent–principal relationship. The authorities held in *Trisa-TSCSA* that in order to accept the existence of an agency agreement, the principal has to keep the legal title to the product and bear the entrepreneurial risks of the transaction. However, in *Trisa-TSCSA* the authorities failed to provide a detailed analysis with regard to the entrepreneurial risks that should remain on the principal for the relationship to be qualified as an agency.

Intellectual property rights

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

The Antitrust Law does not provide any special treatment for any determined sector or activity. However, as explained in question 7 above, the Patents Law establishes some special rules and procedures. These rules and procedures have not yet been applied in any case since the Patents Law was enacted in 1994.

Analytical framework for assessment

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

The Antitrust Law does not prohibit any vertical restraints per se. All vertical restraints are analysed under the rule of reason. In order to determine whether a vertical restraint infringes the Antitrust Law, the CNDC first determines whether there is a vertical restraint and examines the explanation given by the parties to justify their behaviour. The agreement containing the undertakings does not necessarily have to be a formal one. If an anti-competitive restraint is perceived by the CNDC, it will analyse the market structure. For this purpose the CNDC first defines the relevant geographic and product market. Once the relevant market is determined, the

CNDC analyses the entry barriers and the impact of imports in the market. The CNDC looks at the level of market power the parties exert to determine whether their conduct is capable of producing damage to the general economic interest. If the companies do not have sufficient market power, then no damage could be done to the general economic interest and, even if they have such market power, a vertical restraint may still be considered as not damaging the general economic interest if the conduct is considered by the CNDC to be pro-efficiency and pro-competitive. The latter has been the CNDC's most frequent position in the past decade.

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?

Since the Antitrust Law does not consider any restraint as per se unlawful, the authorities, when assessing the legality of individual restraints, take into consideration as a relevant factor the market shares of the supplier, as well taking into account the market share and other circumstances both of the supplier's and of the buyer's markets.

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?

The authorities take into consideration as a relevant factor the market power of the buyer, as well as the market share and other circumstances both of the supplier's and of the buyer's markets. There are no known cases where the CNDC has analysed vertical restraints relating to online sales.

Block exemption and safe harbour

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

There are neither block exemptions nor safe harbours under the Antitrust Law that provide certainty to companies as to the legality of vertical restraints under any conditions because the authorities analyse every vertical restraint on a case-by-case basis.

Types of restraint

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

The authorities have been very permissive with both suggested and maximum resale prices. In 1995, in the *FECRA* case, the authorities held that although Yacimientos Petrolíferos Fiscales (YPF), an Argentine energy company, had a 'suggested' price system that implied strong pressures to comply with it, this vertical restraint was not illegal under the Antitrust Law. The authorities considered that since the YPF prices were lower than those of its competitors, this conduct did not affect the general economic interest.

The authorities' position with minimum prices is a little more restrictive; however, in the past 15 years there has been only one known case in which this practice was considered unlawful under the Antitrust Law. This case is explained in further detail in question 21.

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'?

There are no known cases or guidelines where the authorities have considered 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'.

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

The most relevant RPM case in Argentina also involved an accusation of horizontal collusion among buyers. In *Trisa-TSCSA*, the authorities imposed penalties on three cable operators and two content providers who co-owned the exclusive rights to transmit live first-division soccer matches, for unlawfully fixing minimum prices of pay-per-view events.

The authorities imposed fines of around US$500,000 on the content providers and around US$350,000 on the cable-TV operators for fixing minimum prices. The providers had signed identical vertical agreements with the three cable-TV operators, setting a minimum price for the pay-per-view of live football matches. The authorities concluded that the agreements were a consequence of a collusive action between the operators with the connivance of the producers.

The Court of Appeals revoked the decision, holding that the producers were the ones who imposed the minimum prices, and redefined the relevant market. It broadened the definition of the relevant market from live first-division football matches (which corresponds to the authorities' definition) to all football matches, which in fact was a very competitive market. Hence, the court held that there was no monopoly in the relevant market and, thus, no possible damage to the general economic interest, and therefore considered the RPM as lawful.

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

In *FECRA*, several entities that operated petrol stations denounced YPF, the main Argentine oil company, for imposing a maximum retail prices scheme that, if not obeyed by retailers, would cause an automatic increase in the petrol price at which YPF sold its petrol to the petrol stations. The case had an additional element (consisting of a price discrimination scheme) in the differential treatment YPF provided to Automóvil Club Argentino's petrol stations, which acquired petrol from YPF at a lower price than the other petrol retailers.

The CNDC approved the policy conducted by YPF, pointing out its convenience in terms of reduction of petrol retail prices. Of particular importance was the fact that the suggested prices were maximum and not minimum. This produced an increase in inter-brand competition and a benefit to consumers. Regarding the price discrimination scheme, the CNDC accepted YPF's explanations, based on the fact that the differences in acquired volume justified the difference in pricing.

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.

The Antitrust Law does not specify how pricing relativity agreements should be assessed besides the general rule that such agreement shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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.

The Antitrust Law does not specify how wholesale MFNs should be assessed besides the general rule that such agreement shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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.

The Antitrust Law does not specify how retail MFNs in the online environment should be assessed besides the general rule that such agreement shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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.

The Antitrust Law does not specify how a supplier preventing a buyer from advertising its products for sale below a certain price should be assessed besides the general rule that such agreement should not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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.

There are no known cases in which the CNDC has analysed 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.

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?

The restriction of the territory into which a buyer may resell contract products is analysed under the rule of reason. In practice, only once has a party been sanctioned in a case of territorial restriction, where this conduct occurred as part of a broader practice. In 1999, the antitrust authorities imposed a US$109 million fine on YPF on the basis of an exploitative abuse of a dominant position. YPF was selling liquid gas abroad at a lower price than the liquid gas it sold in Argentina. Among the documents the authorities used to prove the existence of this anti-competitive practice were prohibitions on re-importing the product into Argentina in all of the export agreements signed by YPF. Therefore, the antitrust authorities would most likely have a flexible approach to a restriction of the territory into which a buyer may resell contract products. There is no known difference between the assessment of restrictions on 'active' sales and restrictions on 'passive' sales.

29 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?

The issue of the restriction of the customers to whom a buyer may resell contract products has been dealt in the *Igarreta-Acfor* case in 1983. In this case, the distributors of Ford vehicles who have the contractual right to exclusive geographic distribution were sanctioned by the authorities because they did not allow the governmental agencies located within their territories to acquire vehicles directly from Ford. The Court of Appeals revoked this decision arguing that the supplier had the right to choose the way to sell its products and since it participated in a competitive market the practice was not held unlawful. Therefore, the authorities would most likely have a flexible approach to a restriction on the customers to whom a buyer may resell contract products. There is no known difference between the assessment of restrictions on 'active' sales and restrictions on 'passive' sales.

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

The Antitrust Law does not provide any limits to the uses to which a buyer or a subsequent buyer puts the contract products besides the general rule that it may not affect the general economic interest. There are no known cases in which the authorities have sanctioned such a restriction. The authorities would most likely have a flexible approach regarding a restriction on the use to which a buyer or a subsequent buyer puts the contract products.

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

There are no specific rules or guidelines for sales made on the internet in the Antitrust Law, nor are there are any known cases in which the authorities have treated internet commerce in a manner different from conventional commerce.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There are no specific rules or guidelines for sales made on the internet in the Antitrust Law nor are there are any known cases in which the authorities have given internet commerce a different treatment from the one given to conventional commerce.

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

Agreements establishing 'selective' distribution systems are considered legal unless they could produce damage to the general economic interest. There are no known cases where this practice has been sanctioned by the authorities.

34 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?

Neither the Antitrust Law nor the authorities' case law distinguishes between types of products when assessing the legality of their selective distribution systems.

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

There are no specific rules or guidelines for sales made on the internet in the Antitrust Law, nor are there are any known cases in which the authority has treated internet commerce differently from offline commerce.

36 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?

There are no known cases 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.

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

There are no known cases in which the authorities have taken into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market.

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

There are no known cases in which the authorities have taken decisions nor is there guidance concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products.

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

The only limitation on the buyer's ability to obtain the supplier's products from an alternative source is whether it damages the general economic interest. There have been no known cases in which the authorities have imposed sanctions for doing so.

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

There are no known cases in which the authorities have assessed a restriction on a buyer's ability to sell non-competing products that the supplier deems 'inappropriate'.

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

The Antitrust Law does not specify any restriction on the buyer's ability to stock products competing with those supplied by the supplier under the agreement besides the general rule that such restriction shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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

The Antitrust Law does not specify how requiring the buyer to purchase from the supplier a certain amount, or minimum percentage of its requirements, of the contract products is to be assessed besides the general rule pursuant to which such requirement shall not affect the general economic interest. There are no known cases in which the authorities sanctioned such conduct.

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

The Antitrust Law does not specify how restricting the supplier's ability to supply to other buyers is to be assessed besides the general rule that such restriction shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

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

The Antitrust Law does not specify how restricting the supplier's ability to sell directly to end-consumers is to be assessed besides the general rule that such restriction shall not affect the general economic interest. There are no known cases in which the authorities have sanctioned such conduct.

45 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?

There are no guidelines or known agency decisions in Argentina dealing with the antitrust assessment of restrictions on suppliers other than those covered above.

Notifying agreements

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

No formal procedure has been established by the Antitrust Law to notify agreements containing vertical restraints to the authorities. Therefore, it is not necessary or advisable to notify any particular category of agreements.

Authority guidance

47 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?

Neither the CNDC nor the Secretary gives guidance as to the antitrust assessment of a particular agreement in any circumstances.

Complaints procedure for private parties

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

According to article 26 of the Antitrust Law, any private party may complain to the CNDC about alleged vertical restraints. In order to do so, article 28 sets forth the formal requirements a complaint must meet. The complaint should include:

- the name and address of the person filing the complaint;
- the specific object of the complaint;
- a detailed explanation of the grounds therefor; and
- a concise statement of the right involved.

If the complaint is deemed relevant by the CNDC, the complainant shall attend the CNDC in order to ratify the terms of the claim. After doing so, the complainant cannot progress the investigation further, it being a discretionary power of the CNDC to continue investigating. The complainant may request an injunction or preventive measure. If granted by the CNDC, this measure (generally a temporary cessation of the conduct) will generally last until the case is finally resolved. An average investigation that concludes in a penalty takes approximately three-and-a-half years. Once the investigation is completed, the CNDC issues a report recommending a measure to be taken by the secretary.

Enforcement

49 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?

The vast majority of vertical restraints cases were issued in the early 1980s, during the first decade of the Antitrust Law in Argentina. Since then, there have been very few vertical restraint cases and almost no sanctions have been imposed. There have been only two cases in the past decade in which authorities imposed a fine upon a company for vertical restraints: one in 1997 (exclusive distribution) and the other in 2002 (minimum price). However, in both cases the authorities understood that the vertical agreements reflected a collusive practice.

In the 1997 case, all of the companies that had permits to sell valves for gas cylinders signed exclusive distribution agreements with the same distributor during a one-month period. The authorities found these vertical agreements to be part of a collusive practice and fined the companies between US$300 and US$1,000.

The 2002 case was repealed by the Court of Appeals because the court concluded that the minimum price was set vertically and not as a consequence of a previous horizontal agreement. Since 2001 there have been less than five known cases in which the authorities issued a resolution on vertical restraints without imposing any fines.

In the past decades, the authorities have applied a more flexible approach when analysing vertical restraints. Clearly, the authorities are more interested in pursuing investigations related to collusive practices.

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

The validity and enforceability of a contract containing prohibited vertical restraints is not at risk as a consequence of an infringement of antitrust law. The authorities may, however, order the parties to cease its effects.

51 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 secretary may impose penalties. The secretary, therefore, does not need to have recourse to the court system nor to another administrative or governmental agency. The penalties provided by article 46 of the Antitrust Law for anti-competitive practices are:

- cessation of the anti-competitive behaviours and, if applicable, removal of their effects;
- fines of between 10,000 and 150 million Argentine pesos, which should be adjusted in accordance with: (i) the loss incurred by all persons affected by the prohibited activity; (ii) the profit obtained by all persons involved in the prohibited activity; and (iii) the value of the involved assets belonging to the persons referred to in (ii) at the time of the corresponding violation. If the offence is repeated, the fines will double;
- request to the competent judge to dissolve, liquidate, order the divestiture or split-up of the non-complying companies in order to comply with the conditions aimed at counteracting the distorting effects caused to competitors or others.
- article 50 states that those who obstruct or hinder the investigation or do not comply with the tribunal's requirements may be penalised with a daily fine of up to 500 Argentine pesos.

Update and trends

On 17 September 2014, the Congress of Argentina passed Law No. 26,993, which entered into force on 29 September 2014, partially amending the Antitrust Law.

The main changes introduced to the Antitrust Law are as follows:

- abandonment of the proposal to install an independent antitrust tribunal, created by law in 1999 but never established;
- the CNDC no longer being able to issue injunctions as it does now, this power being transferred to the Secretary of Trade;
- the amended Antitrust Law vesting the enforcement authority with the power to 'control stocks, check origins and costs of raw materials and other goods';
- from now on the amount of the fine first being required to be paid in order to appeal a fine and the term to appeal a fine being reduced from 15 to 10 business days; and
- creation of a Consumer Relations Court of Appeals to be competent to review antitrust matters.

The Argentine government is currently working on a draft to regulate the amendments and the regulatory decree is expected to be published in 2015.

Investigative powers of the authority

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

According to article 24 of the Antitrust Law, the authorities have very broad investigative powers when enforcing the prohibition on vertical restraints. They can request either the parties or third parties to provide any document they deem necessary to investigate a given case. However, the CNDC must obtain a judicial order if it considers it necessary to search a company.

Private enforcement

53 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?

Pursuant to article 51 of the Antitrust Law, any person damaged by anti-competitive practices may bring an action for damages in accordance with the civil law before a judge having jurisdiction over the matter. This article enables private enforcement actions in Argentina. However, no private enforcement cases on vertical restraints have yet been resolved and it is improbable that there will be many of these cases in the future due to the complexity of such cases and the lack of expertise of the judiciary on antitrust matters. It should take at least three years for the authorities to complete the investigation plus at least another two years before the court takes a decision on the appeal, because of the overload of work the judicial system faces in Argentina.

Other issues

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

There are no unique points relating to the assessment of vertical restraints in Argentina that have not been covered above.

ALLENDE & BREA
ABOGADOS

Julián Peña **jp@allendebrea.com.ar**

Maipú 1300, 11th floor
1006 Buenos Aires
Argentina

Tel: +54 11 4318 9907
Fax: +54 11 4318 9999
www.allendebrea.com.ar

Austria

Guenter Bauer and Robert Wagner
Wolf Theiss

Antitrust law

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

The antitrust law applicable to vertical restraints is set out in sections 1 and 2 of the Cartel Act 2005 (CA), which reflect article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU), respectively. The CA came into effect on 1 January 2006 (a German version can be found on the website of the Federal Competition Authority at www.bwb.gv.at/Fachinformationen/rechtlicheGrundlagen/Seiten/Kartellgesetz.aspx).

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 CA provides for a general prohibition of agreements between undertakings, concerted practices and decisions by associations of undertakings that have as their object or effect the prevention, restriction or distortion of competition (CA, section 1). The CA does not distinguish between horizontal and vertical restrictions and does not define the concept of vertical restraint.

In line with EU antitrust rules, a vertical restraint under Austrian antitrust law needs to be understood as a restriction of competition in an agreement between two or more undertakings, each of which operates (for the purposes of the agreement) 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 refer to restrictions such as resale price maintenance, territorial or customer restraints, non-compete or exclusive supply obligations and tie-in clauses, and can encompass selective distribution.

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?

The objective pursued by the CA's antitrust rules is economic. Small business-related interests are taken into account by way of a de minimis exemption (see question 8). The CA contains an exemption for resale price maintenance of books (see question 7), which seeks to ensure the diversity of book offers and to protect cultural heritage.

Responsible authorities

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

The Federal Competition Authority (FCA), the Federal Cartel Attorney (together referred to as the official parties) and the Cartel Court are responsible for the enforcement of competition law, including the prohibition of anti-competitive vertical restraints. The Cartel Court (a section of the Vienna Higher Regional Court) is exclusively empowered to issue binding decisions on substantive matters. In general, the Cartel Court's decisions can be challenged before the Supreme Court (acting as Appellate Cartel Court).

The FCA, although formally affiliated with the Federal Ministry of Science, Research and Economy, is an independent agency empowered to conduct all necessary investigations, while the Federal Cartel Attorney is subject to directives from the Federal Minister of Justice.

Both official parties can initiate proceedings before the Cartel Court.

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?

The CA applies to agreements that have an effect on the Austrian market, irrespective of whether the parties' domicile is in Austria or whether the agreement is concluded in Austria. Thus, vertical restraints by foreign undertakings may be subject to Austrian cartel provisions where the respective agreement has an effect on Austria. The 'effects doctrine' is applied by the courts and the official parties, which in previous cases have taken the view that potential effects on the Austrian market suffice for the applicability of the CA.

The authors are not aware of any decisions of the Cartel Court in which the CA has been applied in a pure internet context. It is however expected that the courts and the official parties will also apply the effects doctrine to vertical restraints in a pure internet context.

Agreements concluded by public entities

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

Public or state-owned entities are subject to the antitrust rules on vertical restraints if they are deemed to be undertakings within the meaning of competition law. This means that the entity in question must pursue an economic activity. As a general rule, Austrian antitrust law – in line with EU competition law – interprets the concept of undertaking broadly.

In 2012, the Supreme Court decided, after having referred a preliminary question to the ECJ, that the activity of a public authority consisting of the storing in the commercial registry of data which undertakings are obliged to report on the basis of statutory obligations, of permitting interested persons to search for that data, and of providing them with print-outs thereof does not constitute an economic activity. Similarly, the Supreme Court took the view in 2004 that statutory health insurance funds do not qualify as undertakings within the meaning of the antitrust rules. In 1996, the Supreme Court decided that Austro Control's activities, when determining the fees for its services (inspection of air-traffic materials), did not constitute an economic activity. Austro Control was responsible for air traffic management in Austria's airspace.

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.

The CA empowers the government to issue block exemptions (decrees). Before the CA entered into force on 1 January 2006, all agreements that

were in accordance with EC Regulation No. 2790/1999 (vertical agreements) and EC Regulation No. 1400/2002 (vertical agreements in the motor vehicle sector) were exempted by way of such a government decree. To date, new decrees on the basis of the CA have not been enacted but it is generally understood that the substance of EU block exemption regulations (now, in particular, EU Regulation No. 330/2010 (vertical agreements) and EU Regulation No. 461/2010 (vertical agreements in the motor vehicle sector)) will be applied by the courts and the Austrian competition authorities by way of analogy. Consequently, it is advisable to observe the specific rules that EU competition law provides for the motor vehicle sector also in purely domestic Austrian cases. By the same token, advisers should take account of the EU block exemption regulation for technology transfer agreements (EU Regulation No. 316/2014) when considering domestic technology transfer agreements.

Section 2 of the CA provides for a specific exemption for the retail of books, certain art prints, music supplies, journals and newspapers. Pursuant to that exemption, publishers or importers of such products can lawfully set retail prices.

Moreover, specific restrictions between a cooperative society and its members, as well as between companies in the agricultural sector, are exempted from the prohibition under CA, section 1.

General exceptions

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

The CA provides for a general legal exception in line with the terms of article 101(3) of the TFEU. Where the substance of EU block exemption regulations is applied by the courts and the Austrian competition authorities, vertical restraints may be exempted under the same conditions as those set out in these regulations.

In addition, the CA contains a de minimis exemption. An amendment to the CA, which entered into force on 1 March 2013, has brought the de minimis exemption better in line with the principles of the De Minimis Notice of the European Commission. Accordingly, agreements between competing undertakings that have a combined share of not more than 10 per cent on the relevant market and agreements between non-competing undertakings each of which has a share of not more than 15 per cent on the respective relevant market shall be exempted from the general prohibition of the CA, section 1, provided that in both cases these agreements do not have as their object the fixing of selling prices, the limitation of production or sales or the sharing of markets. Unlike the De Minimis Notice of the European Commission, the new de minimis exemption of the CA does not contain a flexibility provision concerning market share fluctuations over time.

Agreements

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

Austrian antitrust law does not contain an explicit definition of 'agreement' or its equivalent. It is submitted, however, that Austrian antitrust law follows the definition of 'agreement' as applied in EU competition law (see question 10).

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?

In line with EU competition law, there must be a concurrence of wills between at least two parties. The form in which that concurrence is manifested is irrelevant as long as it constitutes the faithful expression of the parties' intention. In case there is no explicit agreement expressing such concurrence of wills, the Austrian competition authorities, in order to find an agreement, would have to prove that the policy of one party received the (tacit) acquiescence of the other party.

It shall be noted that the CA (section 1(4)) also prohibits the supplier from unilaterally providing 'price recommendations, guidelines on how to calculate resale prices, margins or rebates', except where it is expressly stated that such recommendations and so on are non-binding and no pressure is exerted to impose the application of the recommendations on the buyer (see question 19).

Parent and related-company agreements

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

Section 1 of the CA does not apply to agreements between a parent company and a related company that form part of a 'single economic entity'. According to the case law of the Union courts, which the Austrian authorities would usually take into account in this regard also in purely domestic cases, a subsidiary that does not enjoy real autonomy in determining its course of action in the market but carries out instructions of its parent company will be regarded as part of the same economic entity as the parent company. By the same token, agreements between related companies of the same parent company fall outside the scope of section 1 of the CA if the parent company exercises decisive influence over both related companies.

On the other hand, where a parent company does not exercise decisive influence over its related companies, the vertical restraints rules apply to agreements between the parent company and its related companies and to agreements concluded between related companies of that parent company.

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?

It is submitted that Austrian antitrust law follows the same principles as EU competition law with regard to agent-principal agreements. Whether antitrust law applies to agent-principal agreements thus depends on the degree of financial and commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. If the agent bears more than merely insignificant risks in relation to the contracts concluded or negotiated on behalf of the principal, in relation to the market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market, section 1 of the CA would generally apply to the agent–principal agreement (see also question 13).

In addition to governing the conditions of sale of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions that concern the relationship between the agent and the principal. In particular, they may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) or a provision preventing the agent from acting as an agent or distributor of undertakings that compete with the principal (single branding provisions), or both. Those provisions may infringe section 1 of the CA regardless of the degree of risk borne by the agent.

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?

The CA does not contain specific rules as to what constitutes an agent–principal relationship. However, the concept of agent-principal agreement in Austrian antitrust law is considered to follow the same concept as in EU competition law. For the purposes of applying section 1 of the CA, an agreement will therefore be qualified as an agent-principal agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded or negotiated on behalf of the principal, in relation to the market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in, for instance, premises or personnel, are not material to this assessment. Relevant factors in relation to the bearing of risk are ownership of the goods, contributions to distribution costs (including transport costs), storage, liability for any damage caused, collection risks, investments in sales promotion, as well as market-specific investments in equipment, premises or the training of personnel.

In two cases of 2009, the Austrian Supreme Court had to decide whether an agreement qualifies as an agent–principal agreement for the purposes of applying article 81(1) of the EC Treaty (now article 101(1) of the TFEU). In both decisions the Supreme Court, of course, applied principles established by the case law of the Union courts and the European Commission's Guidelines on Vertical Restraints. It can be assumed that the Austrian authorities and courts would apply these principles also in cases in which trade between member states is not affected and which are to be decided solely on the basis of Austrian competition law. We are not aware of decisions by the Austrian Cartel Court that deal specifically with what constitutes an agent–principal relationship in the online sector.

Intellectual property rights

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

The CA does not contain specific rules for licensing agreements with regard to IPRs. However, as explained above (see question 7), it is generally understood that the Austrian competition authorities and the courts would apply EU block exemption regulations by analogy also to purely domestic cases. Thus, the Austrian authorities would apply EU Regulation No. 330/2010 on Vertical Agreements to vertical agreements that contain provisions relating to the assignment to the buyer of IPRs if those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods by the buyer or its customers. Where the main purpose of an agreement is the licensing or assignment of IPRs, that agreement may fall under the EU block exemption regulation for technology transfer agreements (EU Regulation No. 316/2014).

Analytical framework for assessment

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

The introduction of the CA in January 2006 brought about a wide-ranging harmonisation of the Austrian antitrust rules with EU competition law. There is still a rather limited body of case law from the cartel courts regarding vertical restraints. However, the analytical framework that the Austrian authorities and cartel courts apply when assessing vertical restraints under Austrian antitrust law is, by and large, drawn from EU competition law. That said, the courts will probably also refer to their case law under the legal regime that existed prior to the CA as a reference point where the CA does not deviate from the previous regime.

Moreover, it is expected that the courts will refer to guidelines published by the European Commission when analysing vertical restraints (in particular the Guidelines on Vertical Restraints). Case law based on the old regime suggests that restraints that are necessary for the implementation of a generally neutral or legitimate purpose fall outside the scope of section 1 of the CA (*Immanenztheorie*; see, for example, Supreme Court, 16 Ok 4/01).

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?

In line with the application of EU competition law, the assessment of vertical restraints under Austrian competition law takes account of the overall economic situation in which the agreement exists and the level of competition in the market. Market shares of the supplier, as well as the market positions of competitors, are aspects that are therefore taken into account when assessing the legality of a potentially restrictive vertical agreement. The fact that certain types of restrictions are widely used in the market and that there are parallel networks of similar vertical restraints may also be a relevant factor in that assessment. This has been confirmed by case law of the Austrian Supreme Court.

In general, the analysis of market shares, market structures and other economic factors is relevant under section 1 of the CA and when the possibility of an exemption is assessed. It is understood that the Austrian competition authorities also apply EU Regulation No. 330/2010 on Vertical Agreements to purely domestic cases by analogy.

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?

The authors are not aware of any decisions by the Cartel Court in which the buyer market share has been specifically discussed in relation to the legality of an individual vertical restraint. The market positions of other buyers may be a relevant factor in the assessment of vertical restraints.

As it can be assumed that the Austrian competition authorities would apply EU Regulation No. 330/2010 on Vertical Agreements (which has introduced a threshold of 30 per cent with regard to the buyer market share) to purely domestic cases by way of analogy, the buyer's market share will become increasingly important in analysing the legality of individual restraints.

Block exemption and safe harbour

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

The de minimis rule provides a safe harbour to undertakings that have a market share not exceeding the thresholds set out in section 2 of the CA (see question 8) provided that the vertical restraints concerned do not amount to hard-core restrictions. Besides, it is assumed that the cartel courts apply the EU block exemption regulations, including the safe harbours contained in these regulations, by way of analogy to purely domestic cases.

Types of restraint

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

Vertical restrictions on a buyer's ability to determine its resale price are caught by section 1 of the CA and are unlikely to meet the conditions for exemption set out in section 2 of the CA. Consequently, the supplier must not set fixed or minimum resale prices for its buyers. Under certain circumstances, recommended and maximum resale prices may benefit from the exemptions set out in section 2.

In addition, the CA (section 1(4)) prohibits the supplier from unilaterally setting 'price recommendations, guidelines on how to calculate resale prices, margins or rebates' except where it is expressly stated that the recommendations and so on are non-binding and no pressure is exerted to impose the application of the recommendations on the buyer (assessment under the CA may be different from that under EU competition law in this regard). The application of the second condition requires caution as 'recommendations' could in practice be deemed to constitute a concerted practice prohibited by section 1(1) of the CA.

While vertical restraints, including resale price maintenance, have not been a focus of the FCA's enforcement efforts in the past, the FCA has initiated numerous investigations into resale price maintenance arrangements in the retail sector since 2012. A range of dawn raids have been carried out and – following investigations by the FCA – the Cartel Court imposed fines for resale price maintenance in the retail sector on suppliers and retailers in a large number of decisions issued in the period from 2012 to 2014. In July 2014 the FCA published guidelines setting out its approach to resale price maintenance.

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 authors are not aware of any such decision at the time of writing. As Austrian antitrust law (except for section 1(4) of the CA) follows EU competition law with regard to resale price maintenance restrictions in vertical agreements, it is likely that the Austrian approach is consistent with the EU approach.

According to the FCA's new guidelines on resale price maintenance published in July 2014, resale price maintenance restrictions related to a sales campaign are generally assessed under the same principles as restrictions on regular resale prices. That is to say that a supplier must not determine a fixed or minimum resale price which the retailer would have

to observe during a promotion. The supplier may, however, determine a maximum resale price or issue a non-binding price recommendation for the duration of the sales campaign (which it can also do with regard to regular resale prices in the absence of a specific sales campaign).

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

One decision by the Supreme Court concerning the distribution of German press products in Austria suggests that the FCA and the Federal Cartel Attorney took the view that a resale price maintenance restriction imposed on an exclusive distributor, which also benefited from absolute territorial protection (against distributors and retailers established outside Austria), was particularly harmful to competition since the combination of these restrictions sealed off the Austrian market from the German market and maintained different price levels in Austria and Germany. Although the Supreme Court confirmed the Cartel Court's decision finding an infringement of article 101(1) of the TFEU, the Supreme Court did however not specifically address the links between resale price maintenance and absolute territorial protection (the Cartel Court's decision is not publicly available).

In July 2014, the FCA published guidelines setting out its approach to resale price maintenance. In these guidelines, the FCA explained that resale price maintenance arrangements can have the effect of restricting competition between retailers as well. According to the FCA's guidelines, there is a risk that retailers coordinate their prices via suppliers (hub-and-spoke agreement).

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

At the time of writing there have not been any decisions or guidelines relating to resale price maintenance that specifically address the efficiencies that may arise out of such restrictions.

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.

We are not aware of any precedents by the Austrian cartel courts that would address pricing relativity agreements. Such an agreement may, however, be regarded as a form of resale price maintenance if it has the effect that the retailer is restricted from reducing its retail prices for supplier A's or supplier B's products. We also believe that the Austrian authorities would assess whether the agreement has the object or effect of restricting competition between suppliers A and B.

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.

At the time of writing, and to the best of our knowledge, there are no decisions by the cartel courts that would serve as clear precedents to explain the courts' view on MFNs. In one decision, the Supreme Court mentioned that such clauses may restrict competition without the court addressing this aspect in detail. That case was decided under the old CA. Today the clauses would be assessed under the general antitrust rules. It is anticipated that the courts would take recourse to EU competition rules, and potentially to decisions by competition authorities in other EU member states in this regard.

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.

We are not aware of any decisions of the Austrian cartel courts that have assessed such agreements. The FCA is currently investigating such type of agreements in one industry sector. It is anticipated that the Austrian authorities would take account of the recent decisional practice of other national competition authorities in the EU (eg, the German Federal Cartel Office) in this respect.

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.

At the time of writing the authors are not aware of substantive decisions by the Austrian cartel courts that specifically address minimum advertised price clauses by which a supplier prevents a buyer from advertising its products for resale below a certain price but allows the buyer to offer discounts. It is expected that the Austrian authorities would follow EU competition law in this respect even when deciding purely domestic cases.

However, a recent decision of the Austrian Supreme Court (acting as Appellate Cartel Court) may provide a basis for the argument that the Supreme Court would not regard a minimum advertised price clause as unlawful by itself. In its decision the Supreme Court merely dismissed a request by the FCA requiring the Cartel Court to grant it permission to carry out a dawn raid on the suspicion that a minimum advertised price clause was agreed between a supplier and an online retailer; hence, the Court did not assess the lawfulness of a minimum advertised price clause on the merit. However, it dismissed the FCA's request for permission to carry out the dawn raid although the FCA had submitted evidence on an agreement between the supplier and the retailer requiring the latter not to advertise the contract products in the retailer's online shop below a certain price. The Supreme Court held that the FCA's evidence was not sufficient for there to be a reasonable suspicion of actual resale price maintenance arrangements being in place. Although the Supreme Court's reasoning is not entirely clear in this regard it appears to imply that the Court did not consider that the minimum advertised price policy could, in itself, be regarded as an infringement of Austrian competition law (see Supreme Court, 16 Ok 3/14).

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.

We have no knowledge of any decisions by the Austrian cartel courts that specifically address such an arrangement. It is expected, however, that the Austrian authorities would follow EU competition law in this respect even when deciding purely domestic cases.

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?

It is submitted that Austrian antitrust law follows EU competition law with regard to territorial restrictions in vertical agreements. Consequently, the EU competition rules also need to be observed in purely domestic cases.

29 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?

Austrian antitrust law generally follows EU competition law with regard to customer restrictions in vertical agreements. Consequently, the EU competition rules also need to be observed in purely domestic cases.

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

As Austrian antitrust law follows EU competition law in this regard, the EU competition rules should be observed in purely domestic cases. Clauses imposed by the supplier restricting the buyer's use of the product (field or market of use restrictions) are generally caught by section 1 of the CA. Exemptions may be possible pursuant to section 2 of the CA, in particular with regard to technology transfer agreements.

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

Austrian antitrust law follows EU competition law with regard to restrictions regarding sales via the internet. The EU competition rules, therefore, also need to be observed in purely domestic cases.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The authors are not aware of any decisions or guidelines on vertical restraints by the Austrian competition authorities that deal with the differential treatment of different types of internet sales channels.

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

As with EU competition law, selective distribution systems may fall outside the scope of section 1 of the CA if a number of conditions are met, namely the nature of the product necessitates a selective distribution system, resellers are selected on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and are not applied in a non-discriminatory manner, and the criteria laid down do not go beyond what is necessary. We are not aware of any decision of the Austrian authorities dealing with the question of whether the criteria for selection must be published. It is assumed that the Austrian authorities would follow EU competition law also in purely domestic cases and would, thus, not require a publication of the selection criteria.

If the above-mentioned conditions are not met, selective distribution systems are usually deemed to restrict competition within the meaning of section 1 of the CA because of the inherent reduction of intra-brand competition, the potential foreclosure of distributors and the possible detrimental impact on price competition. However, such systems are eligible for an exemption under section 2 of the CA. It is assumed that the Austrian competition authorities would apply EU Regulation No. 330/2010 on Vertical Agreements to purely domestic cases by way of analogy.

34 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?

Selective distribution systems are more likely to comply with antitrust law where they relate to products that require selective distribution to ensure the quality of the product and its adequate use (eg, high-tech products, luxury goods, etc). Austrian competition law is in line with EU competition law in this regard.

35 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?

We are not aware of any case law by Austrian courts and authorities that suggests that courts and authorities would deviate from the approach taken under EU competition law in this regard. Consequently, the EU competition rules should be observed in purely domestic cases as well.

36 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?

We are not aware of any decisions rendered by the cartel courts that specifically address this issue. The FCA has recently investigated the selective distribution system of one producer of luxury goods however. It appeared that the FCA is inclined to take a rather strict approach to such systems. In general, it can be expected, however, that the Austrian authorities would follow EU competition law in this regard, even when deciding on purely domestic cases.

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

As described above, the Austrian competition authorities take into account the overall economic context in which an agreement exists when assessing vertical restraints (see question 16). Cumulative effects of multiple distribution systems in the same market would consequently be considered by the authorities (for example – in line with EU guidelines – selective distribution systems that are applied in a market where a majority of the main suppliers have such a system in place may not be eligible for an individual exemption under section 2 of the CA where the share of the market covered by selective distribution exceeds 50 per cent).

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

We are not aware of any such decisions by the Austrian cartel courts.

It is noted that a few judgments were rendered by civil senates of the Supreme Court in the aftermath of the adoption of EC Regulation No. 1400/2002 (vertical agreements in the motor vehicle sector), which removed the possibility of a block exemption of distribution networks for motor vehicles that combined elements of exclusive and selective distribution. These judgments, however, do not provide an assessment of distribution arrangements combining exclusive and selective distribution. They deal with the question, in essence, whether (and under what circumstances) the restructuring of a distribution network for motor vehicles which had become necessary as a consequence of the elimination of this type of distribution arrangements from the scope of the block exemption regulation (EC Regulation No. 1400/2002) entitled the supplier to terminate its distribution agreements with a reduced period of notice of one year (instead of two years).

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

Where restricting the buyer's ability to obtain the supplier's products from alternative sources does not have the effect of a non-compete clause, such a restriction on the buyer may be eligible for an exemption under section 2 of the CA, regardless of its duration, if the supplier's and buyer's market shares do not exceed 30 per cent. However, such clauses are prohibited by the antitrust rules if they are imposed on a reseller in a selective distribution system.

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

We are not aware of any Austrian case law that suggests that courts and authorities would deviate from the approach taken under EU competition law in this regard. The EU competition rules should thus also be observed in purely domestic cases.

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

As a general rule, restrictions on the buyer's ability to purchase and resell competing products fall under section 1 of the CA. The Cartel Court's case law suggests that non-compete clauses may be lawful under Austrian antitrust rules where the parties to the agreement do not exceed the market share thresholds of 30 per cent and where the clause is agreed on for a duration that does not exceed five years. Certain factors may justify longer periods, for example, where particularly high and relationship-specific investments are required. However, at the time of writing, the Cartel Court's case law in this regard is limited.

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

The assessment of an obligation on the buyer to purchase a certain quantity, a minimum percentage of its requirements or a full range of the supplier's products, depends on a number of factors, including how much of the buyer's demand is tied, the duration of the tie and the extent of market foreclosure effects for competing suppliers. In line with EU competition law, an obligation imposed on the buyer to purchase from the supplier a certain quantity of the contract products is likely to benefit from the exemption of section 2 of the CA if the parties' market shares do not exceed 30 per cent and if the duration of that obligation does not exceed five years or if the required quantity corresponds to less than 80 per cent of the buyer's requirements.

Update and trends

The FCA has taken an increased interest in resale price maintenance arrangements in the retail sector since 2012. Following investigations and dawn raids by the FCA, the Cartel Court imposed fines for resale price maintenance in the retail sector on a number of suppliers and retailers between 2012 and 2014. In late autumn 2014, the Cartel Court imposed a fine of €3 million on an Austrian food retailer for resale price maintenance arrangements. The decision has been appealed and is, therefore, not yet final.

Against the background of the increased number of resale price maintenance cases, the FCA published guidelines on resale price maintenance arrangements in the retail sector in July 2014. The guidelines are intended to clarify which business practices would likely be regarded as a form of resale price maintenance by the FCA.

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

As a general rule, restrictions on the supplier's ability to supply to other buyers are considered less harmful than non-compete clauses. The main competition risk is foreclosure of other buyers. The assessment of the foreclosure risk is based on the market position of the buyer, the scope of the restriction, the duration for which the restriction is agreed, as well as the market position of competing buyers. It is anticipated that the substance of EU Regulation No. 330/2010 on Vertical Agreements will be applied by analogy.

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

Restrictions on the supplier's ability to sell to end-consumers are usually covered by EU Regulation No. 330/2010 on Vertical Agreements (if the general requirements for the application of this regulation are met). In the area of motor vehicle aftermarkets, a restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to end users, however, qualifies as a hard-core restriction within the meaning of EU Regulation No. 461/2010 on Vertical Agreements in the Motor Vehicle Sector and would normally infringe section 1 of the CA and article 101 of the TFEU. It is anticipated that the Austrian authorities would apply the substance of these EU block exemption regulations also in purely domestic cases.

45 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?

We are not aware of guidelines or decisions by the Austrian cartel courts that have dealt with the antitrust assessment of restrictions on suppliers in the context of vertical agreements other than those covered above.

Notifying agreements

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

The obligation to notify agreements has been abolished by the CA. The parties to an agreement need to self-assess whether their contractual provisions comply with the CA.

Authority guidance

47 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?

With regard to purely domestic cases, undertakings may apply to the Cartel Court for a formal assessment and statement as to the applicability of the CA to a specific agreement. The FCA is generally reticent to informally explain its view on specific restraints to individual parties. In any event, such guidance is not binding (neither on the competition authority nor on the courts).

Complaints procedure for private parties

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

Private parties can complain to the FCA about alleged unlawful vertical restraints. To this end, the FCA has published an official form for complaints, setting out the information that the FCA generally regards as necessary for an assessment of the alleged infringement. For example, information on the complainant, the entities involved in the alleged infringement, the nature of the alleged infringement and evidence thereof are required.

Enforcement

49 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?

The cartel courts (and not the FCA or the Federal Cartel Attorney) are exclusively empowered to issue binding decisions on vertical restraints under the CA. However, under the legal regime in force until 28 February 2013, not all of the Cartel Court's (first instance) decisions were published. It is therefore not possible to set out the number of decisions handed down by the Cartel Court per year.

While vertical restraints have not been the focus of the FCA for quite some time, the FCA has taken an increased interest in resale price maintenance arrangements in the retail sector since 2012. Following investigations and dawn raids by the FCA, the Cartel Court imposed fines for resale price maintenance in the retail sector on a number of suppliers and retailers between 2012 and 2014 (see question 19).

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

Clauses that infringe competition law within the meaning of the CA are null, void and unenforceable. As long as the clause is severable, the nullity does not necessarily affect the entire agreement but is limited to the parts that infringe the CA or are inextricably linked to such parts. Whether the parts of the agreement not affected by the nullity remain valid and enforceable between the parties depends on the hypothetical intent of the parties to the agreement.

51 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 FCA and the Federal Cartel Attorney are not empowered to impose penalties, but need to have recourse to the Cartel Court. Under the CA, the Cartel Court can issue decisions requiring that an infringement be brought to an end, order interim measures, accept commitments or impose fines (up to 10 per cent of the party's annual turnover). Compensation for damages incurred can only be sought before the general civil courts by parties that suffered damage from the respective anti-competitive behaviour.

The current institutional system for the enforcement of competition law is still quite young (the FCA and the Federal Cartel Attorney have been in existence only since 2002). To the extent that any trend can be discerned, there has been a move towards stricter enforcement of competition law in Austria. This means that an increasing number of sanctions have been imposed for anti-competitive conduct in general. Vertical agreements have not been the focus of the Austrian competition authorities' sanctions policy for quite some time. In the past three years, however, the Cartel Court imposed fines for resale price maintenance arrangements in the retail sector on a number of suppliers and retailers (see question 19).

Investigative powers of the authority

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

The FCA is basically empowered to carry out any investigation that it may require in order to fulfil its responsibility to protect competition. In essence, it is vested with wide-ranging powers, from the power to request

information (also from suppliers domiciled outside its jurisdiction) to the power to conduct dawn raids (business premises and home searches). The FCA's measures need to be proportionate and some measures require ex ante judicial approval.

Private enforcement

53 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 enforcement is in principle possible under Austrian law. Parties and non-parties to agreements containing vertical restraints can bring actions for damages before the general civil courts. Besides damages claims, actions to terminate anti-competitive conduct can also be brought before the civil courts under certain conditions. Furthermore, an undertaking can initiate Cartel Court proceedings and request the Cartel Court to issue a decision requiring other undertakings to bring their unlawful anti-competitive conduct to an end if the undertaking initiating the proceedings has a legal or economic interest in such a decision. Such an undertaking can also ask the Cartel Court to award an injunction.

In practice, a significant number of damages claims for the infringement of competition law are currently pending with civil courts (in particular, but not only, follow-on damages claims against the background of the Austrian elevators and escalators cartel case (see Supreme Court, 16 Ok 5/08)). In 2012 the Supreme Court decided, in cases regarding horizontal cartels, that undertakings participating in a cartel are severally and jointly liable for damages caused by the cartel arrangement and also that indirect purchasers have standing to claim damages from the cartel participants. However, the authors are not aware of any decisions regarding damages claims based on an infringement of section 1 of the CA or article 101(1) of the TFEU by way of a vertical restraint.

Other issues

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

Under its current practice, the FCA, as distinct from EU competition law practice, may apply Austria's leniency programme to infringements of competition law by vertical restraints.

WOLF THEISS

Guenter Bauer **guenter.bauer@wolftheiss.com**
Robert Wagner **robert.wagner@wolftheiss.com**

Schubertring 6
1010 Vienna
Austria

Tel: +43 1 515 10
Fax: +43 1 515 10 25
www.wolftheiss.com

Brazil

Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo
Levy & Salomão Advogados

Antitrust law

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

The main legal source applicable to vertical restraints in Brazil is Law No. 12,529 of 30 November 2011 (Law No. 12,529/11 or the Antitrust Law), which entered into force on 29 May 2012 and replaced the former antitrust statute, Law No. 8,884 of 12 June 1994 (Law No. 8,884/94). The new Administrative Council for Economic Defence (CADE) has yet to issue secondary legislation setting formal criteria for the analysis of vertical restraints, and the agency has been relying on regulations issued under the previous law, primarily CADE Resolution No. 20 of 9 June 1999 (Resolution No. 20/99). In Brazil, the Anglo-American common law concept of binding judicial precedent (ie, stare decisis) is virtually non-existent, which means that CADE's commissioners are under no obligation to follow past decisions in future cases. Under CADE's internal regulations, legal certainty is achieved only if CADE rules in the same way at least 10 times, after which the ruling is codified via the issue of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one (Binding Statement No. 7, which provides that it is an antitrust infringement for a physicians' cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians' cooperatives and health plans).

Apart from administrative liability, parties may face private claims (see question 53) and criminal investigations for anti-competitive vertical restraints. Abuse of dominance through vertical restraints can be considered a criminal violation under article 4 of Law No. 8,137 of 27 December 1990 (Law No. 8,137/90 or Criminal Statute). Only individuals (as opposed to corporations) may be held liable under the Criminal Statute and may be subject to imprisonment from two to five years and to the payment of a criminal fine. No individual has been criminally investigated for an anti-competitive vertical restraint as the primary focus of the criminal enforcement has been to fight cartels.

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 basic framework for the assessment of vertical restraints in Brazil is set by article 36 of Law No. 12,529/11. Article 36 deals with all types of anti-competitive conduct other than mergers. The Antitrust Law prohibits acts 'that have as [their] object or effect':

- the limitation, restraint or, in any way, harm to open competition or free enterprise;
- control over a relevant market for a certain good or service;
- an increase in profits on a discretionary basis; or
- engagement in market abuse.

Article 36(3) contains a lengthy but not exhaustive list of acts that may be considered antitrust violations provided they have the object or effect of distorting competition. Potentially anti-competitive vertical practices include resale price maintenance, price discrimination, tying, exclusive dealing and refusal to deal.

Vertical restraints are not defined by Law No. 12,529/11. Such definition is available, however, in annex I of CADE Resolution No. 20/99, which states that vertical restrictive practices are 'restrictions imposed by producers/suppliers of goods or services in a specific market (of origin) on vertically related markets – upstream or downstream – along the productive chain (target market)'. Annex I of CADE Resolution No. 20/99 further notes that 'vertical restrictive practices require, in general, the existence of market power in the market of origin'. Annex I also states that such practices shall be assessed under the rule of reason, as the authority needs to balance their pro- and anti-competitive effects.

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?

CADE's policy has been to enforce the law considering promotion of competition as its main objective, although the law also makes reference to consumer protection, freedom of enterprise and the 'social role of private property' as its guiding principles.

Responsible authorities

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

CADE's structure includes a tribunal composed of six commissioners and a president; a Directorate-General for Competition (DG); and an economics department. The DG is the chief investigative body in matters related to anti-competitive practices. CADE's tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review. Governments or ministers do not play any role in the enforcement of legal competition provisions – on the contrary, article 9 of Law No. 12,529/11 states that no appeal against CADE's decision shall be submitted to the Minister of Justice.

Federal and state public prosecutors are responsible for enforcing the Criminal Statute. Also, the police (local or federal) may initiate investigations of anti-competitive conduct and report the results of their investigation to prosecutors, who may indict the individuals. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. As previously stated, criminal enforcement has mostly focused on cartel cases.

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?

According to article 2 of Law 12,529/11, in order to establish jurisdiction over any practice, including vertical restraints, CADE must prove that the conduct was wholly or partially performed within Brazil or, if performed abroad, was capable of producing effects within Brazil. Direct presence is achieved through a local subsidiary, distributor, sales representative, etc. Although indirect presence is most commonly established through export sales into the country, it cannot be ruled out that CADE would consider third-party sales (eg, via a licensing agreement) as evidence of indirect

presence in Brazil. To date, there has been no case where CADE applied the law extraterritorially against anti-competitive vertical restraints or in a purely internet context against a company with no local presence in Brazil.

Agreements concluded by public entities

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

Brazil's Antitrust Law applies to any vertical restraints by individuals and legal entities, either private or state-owned (wholly-owned or mixed enterprises) (article 31). For example, state-owned Banco do Brasil, one of the largest banks in the country, was being investigated from early 2010 for imposing exclusivity arrangements for the provision of payroll loans to civil servants. In October 2012, Banco do Brasil agreed to terminate the conduct and pay a fine of 65 million reais.

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.

The relationship between manufacturers and distributors in the motor car industry is regulated by Law No. 6,729 of 28 November 1979 (Law No. 6,729/79), which sets forth specific rules on territorial and customer restraints. Furthermore, in regulated industries (such as telecommunications, energy and health care) there are industry-specific laws enforced by a regulatory agency covering assessment of vertical restraints. Finally, Brazil's Copyright Law states that publishers may set retail prices to bookstores, as long as the price is not set at an amount that would deter the publication from being accessible to the general public.

General exceptions

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

No. However, the Antitrust Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. Such a presumption provides some guidance to private parties as it would be unlikely for CADE to find a violation in the absence of market power.

Agreements

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

Law No. 12,529/11 does not provide for a definition of 'agreement'. CADE Resolution No. 20/99 establishes that vertical restrictions raise antitrust issues:

> *when they lead to the creation of mechanisms that exclude rivals, whether by increasing the barriers to the entry of potential competitors or by increasing the costs for actual competitors, or furthermore when they increase the probability of concerted abuse of market power by manufacturers/providers, suppliers or distributors, through mechanisms that enable them to overcome obstacles to the coordination that would otherwise have existed.*

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?

Any arrangement, be it formal or informal, oral or in written, leading to the effects listed in questions 2 and 9 above may be subject to antitrust scrutiny in Brazil. For example, in 2009 CADE imposed what is still today the record fine for a unilateral case for an exclusivity arrangement that was not formally agreed between the parties. The investigation, initiated in 2004, was about a loyalty programme created by AmBev, Brazil's largest beer producer, which accounted for approximately 70 per cent of the beer market in Brazil. The programme, named To Contigo, awarded points to retailers for purchases of AmBev products, which could be then exchanged for gifts. CADE concluded that the programme was implemented in a way that created incentives for exclusive dealing, foreclosing competitors from accessing the market – there was no formal request of Ambev directing the point of sales to exclusive relationships (Administrative Proceeding No. 08012.003805/2004-10).

Parent and related-company agreements

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

Law No. 12,529/11 does not define 'related company'. Nonetheless, CADE Resolution No. 2 of 29 May 2012 (Resolution No. 2/12) defines the following entities as part of the same economic group: entities subject to common control and all companies in which any of the entities subject to common control holds, directly or indirectly, at least 20 per cent of the voting or total capital stock. This definition was made for merger control purposes, but may be adopted for the prosecution of anti-competitive practices by CADE. Vertical restraints rules apply to agreements between companies of the same economic group whenever the agreements result in anti-competitive effects, as the exclusion of rivals from the market through margin squeeze practices, for example.

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?

Vertical restraints rules will apply to agent–principal agreements whenever the agreements result in anti-competitive effects, such as exclusion of the principal's rivals from the market or if the agreement facilitates collusion among principals.

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

See question 12.

Intellectual property rights

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

Article 36 of Brazil's Antitrust Law includes as examples of anti-competitive practices conduct performed through the abuse of intellectual property rights, and CADE has been consistently stating that the grant of IPRs may lead to anti-competitive effects (when, for example, a party licenses IPRs to one party and refuses to do the same to its rivals). Restraints involving IPRs are assessed under the same rules and principles that are applied in other cases.

Analytical framework for assessment

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

CADE Resolution 20/99 specifically provides that exclusivity agreements, refusal to deal, price discrimination and other vertical restraints are not per se infringements in Brazil and shall be assessed under the rule-of-reason test. Annex II of CADE Resolution No. 20/99 (Annex II) outlines 'basic criteria for the analysis of restrictive trade practices', including:

- definition of relevant market;
- determination of the defendants' market share;
- assessing the market structure, including barriers to entry and other factors that may affect rivalry; and
- assessment of possible efficiencies generated by the practice and balance them against potential or actual anti-competitive effects.

In practice, no case has yet been decided on the basis that harmful conduct was justified by pro-competitive efficiencies.

The methodology for defining the relevant market is mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the 'SSNIP test', aiming to identify the smallest market within which a hypothetical monopolist could impose a small and significant non-transitory increase in price – usually taken as a price increase of 5 to 10 per cent for at least 12 months. Supply-side substitutability is also sometimes considered for market definition purposes. As for measures of concentration, reference is made to both the CRX index and the Herfindahl-Hirschman Index (HHI).

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?

Under the rule of reason, CADE undertakes detailed market analysis, including assessment of market shares, market structures and other economic factors. The Antitrust Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. Such a presumption provides some guidance to private parties as it would be unlikely for CADE to find a violation in the absence of market power.

Additionally, according to CADE Resolution No. 10, issued on 29 October 2014, any associative agreement with a term of over two years in which there is a vertical link between the involved economic groups will be subject to mandatory review by CADE when one of the parties holds at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship (see question 46).

In a recent case, CADE sanctioned auto-parts manufacturer SKF for setting a minimum sales price. In its decision, CADE found that resale price maintenance should be deemed illegal unless defendants are able to prove efficiencies; however, there would be a presumption of legality in cases where the supplier has a market share of under 20 per cent and it is not among the four biggest market players (the C4 Index).

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?

As with sellers' market share, CADE also takes into account buyers' market share while conducting its review. For example, in a case related to the mobile service provider market, CADE investigated whether an undertaking, through an exclusivity clause in its contracts with large retailers, had foreclosed sale channels to competitors. In its decision, CADE held that although the defendant held 35 per cent of the market, its conduct did not have the potential to harm competition, as there were several other sale channels available to its rivals (ie, distributors had low market shares). The same conclusion was reached by CADE in cases affecting the market for pesticides and drugs (exclusive agreements not being deemed to be anti-competitive given the low market shares of the distributors).

Additionally, according to CADE Resolution No. 10, issued on 29 October 2014, any associative agreement with a term of over two years in which there is a vertical link between the involved economic groups will be subject to mandatory review by CADE when one of the parties holds at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship (see question 46).

Block exemption and safe harbour

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

There are no block exemptions or safe harbours in the Antitrust Law. The 20 per cent rebuttable presumption of market power contained in the law can be adopted by private parties as an indication of when CADE would be likely to find a given practice to be problematic, even though CADE has already ruled that a low market share is not in itself a fact that enables the authority to conclude that there are no anti-competitive effects.

Types of restraint

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

In recent years, CADE has reviewed a variety of cases involving vertical practices, especially concerning manufacturer's suggested (maximum or minimum) retail price (MSRP). According to CADE's traditional view, a supplier may recommend that resellers charge a given price for goods or services. However, for such practice to be legal, a supplier may not stop supplying goods or put pressure on resellers charging or advertising below or above that price; also, recommended price lists should be available to the final consumer.

CADE also has taken into account whether the structure of the affected market creates incentives for all the resellers to follow the suggested prices (conditions of entry, and other factors that may affect rivalry, eg, scope of competition among resellers).

The landmark *MSRP* case in Brazil is known as the *Kibon* case, adjudicated by CADE in 1997. The complaint was filed by the Bakery Association of the State of São Paulo, which stated that the price list sent by Kibon to its resellers affected the freedom of its members to charge prices for ice cream. The agency did not find a violation of the Antitrust Law as they were only recommended prices and Kibon did not put pressure on resellers to charge such prices. CADE also highlighted the fact that there were no sanctions imposed on resellers that offered below the set prices and no threats to stop supplying such resellers. The same conclusion was reached by CADE in 1999, while reviewing a case involving price lists by Volkswagen to its resellers, and again in 2011, while reviewing a case involving book publishers.

In all these decisions CADE stressed the fact that MSRP and retail price maintenance (RPM) can differently affect competition and must be assessed under different standards. While MSRP is not harmful to competition, RPM could be and should be assessed under the rule of reason.

Under the rule-of-reason standard, CADE dismissed an RPM case in 2011 regarding a producer of water filters and purifiers, Everest, and its distributors. Although Everest adopted RPM practices, CADE concluded that the market structure did not generate anti-competitive effects. The agency also stated that RPM was conceived to avoid having discount retailers free-riding on the service provided by other retailers and there were potential efficiencies associated with the practice.

In 2013 CADE sanctioned auto-parts manufacturer SKF for setting minimum resale prices. According to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement would be found regardless of either the duration of the practice (in this case, distributors followed orders for only seven months) or the fact that distributors followed or did not follow the minimum sales prices, as CADE considered the conduct to be illegal by object.

More recently, in 2014, CADE sanctioned fuel distributor Raízen Combustíveis (formerly Shell Brasil) for abuse of dominance. According to the decision, the company set resale prices and established the standardisation of accounting systems, prices and profit margins of competing fuel stations.

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 framework for the review of RPM and other vertical restraints set out in CADE Resolution No. 20/99 does not assess the duration or rationale of the conduct (eg, to launch a new product or brand). However, in the *SKF* case referred to above, CADE stated that the launch of a new product, for example, could be viewed as a legitimate reason to impose RPM for a short period of time such as three months.

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

Pursuant to CADE Resolution No. 20/99, RPM can facilitate collusive behaviour. CADE addressed the links between RPM and collusion in 1999, when it sanctioned the steel bars cartel. CADE concluded that there was

evidence that defendants had implemented a RPM policy in order to facilitate the monitoring of the cartel agreement. Also, during the adjudication of the *SKF* case, CADE highlighted that RPM may lead to collusion among buyers or suppliers. In the 2014 *Raízen Combustíveis* (formerly Shell Brasil) case, CADE highlighted that the conduct of the company facilitated access to sensitive information, reducing the costs of a possible coordination between gas stations.

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

CADE Resolution No. 20/1999 and CADE's case law list as efficiencies reduction of transaction costs, preventing free-riding and improving distribution of a given product. Although it is standard practice to present efficiencies in connection with RPM investigations in Brazil, such claims have never been accepted by CADE. In fact, there is no case in CADE's case law in which the Brazilian antitrust authority has dismissed an anti-competitive practice based on efficiency arguments.

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.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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.

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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?

CADE has assessed this issue in connection with a few cases involving 'radius clauses' imposed by shopping centres forbidding the tenant from operating within a given distance from the mall. While reviewing those cases, the agency assessed the potential pro-competitive effects of the exclusivity clause, eg, protection from free-riders and strengthening of competition by the formation of different tenant mixes, but concluded that the negative effects outweighed the potential benefits. Furthermore, in a case involving Microsoft's exclusivity agreement with its distributor TBA, for the selling of its products to the Brazilian federal government, CADE viewed the practice as unlawful since it concluded that it would exclude TBA's competitors from the affected market. Intra-brand and inter-brand competition is usually addressed by CADE in its decisions.

29 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?

Pursuant to CADE Resolution No. 20/99, any restriction on customers to whom a buyer may resell should be reviewed under the rule of reason. Thus, even if such restriction may give rise to potential anti-competitive effects (eg, facilitate collusion), those should be balanced against possible benefits that could result from the conduct.

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

The Antitrust Law provides no clear-cut guidance on the subject. There are, however, three pending investigations at CADE's DG against Google regarding allegedly abusive vertical restraints on the internet market (see question 5).

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

The Antitrust Law provides no clear-cut guidance on the subject and no relevant precedents have provided a framework for the review of selective distribution agreements. However, it is likely that such agreements would be assessed as refusals to deal and territorial restraints, under the structure set out in CADE Resolution No. 20/99.

34 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?

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

35 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?

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

36 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?

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

CADE has not had the opportunity to review this issue and the Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

In a case involving Microsoft's exclusivity agreement with its distributor TBA, for the selling of its products to the federal government, CADE viewed the practice as unlawful since it concluded that it would unreasonably prevent intra-brand competition.

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

CADE has reviewed important cases involving arrangements made by Souza Cruz and Phillip Morris – both tobacco companies – with their respective dealers to prohibit the display of competitors' products and in-store advertisements. CADE settled the case with both companies, putting an end to a pending antitrust investigation that was initiated in 2005. Souza Cruz agreed to pay 2.9 million reais, while Philip Morris paid 250,000 reais.

Moreover, while reviewing a distribution agreement in the merger review process, CADE found that a clause preventing resellers from commercialising competing products in certain sales channels would unreasonably limit competition (*Gatorade* case).

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects. Moreover, since requirements to buy a full range of the supplier's product bear similarities to tying arrangements, CADE would probably assess both under a similar framework.

CADE generally requires four conditions to find an infringement for tying:

- dominance in the tying market;
- the tying and the tied goods are two distinct products;
- the tying practice is likely to have a market-distorting foreclosure effect; and
- the tying practice does not generate overriding efficiencies.

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

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

The Antitrust Law provides no clear-cut guidance on the subject. However, since vertical agreements are reviewed under the rule of reason, it is likely that the assessment would take into account the specific characteristics of each case, and balance potentially pro- and anti-competitive effects.

45 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?

No.

Notifying agreements

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

Under the Antitrust Law the types of qualifying business transactions subject to review include the formation of 'a joint venture, an association or a consortium'. Such transactions must be submitted for review if executed by parties that meet the turnover thresholds and produce effects in Brazil. Law No. 12,529/11 provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction: one party must have Brazilian revenues in the last fiscal year of at least 750 million reais and the other 75 million reais – both acquirer and seller, including the whole economic group, should be taken into account. As for the effects test, it is met whenever a given transaction is wholly or partially performed within Brazil or, if performed abroad, it is capable of producing effects within Brazil.

There was significant uncertainty on determining the need for an antitrust filing of associative agreements in Brazil. CADE has recently issued secondary legislation on this subject. CADE Resolution No. 10, issued on 29 October 2014, provides that any associative agreement with a term of over two years and in which there is a vertical link between the involved economic groups should be previously notified to CADE when one of the parties controls at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship. .

When assessing an agreement containing vertical restraints, CADE's DG can either clear it without conditions or send it to the tribunal for judgment with a recommendation of conditional clearance or that it is blocked. At the end of the procedure a reasoned decision is published. In 2013, the average review period for fast-track and ordinary cases was of 18 and 78 days respectively.

Authority guidance

47 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?

According to article 9, paragraph 4, in connection with article 23 of Law No. 12,529/11 parties may consult CADE regarding the legality of ongoing business conduct, subject to the payment of a fee of 15,000 reais and to the submission of supporting documents. This procedure is not available for parties to consult on whether certain transactions meet the notification threshold.

Complaints procedure for private parties

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

The first step of a formal investigation is taken by the DG, which may decide, spontaneously (ex officio) or upon a written and substantiated request or complaint of any interested party, to initiate a preliminary inquiry or to open an administrative proceeding against companies or individuals, or both, which may result in the imposition of sanctions. Once the DG has concluded its investigation, the defendants may present final arguments, after which the DG may choose to dismiss the case, subject to an ex officio appeal to CADE's tribunal. Upon verifying the existence of an antitrust violation, the DG sends the case files to CADE for final judgment. The case is then brought to judgment before CADE's full panel at a public hearing, where decisions are by majority vote. CADE may decide to dismiss the case, if it finds no clear evidence of an antitrust violation, or impose fines or order the defendants to cease the conduct under investigation.

Enforcement

49 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?

According to CADE's annual report, in 2013 CADE's tribunal adjudicated 38 anti-competitive conduct cases. Out of the 22 cases where the defendants were found guilty of an infringement, nine related to vertical restraints. Moreover, there are approximately 70 pending investigations for alleged abuse of dominance affecting Brazil, including allegations of sham litigation in the pharmaceutical and auto-parts markets.

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

CADE has the power to declare a contract or some of its provisions invalid or unenforceable if they are found in violation of antitrust law. In this scenario, the contract's remaining dispositions shall not be affected. In cases where it is possible and enough to end anti-competitive effects, CADE might request only the modification of some clauses.

51 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 Antitrust Law applies to corporations, business and trade associations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company's or group of companies' pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. Moreover, the fine must be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 5 per cent of the company's turnover in connection with vertical restraint violations.

Law No. 12,529/11 further provides that directors and other executives found liable for anti-competitive behaviour may be sanctioned from 1 to 20 per cent of the fine imposed against the company. Under the Antitrust Law, however, individual liability for executives is dependent on proof of guilt or negligence, a significant burden for CADE to meet. Historically, CADE has investigated the involvement of individuals in cartel cases, but it has rarely done so in vertical restraint cases. Other individuals and legal entities that do not directly conduct economic activities are subject to fines ranging from 50,000 to 2 billion reais. Individuals and companies may also be fined:

- for refusing or delaying the provision of information, or for providing misleading information;
- for obstructing an on-site inspection; or
- for failing to appear or failing to cooperate when summoned to provide oral clarification.

Apart from fines, CADE may also:

- order the publication of the decision in a major newspaper at the wrongdoer's expense;
- prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;
- include the wrongdoer's name in the Brazilian Consumer Protection List;
- recommend that the tax authorities block the wrongdoer from obtaining tax benefits;
- recommend to the intellectual property authorities that they grant compulsory licences of patents held by the wrongdoer; and
- prohibit an individual from carrying out market activities on its behalf or representing companies for five years.

As for structural remedies, under the Antitrust Law CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to end the detrimental effects associated with the wrongful conduct. The Antitrust Law also includes a broad provision allowing CADE to impose any 'sanctions necessary to terminate harmful anti-competitive effects', which allows CADE to prohibit or require specific conduct. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provisions may prompt judicial appeals.

The record fine for vertical anti-competitive restraint was imposed in 2009. The investigation, initiated in 2004, involved a loyalty programme developed by AmBev, Brazil's largest beer producer (with a 70 per cent market share). The programme, named To Contigo, awarded points to retailers for purchases of AmBev products, which then could be exchanged for gifts. CADE concluded – based on documents seized during an inspection at AmBev's premises – that the programme was implemented in a way that created incentives for exclusive dealing, foreclosing competitors from accessing the market. On this occasion, CADE imposed a fine of 352 million reais (equivalent to 2 per cent of its turnover in 2003). AmBev challenged CADE's decision before the judicial courts and a final decision is still pending (Administrative Proceeding No. 08012.003805/2004-10).

Update and trends

Regarding vertical restraints, the most significant decision in the past 12 months is the *Raízen Combustíveis* (formerly Shell Brasil) case (Administrative Proceeding No. 08012.011042/2005-61), where CADE sanctioned the fuel distributor for setting resale prices and establishing a standardisation of accounting systems, prices and profit margins of competing gas stations. This decision confirms CADE's more recent restrictive approach towards vertical practices that limit resale prices.

Another important development is the issuance of secondary legislation by CADE related to its view of associative agreements. According to CADE Resolution No. 10, issued on 29 October 2014, any associative agreement with a term of over two years and in which there is a vertical link between the involved economic groups should be previously notified to CADE when one of the parties holds at least 30 per cent of a relevant market, as long as either the agreement provides for the sharing of profits or losses between the parties, or the agreement provides for an exclusivity relationship (see question 46 above).

Investigative powers of the authority

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

After an investigation is initiated, the DG will analyse the defence's arguments and continue with its own investigation, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even conducting inspections and dawn raids. For the purposes of obtaining information from suppliers domiciled outside its jurisdiction, CADE has several cooperation agreements with foreign authorities.

Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and hard-copy material. In 2009, a computer forensics unit was created by the Ministry of Justice for the purpose of analysing electronic records obtained in dawn raids and by other means. Traditionally Brazil's antitrust authorities have resorted to dawn raids exclusively in cartel cases.

Private enforcement

53 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?

Pursuant to article 47 of the Antitrust Law, victims of anti-competitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Civil Code also establishes that any party who causes losses to third parties shall indemnify those that suffer injuries (article 927). Plaintiffs may seek compensation of pecuniary damages (actual damages and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.

Individual lawsuits are governed by the general rules set forth in the Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective rights is relatively restricted. State and federal prosecutors' offices have been responsible for the majority of civil suits seeking collective redress, most of which related to consumer rights complaints.

CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued by the agency, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts.

Parties should expect it to take at least four years from the start of a suit until a final decision of the Superior Court of Justice. Successful parties may recover their legal costs at the end of the suit.

Other issues

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

No.

LEVY & SALOMÃO
ADVOGADOS

Alexandre Ditzel Faraco **afaraco@levysalomao.com.br**
Ana Paula Martinez **amartinez@levysalomao.com.br**
Mariana Tavares de Araujo **mtavares@levysalomao.com.br**

Avenida Brigadeiro Faria Lima, 2601, 12th Floor
01452-924 – São Paulo – SP
Brazil
Tel: +55 11 3555 5000
Fax: +55 11 3555 5048
www.levysalomao.com.br

Praia de Botafogo, 440, 15th Floor
22250-040 – Rio de Janeiro – RJ
Brazil
Tel: +55 21 3503 2000
Fax: +55 21 3503 2000

Bulgaria

Ivan Marinov and Emil Delchev
Delchev & Partners Law Firm

Antitrust law

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

The main Bulgarian legal act is the Bulgarian Protection of Competition Act (PCA). With its adoption in 2008 the system of prior notification of vertical agreements that existed under the old PCA was removed. Article 15 of the PCA contains a general prohibition identical to the one under article 101 of the Treaty on the Functioning of the European Community (TFEU).

The Bulgarian Commission on Protection of Competition (CPC) has adopted a special Decision No. 55/20.01.2011 on the categories of agreements (both horizontal and vertical) subject to block exemptions. In practice, the decision directly indicates that for domestic antitrust purposes (ie, where trade between member states is not affected) the same requirements and rules as those contained in the existing Community legislation on vertical restraints (Regulation (EC) No. 330/2010, Regulation No. 461/2010, etc) will apply, but having regard to the specifics of the domestic market. The CPC has also introduced separate guidelines for the application of the de minimis doctrine.

The Bulgarian Civil Procedure Code provides for civil proceedings concerning possible claims for damages that could result from the infringement of antitrust law.

Where trade between member states is affected, article 101 of the TFEU and the other Community legislation on vertical restraints apply. In practice, the CPC closely follows Community case law on vertical agreements.

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?

Similarly to article 101 of TFEU, the PCA provides for general prohibition on all types of (including vertical) agreements, decisions and concerted practices between two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition on the relevant market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, markets, technical development or investment;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The CPC has stated that this is not an exhaustive list.

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?

The main objective pursued may be outlined as the protection of competition.

Responsible authorities

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

The main competent authority in Bulgaria responsible for enforcing prohibitions on anti-competitive behaviour in general, and vertical restraints in particular, is the CPC. The acts of the CPC are subject to appeal before the Bulgarian Supreme Administrative Court through two instances.

Damages that might be caused as a result of an infringement of antitrust law may be claimed directly before the civil courts. The government and ministers do not have a role.

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?

Vertical restraints will be subject to domestic antitrust law if the undertakings carry out their activities within Bulgaria, or outside the country should they expressly or tacitly prevent, restrain or distort competition within Bulgaria.

Domestic antitrust law will not apply with regard to actions the consequences of which may prevent, restrain or distort the competition in another state, except in cases where it has been provided for by virtue of an international treaty to which Bulgaria is a party.

If a vertical agreement has the potential to affect trade between member states, Community antitrust rules will apply in parallel to domestic antitrust law, so the vertical restraint would be assessed under both the domestic and Community antitrust rules. In such case there may only be one infringement, but it will be qualified at the same time both as an infringement of article 101 of TFEU and the domestic antitrust law.

The antitrust rules regarding vertical agreements have not been applied in a pure internet context so far.

Agreements concluded by public entities

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

Antitrust law applies to vertical restraints in agreements concluded by public entities provided they are concluded in the course of the economic activities of those public entities.

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.

In Decision No. 55/20.01.2011 on the categories of agreements subject to block exemption, the CPC makes direct reference to the existing Community sector-specific rules (both on horizontal and vertical agreements, including the sector-specific rules in the motor sector and the

transfer of technology) and explains that for domestic antitrust purposes the same rules apply accordingly, but having regard to the specifics of the domestic market).

General exceptions

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

The PCA provides for exceptions to antitrust law regarding agreements, decisions and concerted practices with only minor effects on competition (the de minimis doctrine).

Agreements and concerted practices in relation to vertical relations are considered to have a minor effect if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement.

The exception, however, will not apply where the agreements, decisions or concerted practices have as their object and effect:

- the direct or indirect fixing of prices;
- the allocation of markets or customers; or
- the limitation of output and sales.

The CPC has introduced separate guidelines for the application of the de minimis doctrine.

Agreements

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

There is no official legal definition of 'agreement' for antitrust purposes under Bulgarian law, but the PCA officially contains a legal definition of 'concerted practice' as 'coordinated actions or inactions of two or more undertakings'.

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?

The CPC has clarified that for antitrust purposes, 'agreement' is a much broader concept than that under civil or commercial law. In this sense, an agreement for antitrust purposes would be in place even where the agreement may be invalid, non-binding or not yet in force from a civil or commercial law perspective (eg, a draft agreement).

Following Community case law, the CPC has assumed in its latest practice that for the purposes of antitrust law, an agreement would be in place where undertakings express their joint intention to follow a certain pattern of behaviour on the market. Further, the CPC adopts the view that the concept of agreement may apply to newly started processes of pre-contractual negotiations where concordance between the undertakings' will is achieved (even if it is only partial or under certain terms and conditions) that is to result in coordination of their economic behaviour on the market. There has been a case in which the CPC investigated the clauses contained in a joint-venture agreement in relation to a potential vertical agreement between the joint venture and one of its shareholders (which did not exercise control over the joint venture) even though the vertical agreement was actually not yet in place between the parties.

In its earlier practice, the CPC also held that the content of an agreement related to various forms of regulation of commercial relations. In finding the actual will of the undertakings, however, antitrust law focused on those aspects of the will of the undertakings through which they consented to restrain their freedom to determine their independent behaviour on the market. The CPC accepted that an agreement might be in place even when the undertakings assumed a certain plan of action, the purpose of which was to restrain their trade freedom by determining a line of coordinated actions or inactions on the market.

With regard to how informal an agreement may be, the CPC has noted that it is even possible for it to take the form of tacit behaviour on the market even though no formal contact has been made between the undertakings insofar as an alignment in their market behaviour could be discerned (usually where there is no rational economic justification).

Parent and related-company agreements

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

The PCA does not formally differentiate between related and non-related companies or parties for the purposes of vertical agreements. It appears that only the CPC's guidelines on the application of the de minimis doctrine introduce a definition of 'related party', but the guidelines indicate that that definition is for the purposes of the application of the de minimis doctrine itself. At present it may not be said with certainty whether this definition may have a wider application in the CPC's practice on vertical agreements. The definition given under the CPC's guidelines has been directly derived from the definition provided under paragraph 12 of the Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 101 of the Treaty on the functioning of the EU (ex article 81 of the EC Treaty).

Apart from the CPC's guidelines on the application of the de minimis doctrine, there is no other legal definition of related party for antitrust purposes. In practice, however, the CPC seems to adopt the principle of 'vertical integration', so in cases of vertical integration there would be some immunity from antitrust law as vertically integrated undertakings are not independent undertakings. The CPC would consider that vertical integration is in place when the undertakings belong to the same economic group. It also appears that to the CPC the determination of whether two or more undertakings belong to the same economic group would relate to the concept of 'control' derived from the rules on concentrations between undertakings (ie, control by a parent company would be in place where the parent company may exercise decisive influence on the strategic business behaviour of the subsidiary, which includes decisive influence on any of the decisions related to the determination of the budget, the business plan, major investments or the appointment of senior management).

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?

Bulgarian antitrust law does not provide for any specific regulation on matters related to agent–principal agreements in respect of antitrust law, and in particular from a vertical restraints perspective.

In its practice the CPC has adopted the principles laid down in the Guidelines on Vertical Restraints of the European Commission that antitrust law generally does not apply to agent–principal agreements if the agent is not an independent undertaking; however, antitrust law may apply to agent–principal agreements in which the principal transfers certain commercial and financial risks onto the agent.

In 2012 the CPC investigated a case concerning principal–agency agreements in the motor vehicle sector where it concluded that the said agreements were not 'genuine' agency agreements as some considerable risks and burdens were transferred onto the agents, such as:

- the storage and risk of incidental loss of the goods (new motor vehicles);
- insurance costs for the goods;
- investment in advertising activities regarding the sale and trademark of the goods;
- rental payments by agents to the principal (which were considered the most considerable burden of all);
- monthly licence payments for the use of software products licensed by the principal; and
- costs related to guarantee services.

Those risks and burdens were considered to be substantial, disproportionate and economically inadequate to the compensation that each agent received from the principal for the guarantee service performed by each agent. In that decision the CPC underlined the different concepts of 'agency agreement' for competition and civil law purposes.

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?

No, there is no such domestic guidance. In its practice the CPC expressly refers to the rules contained in the Guidelines on Vertical Restraints of the European Commission. No decision of the CPC has so far dealt with what would constitute an agent–principal relationship in the online sector.

Intellectual property rights

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

No, there is no such guidance as Bulgarian antitrust law does not address that matter. As already mentioned above, however, Decision No. 55/20.01.2011 indicates that the same requirements as those contained in the existing Community legislation on vertical restraints would apply (eg, Regulation (EC) No. 330/2010, Regulation (EC) No. 772/2004). We believe that to be valid also for intellectual property.

Analytical framework for assessment

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

When making an assessment of a vertical agreement or restraint the CPC would go generally through three basic steps.

First, it would analyse whether the parties to the investigation are 'undertakings' or 'associations of undertakings' for antitrust purposes. Here, the CPC would assess whether each party performs an 'economic activity' and – if positive – whether what that party is investigated for falls within its economic activity or within another type of activity or powers (a public entity, for instance, may exercise both public functions and economic activity, only the latter being subject to antitrust rules).

The CPC would then assess whether the undertakings were indeed independent, as antitrust rules apply only between independent undertakings. These analyses would require the CPC to ascertain if, for instance, there was a 'vertical integration' or 'agency agreement' in place.

Next, the CPC would analyse if there was a 'vertical agreement' (or concerted practice) in place between the undertakings. Here, the CPC would first need to analyse whether there was an 'agreement' for antitrust purposes and – if positive – whether that agreement is indeed 'vertical' (and not horizontal, for instance).

Finally, it would analyse whether the vertical agreement is liable to prevent, distort or restrict competition by object or effect (ie, the vertical agreement is assessed under the general prohibition under the PCA (which is identical to that under article 101 of the TFEU). If the vertical agreement falls within the general prohibition, it may be exempted if it contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; and does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives, and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Block exemptions and individual exemptions are possible. The analyses here are analogous to those under Community antitrust law. Vertical agreements containing hard-core restrictions are not block exempted as they are considered to be per se illegal and may be subject to individual exemption only under very extreme circumstances. The restrictions considered as hardcore are the same as under Community antitrust law (eg, resale price maintenance, restriction on territory or customers).

There are no specific domestically tailored block exemption rules. Decision No. 55/20.01.2011 indicates that the rules of the respective Community block exemptions will apply accordingly, having regard to the specifics of the domestic market. In the absence of hard-core restrictions, the de minimis doctrine applies.

In parallel to the foregoing, the CPC will also assess whether article 101 of the TFEU applies. In practice, however, the assessment performed by the CPC under domestic and Community antitrust law would be identical.

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?

For domestic purposes Decision No. 55/20.01.2011 makes direct reference to market share under the Community block exemption regulations (eg, a 30 per cent market share cap regarding the supplier and the buyer under article 3 of Regulation (EC) No. 330/2010). Where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market, the CPC may decide that Decision No. 55/20.01.2011 will not apply to vertical agreements containing specific restraints relating to that market.

Further, in the absence of hard-core restrictions, market share is relevant in assessing whether an agreement has only minor importance (the de minimis doctrine). Agreements and concerted practices in relation to vertical relations are considered to have a minor effect if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the markets affected by the agreement.

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?

For domestic antitrust purposes Decision No. 55/20.01.2011 makes direct reference to market share under the Community block exemption regulations (eg, 30 per cent market share cap regarding the supplier and the buyer under article 3 of Regulation (EC) No. 330/2010). Where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market, the CPC may decide that Decision No. 55/20.01.2011 will not apply to vertical agreements containing specific restraints relating to that market.

Further, in the absence of hard-core restrictions the market shares are relevant in assessing whether an agreement is of a minor importance (the de minimis doctrine). Agreements and concerted practices in relation to vertical relations are considered to have a minor effect if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement.

In one case under the old PCA, the CPC prohibited a vertical agreement with regard to clauses that, in combination, led to a state of exclusive supply (very high minimum supply volumes, which corresponded to the actual production capacity of the supplier, and very high liquidated damages in the event of failure to meet these volumes) and clauses that, in combination with the said exclusive supply, led to price maintenance at the level of the supplier (obligations of the supplier not to sell to third parties on more favourable conditions, including the price) due to, inter alia, the economic power of the buyer. These clauses were found in a joint-venture agreement, (the supplier being a shareholder in the buyer without the ability to exercise control over the buyer) with regard to a future vertical agreement between the supplier and the buyer. The CPC considered these clauses as part of the vertical agreement although not actually located in it. The vertical agreement was intended for an indefinite period of time. The price intended for the buyer, however, was fixed for a certain period of time that would exceed the customary commercial practice on the one hand, and would be very low as compared with the price usually offered by the supplier, on the other hand. The CPC inferred that taking into consideration the very low fixed prices intended only for the buyer and the supplier's obligation not to sell to third parties on more favourable conditions would practically result in minimum price fixing for all possible supplies (whether to the buyer or to a third party) at the level of the supplier. In summary, the CPC prohibited the vertical agreement as it inferred that the clauses regarding the prices, the supply and the term of the vertical agreement in combination would have anti-competitive effects.

In 2012 the CPC issued a decision on a case regarding horizontal agreements. The case concerned an investigation of several of the major food retailers in Bulgaria and possible prohibited horizontal concerted practices, the substance of which, however, was the cumulative effect of certain vertical restraints (eg, wholesale MFN clauses, exchange of sensitive information through the vertical agreements and prohibition against the simultaneous participation in competitors' promotions) imposed at the same time by all of the investigated food retailers on their suppliers. Although the investigation formally concerned horizontal agreements, the core of the whole investigation was the vertical restraints and their

cumulative effects. In addition, the CPC ascertained that the food retailers possessed buyer power in the vertical agreements with their suppliers, which facilitated the imposition of those vertical restraints. The ultimate result of the investigation was that the food retailers assumed the obligation to remove those vertical restraints.

There have been no decisions regarding online sales.

Block exemption and safe harbour

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

The PCA allows for block exemption of certain categories of agreements. The criteria for block exemptions are adopted by a decision of the CPC.

As already mentioned above, there are no unique block exemptions specifically tailored for domestic purposes (ie, where the trade between member states is not affected). Instead, Decision No. 55/20.01.2011 makes reference to the block exemption regulations applicable at a Community level (Regulation (EC) No. 330/2010, Regulation (EC) No. 1400/2002, Regulation (EC) No. 461/2010 and Regulation (EC) No. 772/2004), the requirements of which for domestic purposes apply accordingly and having regard to the specifics of the domestic market (eg, the turnover under article 2, paragraph 2 of Regulation (EC) No. 330/2010 for domestic purposes is lowered to 7 million levs, etc).

Those block exemptions function in the same way as the block exemptions at a Community level.

Decision No. 55/20.01.2011 also provides that vertical agreements containing hard-core restrictions and non-compete obligations may not be block exempted. Decision No. 55/20.01.2011 will remain in force until 31 May 2023.

Types of restraint

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

Fixed and minimum resale prices are considered as hard-core restrictions. Recommended and maximum resale prices are generally permitted unless they are indirect means of determining fixed and minimum resale prices.

In 2013 the CPC imposed a sanction in the vegetable oil market for resale price maintenance that involved the direct (ie, as a contractual obligation) and indirect (ie, incentivised) determination of fixed and minimum resale prices, and the fixing of discounts and margins for two levels of trade downstream (ie, both for the distributors and their sub-distributors). The supplier had ensured an effective monitoring system to keep everything under control. The CPC dismissed the supplier's objection that the whole system constituted a recommended commercial policy only and that it was not applied in practice. The decision of the CPC is pending appeal before the court.

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'?

No, we are not aware of any such decisions or guidelines that have that particular matter as their subject. In 2013, however, the CPC investigated a case involving resale price maintenance in which one of the main arguments of the defendants was the short period of the alleged arrangement – four months. In that regard, the CPC noted as an aside that a vertical restraint involving resale price maintenance might be subject to individual exemption if it was indispensable for the organisation of short-term campaigns (ie, between two and six weeks) with low prices in favour of the end consumers, which was not the case with the defendants.

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

In one of its cases in 2006 under the old PCA, the CPC granted an individual exemption to a vertical agreement regarding the distribution of drugs. Each of the parties held 100 per cent market share on the relevant markets in which they were positioned. The vertical agreement contained conditions on resale price maintenance as well as a clause dealing with exclusive distribution, maintenance of minimum volumes of the products in the stores of the distributor, a non-compete obligation for the distributor regarding the same or similar products, and an obligation for the distributor not to enter into other agreements with third parties that may be too burdensome and hinder the execution of the distributor's obligations under the existing agreement. The vertical agreement was concluded, however, specifically for the purposes of a particular public procurement procedure of the Bulgarian Ministry of Healthcare and the participation of the distributor in it. The purpose of the distribution agreement was to ensure the regular supply of drugs to the Bulgarian Ministry of Healthcare. Further, the drugs that were the subject of the distribution agreement were life-saving, had no generic substitutes or substantially similar products and the supply to the Ministry of Healthcare could be procured only with the participation of the supplier as a producer of the drugs. The term of the distribution agreement was one year subject to further extension through the explicit written consent of the parties. The CPC ascertained that, in principle and without having regard to the very specific and exceptional circumstances at hand, such a vertical agreement would always objectively lead to prevention and distortion of competition although it did not encompass the whole portfolio of the supplier, nor did it prevent the distributor from selling to third parties besides the Ministry of Healthcare. The CPC, however, granted the individual exemption only because the distribution agreement was essential for the purposes of public procurement and of prime importance to the interests of end-consumers. The selling by the distributor of the products to the Ministry of Healthcare as per the price list of the supplier was essential for the distributor's participation in such public procurement. Eventually, the CPC explicitly noted that in future the parties had to refrain from entering into such distribution agreements and that the term extension of the existing agreement would be allowed only if it were essential for the purposes of public procurement.

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

No, we are not aware of any such decisions or guidelines.

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.

We are not aware of any such decisions or guidance issued by the CPC.

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.

Two similar vertical restraints were considered by the CPC, one under the old PCA and the other in 2012, described in question 17.

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.

We are not aware of any such decisions or guidance issued by the CPC.

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.

We are not aware of any such decisions or guidance issued by the CPC.

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.

We are not aware of any such decisions or guidance issued by the CPC.

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?

The PCA provides a general prohibition on vertical agreements and concerted practices that have as their object or effect the share of markets and sources of supply. The CPC assesses such vertical restraints following the respective Community regulations and guidelines.

As previously mentioned, in 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from active sales of new motor vehicles outside the territory that was assigned to them. That was considered by the CPC as a hard-core restriction.

29 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?

The PCA provides for a general prohibition of vertical agreements and concerted practices that have as their object or effect the share of markets and sources of supply. The CPC would assess such a vertical restraint following the respective Community regulations and the guidelines.

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

We are not aware of the CPC so far having addressed the matter.

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

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

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

The CPC has investigated few cases involving, inter alia, selective distribution. In assessing selective distribution the CPC follows the respective Community regulations and guidelines. The CPC has not addressed the matter as to whether criteria for selection must be published.

34 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?

The CPC has held in its practice that selective distribution might be more dangerous in terms of competition than non-selective distribution.

According to the CPC, the type of product sometimes justifies particular vertical restraints that could be imposed on a distributor belonging to a selective distribution system. Although there is no established practice with regard to the matter of selective distribution, the CPC has held by way of exemplary reference that the selective distribution is oriented towards the distribution of products in particular categories, such as those representing a certain level of luxury (eg, jewellery, high-class watches, perfumes) or products requiring special technical knowledge and maintenance (eg, cameras, TV sets, hi-fis). That exemplary reference was made by reference to a distribution system of fizzy drinks, non-fizzy drinks, sports drinks, energy drinks, instant drinks, etc, that was not recognised by the CPC as a selective distribution system, as these products did not pertain to any of the foregoing categories of products, although their trademark was known worldwide.

The CPC has also investigated a selective distribution system in the motor vehicle sector. It considered the system as selective, but a number of anti-competitive vertical restraints, both hard-core and non-compete, were identified by the CPC (eg, restriction of cross supplies and resale price maintenance; restrictions on the sale of competing goods; restrictions of active sales outside the assigned territory; and restrictions on the sale of spare parts of equivalent quality outside the guarantee service).

35 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?

We are not aware of any such decisions or guidance issued by the CPC.

36 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?

No, we are not aware of any such decisions of the CPC.

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

We are not aware of any decisions or guidance issued by the CPC.

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

In 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from active sales of new motor vehicles outside the territory that was assigned to them; this was considered a hard-core restriction by the CPC.

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

In 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where cross supplies between the dealers of new motor vehicles and new original spare parts were restricted; this was considered a hard-core restriction by the CPC.

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

We are not aware of any such decisions or guidance issued by the CPC.

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

We are not aware of any such guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

In 2012, however, the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from selling competing goods; this was considered a hard-core restriction by the CPC.

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

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

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

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

Please see the first case referred to in question 24 for a case of very specific circumstances that, in combination, were assessed by the CPC to have led to a state of exclusive supply.

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

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

With respect to the restriction on the supplier's ability to sell directly to end-consumers, in its practice the CPC has implied certain speculations as a side analysis on a case with a different main subject that it would generally not object to such restriction; however, any particular application of this restriction would be subject to consideration in terms of the factual background of the particular case.

45 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?

We are not aware of any such decisions or guidelines.

Notifying agreements

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

There is no obligation on the parties to a vertical agreement to give prior notification to the CPC. It would be for the respective parties to decide and assess whether the respective vertical agreement could benefit from a block exemption.

Authority guidance

47 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?

There is no formal procedure for obtaining guidance from the CPC provided for under the PCA.

Complaints procedure for private parties

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

There is a formal procedure whereby private parties can complain to the CPC about alleged unlawful vertical restraints. The procedure may be initiated by a complaint filed by a party the interests of which are affected or are threatened by the respective vertical agreement or restraint. We need to note, however, that the CPC may also act ex officio.

The CPC launches the proceedings within seven days as of the filing of the complaint, and designates a working group that conducts an investigation. There is no term for the investigation. The investigation concludes with a report of the working group.

Within 14 days of the end of the investigation the CPC conducts a closed session on which the CPC decides on the further proceedings of the file. In that closed session the CPC may adopt the following:

- a decision that no infringement is committed;
- a ruling for an additional investigation by the working group if the collected evidence is not sufficient on which to ground a decision; or
- a ruling through which the CPC brings the assertions for infringement of the competition rules to the defendant (statement of objections).

In the third case, the CPC determines a time period of at least 30 days for the complainant and the defendant to provide their objections. After that they are given access to all materials collected on the file. At least 14 days after the expiry of the term for the provision of objections, the CPC determines a date for an open session on which the parties may be heard.

After the parties are heard the CPC may adopt one of the following:

- a ruling that returns the case to the working group for an additional investigation;
- a ruling through which the CPC adopts new assertions for any committed infringement, in which case the CPC complies with the procedure followed on the primary assertions of the infringement; or
- a decision by which the CPC:
  - ascertains the infringement and the party that committed it;
  - imposes sanctions, periodic sanctions or fines;
  - ascertains that no infringement has been committed or that there are no grounds to initiate actions regarding an infringement of articles 101 and 102 of the TFEU;
  - orders termination of the infringement, including by imposing behavioural or structural measures in order for the competition to be restored;
  - pronounces on the inapplicability of the block exemption for the particular case and determines a time period for the amendment of the vertical agreement in compliance with the competition rules or its termination; or
  - pronounces on the inapplicability of the respective Community regulation on block exemption to the particular case and determines a time period for the amendment of the vertical agreement to be in compliance with article 101(3) of the TFEU.

Enforcement

49 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?

Since the adoption of the new PCA in 2008, there have been between one and four decisions per year concerning vertical restraints. This is not a significant percentage of the CPC's decisions.

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

Vertical agreements that contain hard-core restrictions are by law considered null and void in their entirety.

Bulgarian antitrust law formally does not contain any statutory provisions regarding non-compete obligations and how they should be treated under domestic antitrust law. CPC Decision No. 55/20.01.2011, in making direct reference to the respective Community block exemption regulations (eg, Regulation (EC) No. 330/2010), provides that vertical restraints (non-compete obligations) thereunder (eg, article 5 of Regulation (EC) No. 330/2010) may not be subject to the block exemption for domestic antitrust purposes.

At the beginning of 2014 the CPC issued a decision where the subject of investigation was, inter alia, non-compete obligations for an indefinite period of time. The CPC analysed those following the requirements under Regulation (EC) No. 330/2010 and concluded that they were anti-competitive and therefore prohibited. The CPC was not able, however, to impose sanctions because the time limitation had elapsed.

The CPC also investigated a case under the old PCA in which the entire vertical agreement was prohibited due to the inseverability of the remainder of the vertical agreements from the non-compete obligations.

51 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 CPC may directly impose sanction for infringement of antitrust law. By law the sanction may reach up to 10 per cent of turnover for the preceding financial year. The CPC has adopted a methodology on imposing sanctions that is not, however, legally binding upon the court.

Investigative powers of the authority

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

When conducting an investigation the CPC may:

- request information and tangible, written, digital and electronic evidence irrespective of the carrier;
- take someone's oral or written evidence;
- conduct an investigation on the spot (dawn raids) subject to approval by the court;
- make use of third-party experts; and

- request information or cooperation from other national competition regulators from other member states as well as from the European Commission.

Private enforcement

53 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 enforcement is possible. Any person (either an individual or a legal entity) that has incurred damages may claim, even in the event such person has only been indirectly affected by the infringement (ie, non-parties to the respective vertical agreement).

Damages are claimed before the Bulgarian civil court, by judgment of the Bulgarian Supreme Administrative Court, or by a decision of the CPC that has not been appealed and has entered into force, this being binding upon the civil court with regard to the fact of the committed infringement and the identity of the party that committed it. The amount of the damages is, however, subject to proof.

Other issues

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

No, we are not aware of any such point.

Delchev & Partners Law Firm

Ivan Marinov **ivan.marinov@delchev-lawfirm.com**
Emil Delchev **emil.delchev@delchev-lawfirm.com**

8 Tsar Kaloyan Str, 2nd floor
Sofia 1000
Bulgaria

Tel: + 359 2 933 09 78
Fax: + 359 2 981 81 34
www.delchev-lawfirm.com

Chile

Pedro Rencoret and María Jesús Cifuentes
Pellegrini & Cía

Antitrust law

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

Legislation applicable to vertical restraints – and to all other matters relating to antitrust law – is Decree Law No. 211 of 1973 (DL211).

Section 3 of DL211 contains a generic description of unlawful acts and conducts, according to which 'whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects' shall be penalised. Complementing this broad statutory description, section 3 offers the following examples of illegal behaviour:

- express or tacit agreements between competitors, or concerted practices between them, which confer market power on them and which consist of fixing sale prices, purchase prices or other commercial terms and conditions, restricting output, allocating territories or market quotas, excluding competitors or affecting the results of tender processes (bid rigging);
- abusive exploitation by an economic agent or a group of economic agents of a dominant position in the market, fixing sale or purchase prices, tying a sale to the purchase of another product, allocating territories or market quotas or imposing other similar abuses; and
- predatory practices, or unfair competition practices, carried out with the purpose of attaining, maintaining or increasing a dominant position.

The breadth of section 3 DL211 has resulted in the development of antitrust case law that, although not legally binding, has persuasive authority.

In June 2014, the National Economic Prosecutor's Office (FNE) released the Guidelines for the Analysis of Vertical Restraints (the Guidelines). The Guidelines intend 'to provide detailed information on the general criteria that FNE uses when analysing vertical restraints and their compatibility with Competition Law (DL 211)'. This guideline is not binding on the FNE or the Antitrust Court. However, the FNE's intention is to apply the general guidance described in the Guidelines on its investigations involving vertical restraints issues. According to the Guidelines, should extraordinary and special circumstances in a particular case require a different analysis, the FNE will detail its reasons to depart from the analysis therein detailed.

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 antitrust law does not contain a definition of vertical restraints or describes specific types, with the exception of the examples indicated in section 3 of the statute (see question 1). According to the Antitrust Court's case law, all forms of vertical restraint executed by companies with market power and producing – or tending to produce – anti-competitive effects in a relevant market are considered unlawful (see Decision No. 126/2012; Decision No. 90/2009; and Decision No. 26/2005). In this sense, entities with a dominant position are generally not allowed to impose or even agree to the following vertical restraints:

- exclusivity clauses;
- discounts for compliance of sales goals of a kind that has the same effect as an exclusivity agreement;
- requesting the buyer for a high percentage of its sales to correspond to the product of the supplier; and
- prohibitions imposed by shopping malls on their tenants not to open other shops within a certain radius.

The FNE's Guidelines on Vertical Restraints offers a brief description of the most common types of vertical restraints. As for intra-brand restraints, the document describes resale price maintenance, exclusive territories, selective or exclusive distribution, service requirements, and the most-favoured-nation clause. As for inter-brand restraints, the document describes exclusive contracts, non-linear prices (two-part tariffs and target rebates), bundled or tied sales, 'slotting allowances' or payment for shelf access and 'quantity forcing' or requirement of a minimum purchase amount.

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?

According to section 1, the only objective pursued by DL211 is to promote and defend free competition in the market. The Antitrust Court has explained that the aim of this 'is to prevent conducts that obstruct or eliminate it, in order to avoid losses of social welfare or, in other words, that the economic efficiency be affected negatively in the use of scant resources' (Decision No. 92/2009). Thus, in determining whether a vertical restraint had an anti-competitive effect, the Antitrust Court will examine and evaluate if the vertical restraint has 'foreclosed the market or has the potential to do so, by way of excluding competitors or would-be competitors, with the resulting effect of harming consumers, who would be deprived of alternative to which meet their needs' (Decision No. 126/2012).

Responsible authorities

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

The authorities responsible for enforcing antitrust law, including vertical restraints, are the FNE and the Antitrust Court.

The FNE has the power to open investigations, has broad powers to request and gather information it deems necessary for investigations, may request the Antitrust Court to initiate antitrust enforcement procedures and may act as a party representing the general interest of the economic community before the Antitrust Court and the courts of justice, among others. This agency has no power to enforce prohibitions on anti-competitive vertical restraints; any challenge must be submitted before the Antitrust Court. The FNE is an independent public service, but is subject to the surveillance of the president of the republic, through the Ministry of Economy.

The Antitrust Court is a special and independent jurisdictional body, subject to the supervision of the Supreme Court of Justice. Its purpose is to prevent, amend and punish any act, contract or conduct that infringes antitrust law. It also rules on the legality of existing or proposed acts, contracts or transactions. The decisions of the court are subject to appeal only before the Supreme Court. The Antitrust Court is composed of five members: three lawyers and two economists.

The Antitrust Court was created by Law No. 19,911 of November 2003, which came into effect in February 2004, and replaced the former Antitrust Commissions.

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?

In order for a vertical restraint to be subject to antitrust law in Chile, it is necessary for it to have effects in a relevant market located in Chile (see questions 2 and 3). In this matter, Chilean antitrust law has not been extra-territorially applied nor in a context exclusively related to the internet.

Agreements concluded by public entities

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

Chilean antitrust law does not distinguish between private and public entities, and the Antitrust Court's case law has followed an identical course. Likewise, the Chilean Constitution establishes that the exercise of economic activities by governmental agencies and companies is subject to the same law that is applicable to private parties, without prejudice to justifiable exceptions established by law (section 19 No. 21, second paragraph, of the Chilean Constitution).

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.

We are not aware of substantial vertical restraints regulated by law, with the exception of certain regulated markets, such as electricity generation, transmission and distribution; utility companies; and public ports.

The Antitrust Court has dictated a general instruction that affects the market for the handling of solid domestic waste. In its instruction the Antitrust Court provided that companies that provide services in the intermediate or final stages of the handling of such waste must grant equal conditions to all users and clients who require their services, without arbitrary discrimination, and publish in a national newspaper the tariffs of the facilities they operate and the objective criteria whereby differences of prices could exist (eg, discounts by volume).

General exceptions

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

DL211 does not contemplate such exceptions, so vertical restraints must be analysed on a case-by-case basis. However, we can point out that generally vertical restraints would not be considered illegal if the companies involved do not have a dominant position in the relevant market.

Agreements

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

DL211 does not contain a definition of 'agreement'. However, section 3 indicates in a very extensive way that conduct contrary to free competition can take place through any 'act, agreement or convention'.

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?

No formality is required for a vertical restraint to be the subject of antitrust law. For an infringement to occur, it is enough that the parties consent, and the terms of the anti-competitive agreement can be evidenced by any means. For example, the Antitrust Court has penalised parties for exclusivity agreements which – though not literally stipulated – were considered as such based on photographic evidence (Decision No. 26/2005) or in testimonies of the defendant's officers (Decision No. 90/2009).

Parent and related-company agreements

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

In general, from the perspective of Chilean antitrust law, vertical restraints rules do not apply to matters affecting companies of the same economic group, unless they also affect third parties. It has been resolved that companies with market power must agree on their commercialisation conditions in an objective and non-discriminatory way with all their clients or suppliers, and they are banned from making agreements on more favourable conditions for their related companies.

DL211 does not provide any definition of 'related company'. However, the Antitrust Court does use the definition contained in section 100 of the Chilean Securities Act (Law No. 18,045), according to which the following are considered to be related to a given company:

- those that belong to the same economic group;
- the legal persons who own at least 10 per cent of the capital of the first or who are owned by the first in a larger percentage;
- their principal executives and their close relatives;
- any other entity controlled by any of the above; and
- any person who, by themselves or by means of an agreement with others, can appoint at least one board member or owns more than 10 per cent of the company's equity. A person is not considered to be related when owning only 5 per cent of the company's equity or by just being an employee of it.

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?

DL211 has far-reaching scope and can be applied to agent–principal agreements whenever the relationship between the supplier and the agent may result in infringements against free competition.

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?

See question 12. From an antitrust perspective, there are no rules on what constitutes an agent–principal relationship.

Intellectual property rights

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

The Antitrust Court has resolved that matters involving IPRs lie within its jurisdiction as with any other matter, inasmuch as there is accusation of abusive conduct amounting to disloyal competition (Decision No. 68/2008). On the other hand, the court has declared that it is not competent to resolve 'controversies relating to pure intellectual property rights when the conduct submitted to the decision of this court does not involve objective facts that constitute a threat to free competition' (Decision No. 71/2008).

Analytical framework for assessment

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

DL211 broadly defines the conduct that amounts to a violation of free competition (see question 1). Thus, there is no conduct per se contrary to free competition (or object of a specific regulation); all must be analysed on a case-by-case basis. In this sense, Chilean case law follows a rule-of-reason approach when analysing vertical restraints, examining whether the vertical restraint produces, or tends to produce, anti-competitive effects in

a relevant market (see question 3). To determine the above, the analytic framework followed by the Antitrust Court is as follows:

- it determines the relevant market and its characteristics (market of the product and geographic area, existence of barriers at the entrance and exit, sunk costs, quantity of actors and market share and related markets, among other factors);
- whether the defendant holds a dominant position in the market; and
- whether the challenged vertical restraint, if it exists, constitutes an abuse susceptible of reproach in line with section 3 of DL211.

For these purposes, the tribunal analyses the nature, characteristics and effects on the vertical restraint (eg, its duration and material extension, if it has the purpose of excluding competitors, suppliers, clients or consumers), while it behoves the defendant to show that it is justified under the Antitrust Law (eg, that there are economies of scale or cost efficiencies that override any antitrust risk).

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?

Market share is a very important factor, but it is not a determining factor; the existence and characteristics of other competitors will, for instance, also be considered, and if the market is challengeable, etc. However, the FNE's Guidelines on Vertical Restraints provide that 'the FNE in its investigations will consider as presumptively legal vertical restraints when none of the parties hold a market share exceeding 35 per cent', or if the sum of the market shares of all buyers or sellers subject to those clauses does not exceed that threshold. However, that 'presumption may be rebutted when parallel vertical restraints are detected that govern competing sellers or buyers and that jointly produce what is known in the doctrine as cumulative effects'.

For the tribunal it is irrelevant if a practice is widely used in the market – if it aims to impede free competition it will be consequently condemned.

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?

The same reasoning applies as in question 16.

Block exemption and safe harbour

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

DL211 does not contemplate any block exemption or safe harbour that may provide certainty to companies as to the legality of vertical restraints; thus, each vertical restraint must be analysed on a case-by-case basis. However, if the parties are companies with small market shares, or participate in highly competitive markets, it is probable that there will be no objections in this connection.

Nevertheless, DL211 allows any person or entity with a legitimate interest or the FNE to request the Antitrust Court (in a non-contentious procedure) for a decision on the lawfulness of existing acts or contracts, or on those that are yet to be entered into. This is very relevant as section 32 of DL211 provides that:

> *Acts or contracts executed or entered into in accordance with the decisions of the Antitrust Court shall not bear liability, except in the event that they were later deemed as contrary to free competition by the same court, based on new information, and only after the resolution stating this fact is notified or published, as the case may be.*

The FNE will consider as presumptively legal vertical restraints when none of the parties hold a market share exceeding 35 per cent, or if the sum of the market shares of all buyers or sellers subject to those clauses does not exceed that threshold (see question 16).

Types of restraint

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

Fixing resale prices is not per se contrary to free competition. As a matter of fact, it has been accepted in competitive markets when what is sought is to reduce intra-brand competition to better face inter-brand competition (Decision No. 1286/2004 and Resolution No. 734/2004).

However, if it is imposed by whoever has market power and where competition is weak, it is likely that it will be considered to be against free competition. The Antitrust Court has indicated in a general manner that 'fixing resale prices [...] in some cases is a practice that restricts free competition' (Decision No. 63/2008). More specifically, the Antitrust Court has ruled that restricting the buyer's ability to determine its resale price assessed is anti-competitive conduct if two conditions are met:

- the set or suggested resale price is imposed by the producer of a good or service to the retailers, in a way that prevents intra-brand competition; and
- the relevant market has serious competitive limitations among the different competing brands, that is, that there is no effective competition among brands (Decision No. 131/2013).

The following case law can be pointed out:

- fixing minimum resale prices has been sanctioned on several occasions (eg, Decision No. 1114/2000; Decision No. 1088/1999, Resolution No. 1/1975);
- fixing maximum resale prices has been considered lawful, as the distributor can freely fix a lower price, but it is unlawful if this limit is so low that it deprives it of such freedom (Decision No. 698/1989; Decision No. 122/1976);
- generally, the suggestion of resale prices is not contrary to free competition. In order for it to be considered as such the plaintiff must prove that it leads to a reduction in the intensity of the competition (Resolution No. 14/2006).

The above reasoning can be applicable to vertical restraints that in a more sophisticated way cause the same effects as agreements to fix resale prices, as well as cases in which the buyer's liability to give rebates or discounts is limited.

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'?

An old decision rejected a promotional campaign proposed by a supplier of household appliances that included, among other things, the fixing of a maximum resale price. In such case the authority considered that there were several risks, such as arbitrary discrimination with respect to the distributors that were not part of the campaign, that if the maximum price was too low it could affect both the liberty of the reseller and constitute a predatory price, and that it eventually increased the risk of collusion (Decision No. 122/1976).

However, we believe that in accordance with recent case law it is likely that the Antitrust Court will not express objections with respect to vertical restraints that are limited in time, which are economically justified, and that are applied in a non-discriminatory manner.

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

This occurred when Decision No. 122/1976 was issued (see question 20). We are not aware of more recent decisions.

The FNE's Guidelines on Vertical Restraints do relate resale price maintenance and most-favoured-nation clauses as possible substitute mechanisms for horizontal agreements between rival distributors through the use, to that effect, of common suppliers. The document provides that 'restraints such as resale price maintenance, most favoured-nation-clauses, or the assignment of exclusive territories, for example, may be used by distributors as market-sharing or price coordination mechanisms'. According to the FNE, 'this may happen when distributors exhibit enough market power to induce suppliers to comply with this type of agreement and, at the same time, are capable of preventing the supply at lower wholesale prices

to potential rival distributors. In the absence of sufficient market power at the level of the distributor, the aforementioned case can occur when collusion among distributors also benefits suppliers, contributing to incrementing their own benefits (eg, through higher wholesale prices).'

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

In competitive markets the fixing of resale prices has been authorised as it permits reducing intra-brand competition to better face inter-brand competition (Decision No. 1286/2004, in which the Preventive Commission endorsed the analysis of the FNE). In addition, it has been underlined that restraints of that nature have permitted the increase of access of other importers and distributors to the market, improving in this way its efficiency in the long term (Resolution No. 734/2004).

The FNE's Guidelines on Vertical Restraints address the efficiencies that can arise from vertical restraints in general. The document provides that the most common externalities that vertical restraints try to remedy are double marginalisation, the free-rider effect and the existence of hold-up, related to the under-performance of specific investments. The document also addresses other sources of inefficiency that can be remediated through vertical restraints. For example, the opening and entry into new markets 'may require the providing of compensation to the distributor for the opportunity cost involved in granting space for a product whose success is not assured. This can be achieved through exclusivity contracts, resale price maintenance or slotting allowances, among others'. Also, in highly volatile and risky markets, 'where there are very few products that account for a good part of sales (...) it may be necessary to establish some kind of compensation for the distributor, in order to market all of the manufacturer's inventory and not only those products it considers most likely to be successful.'

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.

Restricting the buyer's ability to determine its resale price will be held unlawful as long as the conditions required by the Antitrust Court are met, and thus producing, or tending to produce, anti-competitive effects (see question 19).

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.

The Antitrust Court has not addressed this situation yet. However, restricting the supplier's ability to determine its prices will be held unlawful if, and only if, any restriction imposed on him results in anti-competitive effects (see question 19). This is likely to be the case if the party imposing the restriction has market power and there is lack of competition in the relevant market. Also, the FNE's Guidelines on Vertical Restraints address the possibility that a most-favoured-nation clause may be used as a possible substitute mechanism for horizontal agreements between rival distributors through the use, to that effect, of common suppliers (see question 21).

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.

The same reasoning applies as in question 24. Online and in-store sales have not received different treatment in this regard.

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.

The Antitrust Court and the FNE have not addressed this situation. However, in the Guidelines the FNE makes explicit that it considers minimum resale price maintenance as potentially the most harmful vertical restraint. Thus, a minimum advertised price policy may be deemed unlawful if it produces or tends to produce the same effects as an anti-competitive minimum resale price maintenance clause.

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.

The same reasoning applies as in question 24.

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?

It has been resolved that it is lawful to restrict the territory into which a buyer may or may not resell contract products, if the market in question is competitive and if the restraint is economically justified (eg, Decision No. 833/1992, Decision No. 1061/1999 and Decision No. 1114/2000). There has been no difference between the assessment of restrictions on 'active' sales and restrictions on 'passive' sales.

29 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?

The Antitrust Court has reasoned that, in a competitive market without entry barriers, the clause of a distribution agreement whereby the distributing company binds itself to provide to certain clients, as well as the clause whereby the same company binds itself not to provide to certain clients, does not restrict free competition (Resolution No. 16/2006). There has been no difference between the assessment of restrictions on 'active' sales and restrictions on 'passive' sales.

Furthermore, in Resolution No. 19/2006 the Antitrust Court indicated that the following requirements must be met for a refusal of sale to be contrary to free competition:

- a person considers that its capacity to act or to continue acting in the market is substantially affected as it is unable to obtain the necessary supplies to develop its economic activity in normal commercial conditions;
- the reason that prevents such person from having access to such supplies consists of an insufficient degree of competition among the suppliers thereof, in a manner that one of such suppliers, or a group of colluded suppliers, deny that person the referred to supply; and
- the person referred to is willing to accept the commercial conditions usually established by the supplier with respect to its clients, as such acceptance necessarily imposes on the supplier the obligation to sell or supply what is requested from it.

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

DL211 does not regulate the situation and we do not know of any decisions of the authorities in this regard. Nevertheless, any unjustifiable restriction imposed by a firm with market power will probably be considered to be against free competition.

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

DL211 does not regulate the situation and we do not know of any decisions of the authorities in this regard. Nevertheless, any unjustifiable restriction imposed by a firm with market power will probably be considered to be against free competition.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

DL211 does not regulate the situation and we do not know of any decisions of the authorities in this regard.

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

Although considered illegal until the early 1990s, today selective distribution systems are welcomed by the authorities in competitive markets (eg, Decision No. 126/2012 and Decision No. 1286/2004). The incorporation

of new members must remain open and the criteria of selection must be general, objective and reasonable (Decision No. 761/1991). For existing distributors, the rules that are agreed must be the same, uniform, public and non-discriminatory with regard to the same categories of distribution (Decision No. 1114/2000).

34 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?

Selective distribution systems are more likely to be lawful in competitive markets. The Guidelines indicate that:

> *in order for the efficiencies associated with these types of clauses to exceed the competitive risks and/or effects inherent to them, they must comply with certain conditions, including at least: that the degree of appropriability of revenues associated with the sales effort is low (eg, investment in advertising is much less appropriable than the investment in sales infrastructure); that the characteristics of the product make sales effort indispensable (new or technically complex product); that the product represents a high percentage of consumers' spending (so there are incentives to obtain complementary services form a certain distributor, and later purchase from a cheaper one); and that it is not economically efficient to impose direct restraints on the level of the desired sales effort (eg, monitoring is very expensive).*

35 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?

DL211 does not regulate the situation and we do not know of any decisions of the authorities in this regard.

36 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?

We are not aware of any decisions rendered by Chilean antitrust agencies relating suppliers taking actions to prevent sales by unauthorised buyers.

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

In competitive markets, selective distribution systems have been well appreciated by the authorities. For example, with regard to the selective distribution system widely used in the automobile market, the Preventive Commission endorsed the following analysis by the national economic prosecutor:

> *The limitations in the diverse brands are similar and most of them are framed within the normal restraints that are established in the exclusive and selective distribution agreements of brand products that require technical assistance, as their objective is, fundamentally, to guarantee the image of the product, the post-sale service and the fulfilment of technical criteria [...] the vertical restraints seem to have a positive absolute effect, as they would be helping to improve economic efficiency by means of a better coordination between manufacturers and distributors [...], have tended rather to increase benefits obtained through the vertical structures than to increase their disadvantages. Likewise, it can be inferred that they have stimulated access of other producers and distributors to the market, increasing and stimulating efficiency in the long term. (Decision No. 1286/2004.)*

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

The authorities have accepted that in competitive markets selective distribution systems may combine other forms of vertical restraints, such as restrictions on the territory into which approved buyers are allowed to resell the contract products. If competition is weak, the assessment would be different (see question 37).

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

For franchises, it is lawful to ban the buyer from resorting to the supply of alternative sources if this is justified to protect the business model and the value of the brand of the supplier (Resolution No. 15/2006).

As mentioned before, any unjustified restriction imposed by a firm with market power will probably be considered against free competition.

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

Such a restriction would be justified to the extent that its non-establishment would affect the business model and the value of the supplier's brand (Resolution No. 15/2006). The application of such limitation must be equal, uniform, public and non-discriminatory with respect to distributors that are in the same category (Decision No. 1114/2000).

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

As a general rule, in competitive markets exclusivity clauses are permitted. However, for suppliers that have a dominant position, exclusivity clauses have been penalised because they constitute an abuse of dominant position when used to exclude competitors, at the same time being the source of that market power (barrier to entry).

In that sense, the Antitrust Court in two separate cases condemned Compañía Chilena de Fósforos and Chiletabacos (each a company with over 90 per cent share in their respective markets) because they entered into agreements of exclusivity with a large proportion of the distributors in the market (Decisions No. 90/2009 and 26/2005 respectively.)

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

Unless agreed by a company with market power, such restrictions cannot constitute an exclusionary practice against free competition.

For example, Compañía Chilena de Fósforos was penalised for agreeing to grant discounts for fulfilling sales goals (fidelity discounts) in such a way that it had the same effect as an exclusivity agreement (Decision No. 90/2009). Likewise, the Antitrust Court has resolved that making the payment of incentives to the buyer conditional on fulfilling goals of participation in sales in the commercial establishment of a product constitutes a strategic barrier to entrance (Decision No. 26/2005).

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

Restricting the supplier's ability to supply to other buyers will be held unlawful if it produces, or tends to produce, anti-competitive effects. The Antitrust Court will examine and evaluate if the restraint forecloses the market, or has the potential to do so, for other potential buyers, with the resulting effect of harming consumers, who would be deprived of alternative to meet their needs. The Antitrust Court will examine 'the presence or absence of products from different brands to which other buyers may have access, as well as the efficiencies justifying the corresponding restraint' (Decision No. 126/2012).

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

The same reasoning applies as in question 43.

45 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?

No.

Update and trends

We are not aware of any significant decisions rendered by Chilean antitrust agencies in this area in the past 12 months. However, on 30 April 2014, the Antitrust Court approved a settlement between the FNE and other independent plaintiffs, and Unilever as a defendant, regarding the distribution and resale of detergents (Decision No. 119-2014). This settlement will allow small and medium-sized producers to compete in the detergents market on the same terms with the largest producers, as Unilever was obliged to refrain from engaging in exclusivity agreements, loyalty discounts, and tied sales, among other restraints. This agreement is consistent with other agreements approved regarding vertical restraints, such as the *Beverages* case (Decision No. 92-2011) and the *Beer* case (Decision No. 62-2008).

In addition, it is important to note that, in July 2014, the FNE released the Guidelines for the Analysis of Vertical Restraints 'to provide detailed information on the general criteria the FNE uses when analysing vertical restraints and their compatibility with Competition Law (DL 211)' and they aim to deliver legal certainty to the market. The Guidelines have incorporated comments and suggestions from lawyers and economists as well as from foreign competition agencies.

The main criteria the FNE uses when analysing vertical restraints is to weigh the eventual pro-competitive effects that may result from the agreement, by increasing efficiency levels of production or when they result to real benefits to the parties that sign them, with the competition laws, evaluating the potential risks and anti-competitive effects.

To undertake its analysis, the FNE carries out three different stages. First, an estimation of the market shares for the parties involved, assuming that the threshold of 35 per cent of the affected market increases the probability of anti-competitive effects. Second, the FNE evaluates the anti-competitive effects and third, it identifies the efficiencies that arise from the agreement.

Notifying agreements

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

The only formal procedure for notifying agreements containing vertical restraints is the non-contentious procedure considered in section 31 of DL211, which gives the Antitrust Court the power to hear, upon request of whoever has a legitimate interest or by the FNE, issues that could violate the provisions of DL211 regarding existing acts or contracts or those pending completion. Notifying agreements is not mandatory, but it could be advisable if parties have market power or when they could gain a dominant position after the completion of the agreement.

The court order that opens the procedure shall be published in the Official Gazette and on the website of the Antitrust Court, and shall be notified to the FNE, to the authorities who are directly affected and to economic agents who are related to the matter, so that they may contribute relevant information within a period of no less than 15 working days.

Finally, the Antitrust Court shall call a public hearing, so that those who provided information may express their opinion.

After these stages have been completed, the court issues a final decision, in which it may approve or reject the agreement, or set conditions to be met by the agreement. The final resolutions may only be appealed before the Supreme Court. The ruling must be reasoned and is published on its website (www.tdlc.cl).

The process lasts between seven and 10 months, the average being 240 days. If a ruling is appealed before the Supreme Court, this adds another three or four months.

If the agreement subject to consultation has already been executed, opposition by a legitimate opponent or filing a claim referring to the agreement shall cause the procedure to become contentious.

What is provided in section 32 makes the decision particularly relevant (see question 18).

Authority guidance

47 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?

It is possible to notify the agreement to the FNE, to obtain its opinion or request an investigation that could end on a claim or report issued before the Antitrust Court.

Complaints procedure for private parties

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

Any party to an agreement, third parties with a legitimate interest or the FNE can file a claim before the Antitrust Court regarding alleged unlawful vertical restraints or any situations that could constitute violations of antitrust law.

The main features of the contentious procedure are as follows:

- upon filing a request (lawsuit), the defendant shall respond within a period of 15 working days or such longer term that the Antitrust Court establishes, which may not exceed 30 days;
- after the period to respond has expired, the tribunal summons the parties to a settlement hearing. If it is not considered pertinent to do so, or if said procedure has failed, the tribunal shall set a period of 20 working days for the submission of evidence;
- once the evidentiary term expires, the Antitrust Court must set a date and time for a public hearing; and
- the final ruling shall be reasoned, stating the facts, law and economic principles on which it is based. In its judgment, the Antitrust Court may either dismiss the claim or adopt the measures established in section 26, for example: modify or terminate acts, contracts, agreements, systems or decide that are unlawful; modify or terminate the companies involved in the unlawful actions; or impose fines of an amount up to the US$18 million approximately, or up to US$27 million approximately if conducts involved collusive acts.

The final ruling can be subject to appeal before the Supreme Court.

A contentious procedure usually takes between 18 months and two years, the average duration being 592 days. If a ruling is appealed before the Supreme Court, this adds another three or four months.

Enforcement

49 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?

Between 1975 and 1990 there were many decisions relating to vertical restraints, with special attention paid to agreements on sales price fixing and exclusive distribution systems.

Between 2005 and 2011 the Antitrust Court issued between two and three decisions per year regarding this matter. Most of the decisions referred to claims presented due to restraints in franchise contracts, although the highest penalties were imposed in cases that refer to exclusivity clauses.

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

If in a contentious procedure the Antitrust Court estimates that certain vertical restraints submitted for its consideration violate the antitrust laws, it may impose any of the measures indicated in section 26 (see question 48), among which modifying or terminating an agreement can be emphasised. In this way, the Antitrust Court can let a contract stand while challenging only the vertical restraint, or terminate the entire agreement if it deems it necessary.

If it is a non-contentious procedure, it may define the conditions to be complied with in the agreement submitted for its consideration.

51 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?

Only the Antitrust Court may impose penalties or measures by means of a ruling in a contentious procedure after a request from the parties or the FNE (see question 48).

In a non-contentious procedure no penalties can be imposed, but the Antitrust Court may set the conditions to be met by said agreement. The FNE cannot impose penalties or remedies.

The following penalties and measures can be highlighted:

- Decision No. 90/2009: a fine of 1,500 UTA (an annual unit determined by law and continually updated, which serves as a measure or reference point for tax purposes) (approximately US$1.4 million) was imposed on Compañía Chilena de Fósforos because it agreed on exclusivity clauses with a large part of the distributors of the country (principally supermarkets). In addition, it was ordered to refrain from making agreements with its clients or distributors that included discriminatory terms, unless they were based on general, uniform and objective circumstances, or based on justifiable conditions by reason of their costs, and that they be applicable to everything that was in the same conditions; and
- Decision No. 97/2010: a fine of 5,000 UTA (approximately US$4.5 million) was imposed on Compañía de Telecomunicaciones de Chile SA because it engaged in sales tied in a way that was contrary to free competition, ordering it to market its products separately with prices that were higher than the sale price separately from the integrating product of a higher value.

The case law of the Antitrust Court shows a rejection of the practice of vertical restraints that lack economic justification by companies with market power. The fines imposed tend to be higher, generally reflecting the economic benefit derived from the sanctioned conduct.

Investigative powers of the authority

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

The Antitrust Court does not have any investigative powers. However, during lawsuit proceedings it has the capacity to request (but not demand) the information it deems pertinent.

The FNE has broad investigative powers in order to fulfil its functions, which are largely enumerated in section 39. Among other things, it can interview officers, formulate questionnaires and request information from competitors, clients, suppliers, and so on. If an act of collusion is involved, with the help of the police, the FNE can:

- enter public or private premises, and if necessary, force entry and break in;
- search and seize all kinds of objects and documents;
- authorise interception of all types of communications; and
- order any company that supplies communication services to provide copies and records of communications transmitted or received by them.

Private enforcement

53 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 enforcement before the Antitrust Court is possible, as long as the private party was in some way a direct victim of an anti-competitive conduct, whether it is a party or non-party of an agreement containing vertical restraints. Regarding damages claims, according to section 30, a damages claim that may result from the anti-competitive conduct judged as such by a final ruling of the Antitrust Court shall be filed before the competent civil court according to the general rules, within the four years following the Antitrust Court's final decision. The competent civil court, when ruling on the damages claim, shall base its ruling on the conduct, actions and legal classification thereof, as established by the decision in the final ruling. The successful party can recover its legal costs if the other party is declared to have lost completely.

Other issues

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

No.

PELLEGRINI & CIA
ABOGADOS

Pedro Rencoret **prencoret@pycia.cl**
María Jesús Cifuentes **mjcifuentes@pycia.cl**

Av Isidora Goyenechea 3477, 7th Floor
Las Condes
Santiago 7550106
Chile

Tel: +56 2 2611 9500
www.pycia.cl

China

Lei Li
Sidley Austin LLP

Antitrust law

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

China's main competition legislation is the Antimonopoly Law of the People's Republic of China (PRC) (2007), which entered into force on 1 August 2008.

Vertical restraints are classed as a type of 'monopolistic conduct' under the Antimonopoly Law. The two enforcement agencies having power in relation to monopolistic conduct, the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC), issued agency rules in 2009 and 2010 that are directly applicable to vertical restraints. These agency rules include:

- SAIC Rules on Procedures of Administrations for Industry and Commerce for Investigation of Monopoly Agreements and Abuse of Market Dominance Cases, promulgated on 26 May 2009 and effective on 1 July 2009;
- NDRC Rules against Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011;
- NDRC Rules on Administrative Enforcement Procedures for Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011; and
- SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts, promulgated on 31 December 2010 and effective on 1 February 2011.

In addition to the Antimonopoly Law, certain other laws and regulations also have provisions regulating vertical restraints, including notably:

- Anti-Unfair Competition Law of the PRC (1993);
- Price Law of the PRC (1997);
- Contract Law of the PRC (1999) as amended;
- Administrative Measures for Fair Transactions between Retailers and Suppliers (2006) (Fair Transaction Administrative Measures); and
- Provisional Measures for the Prohibition against Monopolistic Pricing (2003) (Anti-Monopolistic Pricing Measures).

There are also rules implementing the Anti-Unfair Competition Law issued by several local governments (including Beijing, Shanghai and Shenzhen). This chapter considers only the rules adopted at a national level.

It seems that the Antimonopoly Law in the foreseeable future will not replace the pertinent provisions in prior legislation such as the Anti-Unfair Competition Law and the Price Law, but rather will coexist with them. Theoretically, government agencies could still choose from the Antimonopoly Law and other laws as the basis for their enforcement, and the outcomes under different laws might be quite different; however, recent enforcement seems to indicate that if any conflict occurs between the terms of the Antimonopoly Law and other laws, the Antimonopoly Law in principle prevails. Therefore, in the remainder of this chapter, although we assume that the provisions in the other laws continue to apply, our analysis is based primarily on the Antimonopoly Law.

Where a party occupies a dominant market position in one of the markets to which the vertical agreement relates, articles 17 to 19 of the Antimonopoly Law may also be relevant to the antitrust assessment of a given vertical restraint. The SAIC has also promulgated an agency rule to implement these articles in the Antimonopoly Law. However, these provisions are considered in *Getting the Deal Through – Dominance* and are 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 Antimonopoly Law does not use the term 'vertical restraint', so does not have a definition of it. The Antimonopoly Law instead uses the term 'agreements between a business undertaking and its trading counterpart'. Restraints in such agreements would be vertical restraints.

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?

The Antimonopoly Law does not have a specific objective relating to vertical restraints. In general, the Antimonopoly Law pursues multiple objectives, which include both micro-economic efficiency and macro-economic development. These objectives would also apply to the regulation of vertical restraints. Specifically, these objectives are:

- to prevent and prohibit monopolistic conduct;
- to protect market competition;
- to promote efficiency of economic operations;
- to safeguard the interests of consumers and the general public; and
- to promote the healthy development of the socialist market economy.

In addition, article 15 of the Antimonopoly Law provides the possibility to exempt 'monopoly' agreements, including vertical ones, if certain conditions are fulfilled. Many of these conditions are not purely economic. They include, for example, social interests (such as energy saving, environmental protection and disaster relief), alleviation of serious decreases in sales volumes or overcapacities during recession and the safeguard of legitimate interests in foreign trade and foreign economic cooperation.

Responsible authorities

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

According to notices issued by the State Council, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) are responsible for enforcing the prohibitions on anti-competitive activities, including vertical restraints. NDRC is in charge of investigating and sanctioning anti-competitive activities related to pricing. SAIC has jurisdiction over anti-competitive activities not related to pricing. NDRC may delegate its powers to its provincial and prefectural bureaux, and SAIC may likewise delegate its powers to its provincial bureaux.

Different ministries and bodies enforce the competition provisions contained in other laws. For example, SAIC and its local bureaux are responsible for enforcing the provisions of the Anti-Unfair Competition Law and the Several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition, while a number of bodies

share the competence to enforce the provisions of the Fair Transaction Administrative Measures.

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?

The test is whether the vertical restraint has the effect of eliminating or restricting competition within the Chinese market. Where the activity takes place, in or outside China, is not a relevant factor.

In 2014, the Antimonopoly Law was applied extraterritorially in at least two cases, but these cases were about cartels, not vertical restraints. The Antimonopoly Law has not been applied to vertical restraints in a pure internet context.

Agreements concluded by public entities

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

In principle, the Antimonopoly Law and the competition provisions in other laws and regulations (including provisions relating to vertical agreements) apply irrespective of the ownership of an entity.

Most laws containing competition provisions, including the Antimonopoly Law, the Anti-Unfair Competition Law and the Price Law, stipulate that any 'undertaking' is subject to those provisions. The Antimonopoly Law defines an undertaking as a natural person, legal person or other organisation that engages in the manufacture or sale of products or the provision of services. No reference is made to the ownership of the undertaking. Therefore, these laws apply to vertical restraints contained in agreements concluded by public entities.

The Antimonopoly Law also prohibits administrative authorities and organisations from taking certain steps that might restrict competition, including the imposition of exclusive dealing obligations. The Antimonopoly Law does not have any provision that provides exemption or special treatment to public entities.

article 7 of the Antimonopoly Law establishes a particular system for state-owned enterprises in industries vital to the national economy and national security and industries subject at law to exclusive operations and sales. This complex provision seems to make the pricing policy of such enterprises subject to government intervention and, possibly, exempt them from the Antimonopoly Law.

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.

The Antimonopoly Law does not contain any provisions on vertical restraints that apply to specific sectors.

Some regulations enacted before the inception of the Antimonopoly Law do, however, address vertical restraint issues in specific industry sectors. These regulations have very rarely been enforced, if at all, and it remains uncertain how they will be enforced following the implementation of the Antimonopoly Law.

Sectors subject to specific rules include, inter alia, certain defined public utilities, telecommunications, civil air transport and international maritime transport. The sector-specific sources relevant to those industries are:

- several of the Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition (1993) that apply to public utilities enterprises (such as postal services, certain tele-coms services, transport, water supply and energy supply);
- the Telecommunication Regulation of the PRC (2000), which applies to the telecommunications industry;
- the Regulation on the Prohibition of Anti-Unfair Competition Practices in Civil Air Transportation Market (1996), which applies to the civil air transport industry; and
- the Regulation of the PRC on International Ocean Shipping (2001), which applies to international maritime transport.

General exceptions

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

article 15 of the Antimonopoly Law lists the circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition of article 14. These circumstances are:

- improving technology or research and development (R&D) of new products;
- improving product quality, reducing costs, enhancing efficiency, harmonising product specifications and standards, or dividing work based on specialisation;
- improving the operational efficiency and enhancing competitiveness of small and medium-sized enterprises;
- serving social public interests such as energy saving, environmental protection and disaster relief and aid;
- alleviating serious decreases in sales volumes or significant production overcapacities during economic recession; and
- safeguarding legitimate interests in foreign trade and foreign economic cooperation.

If a company wishes to argue that the prohibition of article 14 should be disapplied, it bears the burden of proof to show that the agreement in question fulfils one of these circumstances. If it claims that one of the first five circumstances exists, the company must also prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

Agreements

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

The Antimonopoly Law does not contain a precise definition of an 'agreement'. Nonetheless, article 13 of the Antimonopoly Law defines a 'monopoly agreement' as an 'agreement, decision or other concerted practice which eliminates or restricts competition'. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts further provide that a monopoly agreement may be entered into between business undertakings either directly or through the coordination of industry associations.

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?

The agreement does not need to be in written form. The Antimonopoly Law defines a 'monopoly agreement' as an 'agreement, decision or other concerted practice which eliminates or restricts competition'.

Furthermore, the SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts explicitly provide that a 'monopoly agreement' may be in written, oral or tacit forms (ie, a 'concerted practice'). The rules further provide that a 'concerted practice' means a practice where coordination and concordance exist between the relevant business undertakings although there is no explicit written or oral agreement or decision. The rules also list the factors considered when determining whether a concerted practice exists; they include:

- whether the practices in the market taken by the business undertakings have concordance;
- whether the business undertakings conducted communications or exchanges of information; and
- whether the business undertakings have reasonable justifications for their coordinated practice.

The rules further provide that in determining what constitutes a concerted practice, other factors need to be taken into consideration, including the structure of the relevant market, the competitive situation, changes in the market and the situation of the industry.

The NDRC Rules Against Pricing-related Monopolies contain similar provisions on what constitutes a 'monopoly agreement'.

Parent and related-company agreements

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

It is unclear whether the Antimonopoly Law and the competition provisions in other laws or regulations apply to agreements between a parent and a related company. However, because one aim of the competition laws and regulations is to maintain fair market competition and since such intra-company agreements would not adversely affect the wider competitive environment, it appears unlikely that Chinese competition laws and regulations would apply to such agreements.

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?

There are no provisions in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address this question.

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?

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

Intellectual property rights

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

In principle, the provisions of the Antimonopoly Law do not apply differently if an agreement grants an IPR. Article 55 of the Antimonopoly Law states that application of the law is not precluded as a matter of principle on the grounds that an IPR is involved. Where a company restricts or eliminates competition by abusing an IPR, the provisions of the Antimonopoly Law apply.

In contrast, the competition provisions in the Contract Law and the Judicial Interpretation on Technology Contracts apply to technology contracts only. Similarly, the Regulation on the Administration of Import and Export of Technologies applies only to the import and export of technology as defined by that regulation. Article 10 of the Judicial Interpretation on Technology Contracts prohibits the inclusion in agreements of clauses restricting the freedom of a technology recipient to undertake R&D or clauses imposing inequitable conditions for sharing improvements of the technology.

In addition, the State Administration for Industry and Commerce has been formulating Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, which will address IPR issues in antitrust law. In June 2014, the agency circulated the seventh draft of the rules to the public for comments, but it is unknown when it will finalise and formally issue the rules. The seventh draft prohibits a set of activities that an undertaking with dominant market position may take 'without justifiable cause' during exercise of its IPR, including tying and bundling, exclusive grant-back of technology improvement, prohibition of challenging the validity of the IPR, etc. These issues may arise in the context of vertical agreements.

Analytical framework for assessment

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

There is no uniform analytical framework that applies to the assessment of all vertical restraints under Chinese antitrust law. Rather, the various legal instruments provide limited information on the analytical approach that should be expected in relation to the specific types of conduct they cover. The instruments set out below cover the potential infringements identified. Where appropriate, explanations of likely analytical frameworks are provided.

Antimonopoly Law

article 14 of the Antimonopoly Law identifies as illegal:

- resale price maintenance – the fixing of resale prices of products sold to third parties; and
- fixing of minimum resale price – the fixing of minimum resale prices of products sold to third parties.

article 14 of the Antimonopoly Law also empowers NDRC and SAIC to prohibit other vertical restraints that they consider to be anti-competitive.

The general analytical framework underpinning the assessment of vertical restraints under the Antimonopoly Law is the following: if NDRC or SAIC finds that an agreement fixes resale prices or minimum resale prices, it is likely to conclude that article 14 of the Antimonopoly Law is breached. However, the parties can still argue that the prohibition in article 14 should be disapplied on the grounds that the agreement fulfils one of the circumstances listed in article 15 of the Antimonopoly Law, or has other beneficial effects which are not explicitly listed. In addition, the parties must prove, as a general rule, that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit. This same analysis would, in principle, apply for all types of vertical restraints examined under the Antimonopoly Law, whether the explicitly prohibited resale price maintenance and minimum resale price fixing, or additional yet unspecified restraints which NDRC or SAIC finds to be in breach of article 14.

Anti-Unfair Competition Law

The Anti-Unfair Competition Law identifies as illegal:

- predatory pricing – below-cost sales with the aim to exclude competitors (except for fresh and live goods, perishable goods before expiry date and reduction of excessive stock, seasonal sales, or clearance of debts and change or suspension of business operations); and
- tie-in sales – tying the sale of certain products to the sale of other products, with the result that a purchaser is forced to purchase goods against its will, or attaching other unreasonable conditions to the sale of a product.

At present, it is not clear whether these provisions in the Anti-Unfair Competition Law continue to apply after the entry into force of the Antimonopoly Law. The latter law censures predatory pricing and tie-in sales only where the company at issue is in a dominant market position.

Contract Law and Judicial Interpretation on Technology Contracts

The Contract Law and the Judicial Interpretation on Technology Contracts identify the monopolisation of technology and the restriction of technological improvements as illegal. This includes the following practices:

- restricting technological improvements made by one party to a technology contract or providing for an inequitable sharing of such technological improvements;
- restricting a technology recipient's procurement of technology from other sources;
- unfairly limiting the volume, variety, price, sales channels, or export markets of the technology recipient's products and services;
- requiring the technology recipient to purchase other unnecessary technology, raw materials, products, equipment, services, etc;
- unjustly restricting the technology recipient's options for sourcing supplies of raw materials, parts or equipment; or
- prohibiting or restricting the technology recipients' ability to challenge the IPR at issue in the technology contract.

For technology import-export contracts, the Regulation on the Administration of Import and Export of Technologies contains similar prohibitions to the Judicial Interpretation on Technology Contracts.

Fair Transaction Administrative Measures

The Fair Transaction Administrative Measures only apply to certain types of vertical agreements, that is, where the buyer is a retailer selling to end-consumers and where its sales are above 10 million renminbi. They prohibit:

- price restrictions upon suppliers – where the retailer restricts the prices at which the supplier can sell products to other companies or consumers;
- exclusive dealing imposed upon suppliers – where the retailer restricts the supplier's sales to other retailers;

- tie-in sales imposed upon retailers – where the supplier ties the sale of a product with other products that the retailer did not order; and
- exclusive dealing imposed upon retailers – where the supplier restricts the retailer's freedom to purchase from other suppliers.

In addition, if a retailer is in an 'advantageous position', it is prohibited from imposing an obligation upon its suppliers to purchase products designated by it.

However, according to article 23, the Fair Transaction Administrative Measures only apply where no law or regulation regulates the same conduct. It remains to be seen how the Fair Transaction Administrative Measures will be deemed to interact with the Antimonopoly Law and, in particular, with articles 14 and 15 thereof.

Provisions on the Prohibition of Regional Blockades in Market Economy Activities

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities essentially aim to curb barriers to entry into regional markets that are erected by local governments and public authorities. They may also apply to the conduct of companies, in particular prohibiting: territorial restrictions on sales within China – restricting the 'import' of products and construction services originating in other regions within China. However, the exact scope of this prohibition remains unclear.

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?

As a general rule, the Antimonopoly Law and the competition provisions in other laws or regulations do not require the enforcement agencies to take account of market shares in their assessment of the legality of individual restraints. For example, article 14 of the Antimonopoly Law prohibits resale price maintenance and the fixing of minimum resale prices without referring to market shares. In addition, under article 15, the availability of exemptions for agreements containing vertical restraints refers, inter alia, to economic factors such as the improvement of product quality, cost reductions and efficiencies and requires that the agreements do not significantly restrict competition in the relevant market. Again, market share is not one of these factors.

Notwithstanding the foregoing, market share is an important factor when an agency or court assesses the anti-competitive effects of activities. One example is a recent case involving Johnson & Johnson (J&J). On 18 May 2012, the Shanghai No.1 Intermediate People's Court issued a judgment dismissing petitions from a lead distributor of J&J that accused J&J of retail price maintenance. On 1 August 2013, the Shanghai Higher People's Court issued a final judgment in the *J&J* case, in which it reversed the judgment of the first-instance court, and ruled that J&J had engaged in illegal retail price maintenance. In its analysis, the appellate court viewed the market share of the supplier as an important factor when determining whether the pricing activities in question had anti-competitive effects. Specifically, the appellate court opined that resale price maintenance activities conducted by suppliers with 'strong market positions' will affect competition significantly, and therefore the supplier's 'market position' is an important factor in any analysis of competitive effects. Naturally, the most important factor when determining the strength of the supplier's 'market position' is its market share.

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?

The Antimonopoly Law does not address these issues.

Block exemption and safe harbour

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

The Antimonopoly Law, the Anti-Unfair Competition Law and its implementing measures do not contain any safe harbours, and there are currently no block exemptions.

Types of restraint

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

article 14 of the Antimonopoly Law prohibits a supplier from fixing the buyer's resale price or minimum resale price. Nonetheless, an agreement containing such a restriction can be exempted if the conditions of article 15 are met. The adoption of measures implementing articles 14 or 15 may give further guidance on the circumstances in which exemptions might be available.

In 2012, in the first-instance trial of the *J&J* case, the Shanghai No.1 Intermediate People's Court, the distributor claimed that in its distribution agreements, J&J required it to sell products to hospitals in allocated territories only, and at prices no lower than minimum prices decided by J&J. The distribution relationship was terminated by J&J after it discovered that the distributor sold products outside its allocated territories and at prices lower than the minimum price. The presiding judge, in an interview, explained the rationale of the court's judgment, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor's petitions because the distributor failed to prove that competition was eliminated or restricted.

In 2013, in the appellate trial of the *J&J* case, the Shanghai Higher People's Court ruled that J&J engaged in illegal retail price maintenance and ordered it to pay damages (530,000 renminbi) to the distributor that filed the suit. The appellate court upheld the first-instance court's view that retail price maintenance is not a per se violation of law. It also laid out four factors that need be assessed when determining whether retail price maintenance practices have anti-competition effects:

- whether there is sufficient competition in the relevant market;
- whether the defendant has a strong market position;
- what is the motivation of the defendant for its retail price maintenance activities, and whether the motivation is pro or anti-competition; and
- what are the effects of the retail price maintenance activities on competition, and whether the effects are pro or anti-competition.

The decision in the *J&J* case is expected to be the benchmark for court review of resale price maintenance cases in the foreseeable future.

In 2013 and 2014, NDRC and its local authorities conducted a number of investigations regarding resale price maintenance violations. Two provincial authorities of NDRC conducted investigations in January 2013 into alleged resale price maintenance by spirits manufacturers Moutai and Wuliangye, and imposed fines of 247 million renminbi and 202 million renminbi respectively, representing 1 per cent of each company's 2012 revenues. In August 2013, NDRC also announced that it had decided to impose fines on six milk powder producers for illegal resale price maintenance, and the fines totalled 668.73 million renminbi. In September 2014, a provincial authority of NDRC decided that FAW-Volkswagen had violated resale price maintenance prohibitions by organising its distributors to agree on minimum resale prices, and imposed a fine of 248.58 million renminbi on FAW-Volkswagen and 29.96 million renminbi on eight of its distributors.

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'?

At the time of writing, there does not appear to be a decision issued by the court or published by NDRC or SAIC that specifically addresses these questions.

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

In the *J&J* case, the appellate court used J&J's ability to implement territorial sales restrictions (in fact, the 'territories' are hospitals, not geographical areas) as an evidence to prove J&J's 'strong market position', but did not find such territorial sales restrictions per se a violation of the antitrust law. Other than this, at the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that specifically addresses these questions.

In several enforcement cases, NDRC and its local authorities mentioned distribution territory restrictions in their decisions on resale price maintenance. However, the authorities seemed to imply that these distribution territory restrictions were a means of implementing resale price maintenance, and not a stand-alone violation of the law.

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

In the *J&J* case, the appellate court, the plaintiff, the defendant and their respective expert witnesses discussed the potential efficiencies of the resale price maintenance agreements – and lack thereof – in great detail. The appellate court determined that the agreements 'do not have obvious effects of promoting competition', because the defendant failed to demonstrate:

- the agreements had the result of improving product quality and safety;
- the agreements were necessary to prevent 'free-riding' of other distributors, because J&J had strong control of the distributors, and also assigned only one distributor for each hospital; or
- J&J needed to use the resale price maintenance agreements to promote a new brand or a new product in the relevant market, because J&J's products at issue had been sold in China for over 15 years.

However, the NDRC has not yet explained its view on efficiencies in any enforcement decision.

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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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?

Territorial restrictions on sales appear to have formed part of the 2012 *J&J* case (see question 19). The Antimonopoly Law prohibits a business operator with a dominant market position from 'requiring a trading party to trade exclusively with itself or trade exclusively with designated business operator(s) without any justifiable cause'. Reflecting this, the SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit a business undertaking from imposing unreasonable transaction terms on the other party to the transaction 'without justifiable cause', and one such unreasonable transaction term is the imposition of 'unreasonable restrictions on the geographic area into which the goods may be sold'.

In the *Wuliangye* case in 2013, the provincial NDRC authority in its penalty decision described the supplier's territory management as one means of implementing the resale price maintenance requirements, but did not impose a separate penalty for the territory management activities. In a few other enforcement cases, central or provincial NDRC authorities appeared to espouse similar views, either expressly or implicitly.

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities prohibit companies from restricting the import of products and construction services originating in other regions within China, but the exact scope of this prohibition is unclear.

29 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?

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit the imposition of 'unreasonable transaction terms' by a business undertaking with dominant position 'without justifiable cause'. The rules list two factors to be assessed in determination of a 'justifiable cause', namely:

- whether the action in question is carried out on the basis of the operator's own ordinary business activities and its ordinary benefits; and
- the action's effects on the efficiency of the economy's operation, social and public interests, and economic development.

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

At the time of writing, neither the Antimonopoly Law nor the competition provisions in other laws or regulations contain general rules on such use restriction clauses contained in vertical agreements.

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

At the time of writing, neither the Antimonopoly Law nor the competition provisions in other laws or regulations contain rules addressing this issue.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

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

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

34 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?

Not applicable – see question 33.

35 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?

Not applicable – see question 33.

36 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?

Not applicable – see question 33.

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

Not applicable – see question 33.

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

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

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

The Antimonopoly Law does not have provisions specifically relating to this issue but article 17.4 of the Law may be considered relevant. Article 17.4 prohibits a business undertaking with market dominance from 'without justifiable cause, requiring the business counterparts to only deal with this business undertaking, or to only deal with other business undertakings that it designates'.

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance contain a provision that is identical to article 17.4 of the Antimonopoly Law. The Rules also state that two factors need to be considered when determining a 'justifiable cause': whether the action is conducted on the basis of the business operator's own ordinary business activities and its ordinary benefits; and the action's effects on the efficiency of the economy's operation, social and public interests, and economic development.

There has not been, however, any court case or government enforcement of these clauses in the Law and the SAIC agency rules that could provide any additional clarity on their scope or application.

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

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

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

The Antimonopoly Law does not have provisions specifically relating to this issue, but article 17.4 of the Law may be considered relevant. Article 17.4 prohibits a business undertaking with market dominance from 'without justifiable cause, requiring the business counterparts to only deal with this business undertaking, or to only deal with other business undertakings that it designates'.

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance also contain a clause (article 5.3) that is specifically focused on this issue, which prohibits a business undertaking with market dominance from 'without justifiable cause, requiring the business counterparts not to deal with its competitors'.

That being said, there has not been any court case or government enforcement of these clauses in the Law and the SAIC agency rules that could provide any additional clarity on their scope or application.

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

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

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

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

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

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

45 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 Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Notifying agreements

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

Neither the Antimonopoly Law nor the competition provisions in other laws and regulations provide for a notification system for agreements. However, depending on the adoption of measures implementing the Antimonopoly Law and the enforcement practice of NDRC and SAIC, it is possible that a formal or informal consultation procedure may be adopted.

Authority guidance

47 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?

Neither the NDRC, the SAIC nor the Chinese courts have disclosed any information that indicates such a possibility.

Complaints procedure for private parties

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

According to the Antimonopoly Law, any organisation or individual is entitled to report conduct that he or she suspects is an infringement of the law. This includes vertical agreements containing clauses fixing the resale price or setting a minimum resale price.

NDRC and SAIC must keep the identity of the complainant confidential. If the complaint is made in writing and is supported by sufficient evidence, NDRC and SAIC are in principle under an obligation to conduct an investigation.

There are no detailed provisions on reporting procedures under the Anti-Unfair Competition Law or the competition provisions in other laws and regulations (although the Fair Transaction Administrative Measures mention the possibility for entities and individuals to report illegal conduct to the authorities). More generally, government authorities may accept complaints filed by private parties.

Enforcement

49 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?

NDRC and SAIC authorities at national and local levels are understood to have taken several decisions regarding vertical restraints in violation of the Antimonopoly Law. In 2014, NDRC and SAIC and their local counterparts started publishing their decisions, but it is unknown whether all such decisions have been published, and the published decisions usually do not contain enough detail to provide much guidance.

In 2011, NDRC issued one decision regarding a violation of the Antimonopoly Law that appears to relate in large part to vertical restraints. In this case, two distributors of a certain active pharmaceutical ingredient (API) entered into distribution agreements with the only two manufacturers of that API in China, pursuant to which the API manufacturers were required to obtain prior consent from the two distributors before selling the API to any other distributor. The NDRC imposed monetary fines and required a disgorgement of profits.

In 2012, the Shanghai No. 1 Intermediate People's Court issued a judgment dismissing petitions from a local distributor of Johnson & Johnson (J&J) that accused J&J of minimum resale price maintenance. The distributor claimed that in the distribution agreements, J&J required it to sell products to hospitals in allocated territories only, and at prices no lower

than minimum prices decided by J&J. The distribution relationship was terminated by J&J after it discovered that the distributor sold products outside its authorised territories and at prices lower than the minimum price. The presiding judge, in an interview, explained the rationale of the court's decision, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor's petitions because the distributor failed to prove that competition was eliminated or restricted.

From 2013 to 2014, NDRC imposed fines on spirits manufacturers, milk powder manufacturers and a car company in relation to alleged resale price maintenance (see question 19).

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

The Antimonopoly Law does not itself stipulate the consequences of an infringement of article 14 for the validity and enforceability of a contract that contains a prohibited vertical restraint. Nonetheless, according to articles 52 and 56 of the Contract Law, such a contract is null and void, and has no legally binding force from the beginning.

However, article 56 of the Contract Law also stipulates that invalid portions of a contract will not affect the validity or enforceability of the rest of the contract if such portions can be severed or separated from the whole.

51 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?

NDRC and SAIC can directly impose penalties without the involvement of other agencies or the courts.

If NDRC or SAIC finds that a vertical agreement violates article 14 of the Antimonopoly Law, it must order that the parties to the agreement cease giving effect to the illegal clause of the agreement, and confiscate the gains obtained through the illegal conduct.

Furthermore, NDRC and SAIC are in principle under an obligation to impose a fine of 1 per cent to 10 per cent of a company's annual turnover, unless:

- the agreement is not implemented (in which case a fine of up to 500,000 renminbi will be imposed);
- the company has filed a leniency application (in which case NDRC and SAIC can grant immunity or impose a reduced penalty); or
- the company makes specific commitments that eliminate the negative effects of the agreement (in which case, in principle, no fine will be imposed).

Under the competition provisions in other laws and regulations, the enforcement authorities normally impose two types of sanctions, that is, the cessation of the illegal conduct and the imposition of penalties. If a company has obtained illegal gains, the authorities may also confiscate those gains. In addition, if the illegal conduct is serious, the authorities may suspend the company's business licence.

Courts can also hear cases alleging the illegality of clauses inserted in vertical agreements in actions for damages.

Investigative powers of the authority

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

Under the Antimonopoly Law, NDRC and SAIC have the following powers when investigating alleged infringements, including those relating to vertical agreements:

- to conduct on-the-spot-inspections at the business premises of the companies under investigation or other relevant places;
- to interrogate the companies under investigation, interested parties and other relevant parties, and request that they explain all relevant circumstances;
- to examine and take copies of the relevant documents and information of the companies under investigation, interested parties or other relevant entities or individuals, such as agreements, accounting books, faxes or letters, electronic data, and other documents and materials;
- to seal and retain relevant evidence; and
- to investigate the companies' bank accounts.

The investigation must be carried out by at least two of NDRC's or SAIC's enforcement officials who are to present their credentials for the investigation. The officials must keep a written record of the inspection to be signed by the companies being investigated. NDRC and SAIC must maintain the confidentiality of any business secrets collected during the investigation. Among the other laws and regulations containing competition rules, only the Anti-Unfair Competition Law specifies the agency's investigative powers. The Anti-Unfair Competition Law provides SAIC and its local bureaux with the following powers when investigating unfair competition practices:

- to interrogate companies, interested parties and witnesses and require them to supply evidence or other documents related to the alleged unfair practices;
- to examine and take copies of agreements, accounting books, documents, records, faxes or letters and other materials related to the alleged unfair practices; and
- to examine property connected with the suspected infringements and, where necessary, order the companies under investigation to suspend sales and to provide details on the source and quantity of products obtained. Pending examination, such property cannot be removed, concealed or destroyed by the company.

SIDLEY AUSTIN LLP
SIDLEY

Lei Li **lei.li@sidley.com**

Suite 608, Tower C2, Oriental Plaza
No. 1 East Chang An Avenue
Dong Cheng District
Beijing 100738
China

Tel: +86 10 5905 5588
Fax: +86 10 6505 5360
www.sidley.com

Private enforcement

53 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?

Non-parties to a monopolistic agreement can bring damages claims if they have suffered losses due to an anti-competitive clause contained in a vertical agreement. The Antimonopoly Law does not explicitly address the issue of whether parties to an agreement can bring damages claims. However, the Supreme People's Court of China issued a judicial interpretation in 2012 that states that persons who have a dispute over whether a contract violates antitrust laws have standing to file antitrust suits. Therefore, the parties to agreements can themselves bring damages claims in the court by alleging the agreements violate antitrust laws. The appellate court in the *J&J* case upheld the plaintiff's standing to sue because it found that the plaintiff suffered loss due to the resale price maintenance scheme, and also it had a dispute with J&J over the distribution agreement's compliance with China's antitrust law.

Such cases are generally expected to be decided by the intermediate courts. Injunctions and damages can be granted.

Generally, the adjudication is to be made within six months from the acceptance by the court of the case, with the possibility of extension for another six months upon approval. For expedited summary procedures, adjudication is made within three months without a possibility of extension. Successful parties can also recover from losing parties the legal costs charged by the court.

Other issues

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

Not applicable.

Colombia

Ximena Zuleta-Londoño and Alberto Zuleta-Londoño

Cardenas & Cardenas Abogados

Antitrust law

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

Vertical restraints in Colombia are governed by the general competition regime: Law 155 of 1959, Decree 1302 of 1964, Decree 2153 of 1992 and Law 1340 of 2009. There also exists a specific regulation concerning exclusive-dealing arrangements in Law 256 of 1996 (unfair trade practices).

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?

Colombian law does not specifically refer to vertical restraints, except in the clearance of vertical mergers, in which case they are referred to as operations between two companies that participate in the same value chain. The antitrust authority in Colombia, the Superintendence of Industry and Commerce (SIC), as well as legal scholars, have understood that vertical restraints mainly encompass resale price maintenance (RPM), vertical allocation of customers or territories, and exclusive-dealing arrangements.

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?

Colombian law establishes that the SIC must protect the free participation of enterprises in the market, consumer welfare and economic efficiency. There are, however, a few exceptions, such as Law 590 of 2000, which protects small and medium-sized businesses by banning illegal interference with a competitor's entry into a market. It can also be argued that the prohibition against price discrimination protects small companies in certain circumstances.

Responsible authorities

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

The national antitrust authority in Colombia is the SIC. It is an administrative entity of which the head, the Superintendent of Industry and Commerce, is freely appointed and removed by the President of Colombia. The Superintendent has an advisory council that is made up of five members, also appointed and removed freely by the President of Colombia.

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?

Colombian antitrust law is applied to any conduct that has effects within Colombian territory, regardless of where it takes place. This means that extraterritorial application of Colombian antitrust law is possible. Even though there has been no internet antitrust enforcement by Colombian antitrust authorities to date, internet transactions are also subject to Colombian antitrust law as far as they produce effects in Colombian territory. It must be borne in mind, however, that decisions by the Colombian antitrust authority are administrative acts and not judicial decisions, which makes them very difficult to enforce abroad.

Agreements concluded by public entities

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

It applies to the extent that they are acting as market participants and not as administrative authorities.

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.

Specific regulations exist for certain sectors such as public utilities and the financial sector. The general regime also applies in each sector, specific regulations notwithstanding.

General exceptions

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

Colombian law does not establish market share thresholds below which vertical agreements are permissible. It does, however, limit the antitrust authority's jurisdiction to antitrust violations that are 'significant', a requirement that excludes low-impact conducts from antitrust scrutiny. There is, however, no objective criteria by which to determine whether the impact is such that it warrants antitrust scrutiny.

Agreements

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

Colombian antitrust law defines an 'agreement' as any contract, understanding, concerted or consciously parallel practice. This is a broad definition intended to include any kind of meeting of minds, as well as conscious parallelism in the case of horizontal relationships.

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?

There are no formal requirements to engage the antitrust laws concerning vertical restraints. An unwritten understanding is sufficient.

Parent and related-company agreements

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

Colombian antitrust law does not directly address the issue, but under Colombian merger law, a merger or economic integration between related companies is exempt from clearance, as the law understands that they are already integrated (related companies are understood to be those in which one controls the other or both are subject to common control). In our opinion, it follows from this that related companies are a single entity for antitrust purposes and therefore agreements between them should escape antitrust scrutiny – this interpretation is, however, not settled law.

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?

Agent–principal agreements are subject to general antitrust law. An agent in Colombia does not purchase for resale, so RPM provisions do not apply. Other antitrust provisions regarding vertical restraints, such as those regarding territorial and customer allocations, do apply, however.

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?

Agent–principal agreements are subject to general antitrust law, as pointed out in question 14. The qualification of a market participant as an agent is a matter of general commercial law in Colombian, not antitrust law.

Intellectual property rights

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

No.

Analytical framework for assessment

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

Colombia has walked away from the per se illegality of vertical restraints, with RPM arrangements being the last ones to make use of an effects-based or rule of reason-like approach, in 2012. The criterion for legality, however, varies depending on the type of agreement.

In the case of exclusive-dealing arrangements the law adopts a standard of market foreclosure and specifically bans exclusive dealing when it can result in restricting the access of competitors to the market or distribution channels, or in the monopolisation of the distribution of products or services. We take this to apply to partial requirements contracts as well as full exclusive-dealing agreements. One exclusive-dealing arrangement precedent is Resolution 23890 of 2011, in which the SIC determined the existence of a vertical restraint between the only company that carries out studies of television audience measurement, two television channels and an association of advertising agencies and media centres. In this case, the SIC established that an exclusive-dealing arrangement between the aforementioned parties regarding audience measurement studies – which is basic information for the TV advertising market in Colombia – which created the following restrictions on competition: an entry barrier to participation in the market for advertising agencies and media centres that were not party to the agreement; and limiting or eliminating competition from any other agent in the advertising market.

Another precedent is Resolution 3361 of 2011, in which the SIC exonerated a company that supplies beer to its distributors, finding that its conduct (exclusive-dealing arrangements between the latter and some restaurants) did not generate any restrictive effects on competition. The SIC established in this case that not every exclusive-dealing arrangement constitutes a vertical restraint; on the contrary, it stated that in order to affect competition, an exclusive-dealing arrangement must have such scope to limit market access to potential competitors, and restrict the participation of actual competitors. Certainly, the appropriateness of the conduct in order to be restrictive is determined, inter alia, for the existence of alternative sources of supply, entry barriers, duration of the exclusive-dealing arrangement and dominance. For the case in question, the SIC found that the exclusive-dealing arrangements between the beer company and the restaurants were justified for positioning a new trademark in the market; additionally, it determined that this conduct did not have the scope to restrict or limit the participation of actual and potential competitors.

The case of RPM is rather complex under Colombian law. Resolution 48092 of 2012, issued by the SIC, essentially eliminated the previous per se illegality of the conduct and established an effects-based or rule-of-reason-like approach. In keeping with the antitrust law of the United States and several other countries, the SIC considered that intra-brand restrictions could have pro-competitive effects or, in other words, could stimulate inter-brand competition. It adopted, however, a more cautious approach than that of other countries. In order to establish the legality of the conduct, the SIC will review:

- the structure of the market, including entry barriers, upstream and downstream market concentration and how widespread RPM is in that particular market;
- characteristics of the upstream agent, especially whether it possesses significant market power and whether the same result can be achieved in a less restrictive manner;
- the nature of the goods and the brand, by which the SIC means to establish whether the goods that are being resold are luxury goods and whether they require pre-sale or post-sale services, how long they have been in the market, as well of the level of standardisation required by the brand;
- the contractual relationship, in terms of which party possesses greater contractual power as well as who bears the risk of the sale and the relationship with customers; and
- long-term effects, especially in terms of whether pro-competitive effects will be generated by the conduct.

Finally, regarding allocation of territories as a vertical restraint, the SIC has determined in the *Motor* case, Resolutions 367 and 1187 of 1997, that such restrictions must be analysed under the 'rule of reason', rather than a regime of per se illegality. This is not only because of the fact that these practices can generate pro-competitive effects and promote inter-brand competition, but also considering that the rule that describes this conduct provides that it is per se illegal only in horizontal restraints. This view was reiterated in two subsequent decisions: Resolution 48092 of 2012 and Resolution 76724 of 2014.

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?

Given that individual vertical restraints are assessed by the SIC in the light of their potential effects on competition, the market power of the supplier and the competition level of the market are reviewed carefully. The SIC is bound to inquire about not only the market power of the supplier, but also upstream and downstream market concentration, price elasticity of demand of the products or services, and entry barriers. In this context it must be borne in mind that although SIC does not necessarily establish a direct relationship between market share and market power, the latter is usually considered, at least, evidence that the latter exists (in the events of high market shares). It follows that a restriction imposed by a company with relatively small market share will probably be accompanied by a prima facie assumption that it is not restrictive.

Finally, it is important to point out that both the conduct of other suppliers and the extent to which certain restraints are used in the market is considered by the SIC as one of the determining factors for establishing the potential anti-competitive impact of the conduct and, therefore, its legality under antitrust law.

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?

The response to the previous question also applies to buyer market power.

Block exemption and safe harbour

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

No, there is no quantifiable criterion upon which companies can rely to establish the legality of a vertical restraint. The SIC has, however, been very conservative in prosecuting exclusive-dealing agreements and territorial or customer allocations. The rule concerning the legality of RPM agreements, as we explained above, is new, complex and relatively murky.

Also, there is a block exemption established in article 1 of the Law 155 of 1959, applicable to any restrictive agreements – including vertical restraints – this is, the government can authorise a restrictive agreement only in the event that it protects the stability of agriculture.

Types of restraint

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

For the general regime of RPM, please refer to question 15. In general terms, it can be said that the SIC's position with respect to this conduct allows us to conclude that maximum RPM is permissible in virtually all cases, as it benefits consumers, whereas fixed and minimum RPM is subject to higher scrutiny under a balancing approach of their anti-competitive impact as compared with possible medium or long-term competitive benefits. This rule applies to any of the conditions of the sale, such as rebates, financing and others. For several years the SIC has been relatively active in prosecuting RPM schemes as they were seen as being akin to horizontal collusion. Since the decision in 2012 in which the SIC adopted a rule-of-reason-like approach to assessing the conduct, the prosecution of RPM schemes has dropped dramatically.

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'?

Not specifically, but these types of conduct are usually exempt from antitrust sanction because they tend to lack at least some of the building blocks of an antitrust offence. The launch of a new product or brand will probably happen in a context where such product or brand lacks market power, whereas trying to prevent a product from being used by a retailer as a 'loss leader' could be seen as legal if the market for that product is competitive.

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

Decisions dealing with RPM have raised concerns that it can be used to conceal cartel arrangements or as a tool for market foreclosure by overpaying distributors into not dealing with competitors' products. There also exists a concern that, even in cases where there is scarce inter-brand competition, they can be used to transfer upstream market power to lower levels of the chain.

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

Decisions concerning RPM have pointed to the following possible efficiencies:

- limiting the distributors' margin, thereby increasing the number of goods available to consumers;
- stimulating non-price competition;
- eliminating the possibility of free-riding; and
- maintaining a stable distribution network.

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.

We believe that these types of 'pricing relativity' agreements would be seen as unjustifiably limiting price competition.

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.

A supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer would probably be considered legal, not only because discriminating under certain conditions would be illegal but because this arrangement would tend to keep prices lower in the specific market. The supplier agreeing not to supply third parties on more favourable terms, assuming the supplier is allowed to discriminate in the specific case, would tend to keep prices high and would probably be held to be illegal under the prohibition of influencing others to raise or not to lower prices.

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.

This conduct would be reviewed first under the prohibition of price discrimination. If price discrimination rules were to allow different pricing on the two platforms, the conduct would be legal if it had the effect of decreasing one price to the level of the lower one, and illegal in the event of the opposite result.

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.

There is no rule or precedent in this regard, but we believe that it would be illegal under consumer protection law.

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.

Buyers are free to commit to not purchasing contract products elsewhere, provided that the requirements for legal exclusive dealing are met. An agreement to meet higher prices of purchase would be illegal under the rule that prohibits one party from influencing another to raise prices or refrain from lowering them.

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?

Territorial restrictions in vertical relationships have received little scrutiny in Colombia. The statute that prohibits territorial allocations is very clear in limiting the prohibition on horizontal relationships, which means that vertical territorial allocations are subject to the general prohibition of restricting competition. The SIC has recently held, in Resolution 76724 of 2014, that territorial restrictions are subject to an effects-based analysis under antitrust law under criteria that are similar to those under which RPM is assessed.

29 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?

There is no specific rule in this regard. We believe it should be reviewed with the same antitrust logic as vertical territorial allocations.

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

We believe it would be viewed as an illegal restriction on competition.

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

There is no specific rule or precedent in this regard, but restrictions imposed for resale would be analysed under an effects-based approach and could be found to be legal in many cases.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

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

There is no specific rule in this regard. We believe it would be reviewed under the rule for exclusive dealing. As for publishing the criteria for selection, we believe that Colombian law does not demand that such information be made public or that rules for selection even exist.

34 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?

We do not think that the type of product would influence the legality of any agreement.

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

There is no rule in this regard.

36 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?

No.

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

Given that the test would be that of the competitive impact of the arrangement, the authority would probably take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market.

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

No.

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

Exclusive-dealing agreements such as this are generally legal in Colombia except where they may foreclose the market by increasing costs to competitors at a particular level in the chain. This rarely happens in competitive markets.

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

It is assessed under the rule of possible foreclosure of the market for distribution of 'inappropriate' products. In the absence of such foreclosure, it would be a valid exclusive-dealing agreement.

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

This agreement would also, as with the situation to which the previous question refers, be assessed under the rule of possible foreclosure of the market for the distribution of competing products. In the absence of such foreclosure, it would be a valid exclusive-dealing agreement.

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

It is viewed as a partial exclusive-dealing arrangement (a partial requirements contract) and is scrutinised under the level to which it can foreclose the supplier's market by preventing other suppliers from selling to the same buyer. This would be illegal if those suppliers lack other potential customers and are prevented by the agreement from offering their product to this particular buyer.

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

This type of agreement is also analysed under exclusive-dealing rules and would be illegal in those instances where other buyers would be prevented from acquiring the products because of a lack of alternative suppliers.

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

This is not an uncommon practice in Colombia, but it has yet to receive antitrust scrutiny. We believe it could be declared illegal when it arises from and contributes to the successful exercise of distributor market power.

45 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?

No.

Notifying agreements

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

Vertical agreements need not be notified to the antitrust authority in Colombia.

Authority guidance

47 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?

No.

Complaints procedure for private parties

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

Yes. Once a complaint is brought the antitrust authority will review whether it has sufficient substantive and factual merit. If so, it will open a preliminary investigation, which can lead to a full investigation. If sufficient evidence exists of an antitrust violation, the investigation will end with a fine and an order to the infringing company not to continue such conduct. An investigation like this can last between one and three years. Interested (affected) third parties are allowed to intervene in the proceedings, including in the gathering of evidence.

Enforcement

49 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?

The bulk of antitrust enforcement in Colombia deals with horizontal agreements and merger clearance. Up until 2007, according to the Organisation for Economic Co-operation and Development, only 2 per cent of enforcement by the SIC was directed at vertical agreements. This percentage has not increased significantly in the subsequent seven years.

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

The antitrust authority, being an administrative entity, may only punish the parties or the guilty party by imposing a fine, but a judge must declare the agreement void. Under Colombian law the partial nullity of an agreement does not extend to the rest of the agreement unless it is apparent that the parties would not have entered into the agreement, in the absence of the annulled portion.

51 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 SIC directly imposes the fines, although they can be reversed by the Council of State, the highest administrative court in the land. There is no established legal regime for claiming for damages arising out of antitrust offences.

Investigative powers of the authority

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

The SIC has the power to conduct unannounced visits to companies, retrieve information (including computer hard drives), conduct interrogations and generally has ample means of gathering evidence. It also has the power to impose fines, issue injunction-like orders and order that certain conducts cease. The SIC does not usually request information from companies outside its jurisdiction but, rather, would use international cooperation tools for this purpose.

Update and trends

The most significant recent decision concerning vertical agreements is Resolution 76724 of 2014, where the SIC imposed a fine on a company managing an airport concession contracting for charging excessive prices and engaging in illegal vertical restrictions. The SIC redefined vertical arrangements in such a way as to encompass a broader scope of agreements, and also set out a general rule for RPM and territorial allocation agreements, stating clearly that they may be valid when they result in pro-competitive benefits, but imposing the burden on the parties of proving these benefits. It is possible that, having outlined more clearly the legal regime for vertical restraints in this case, the SIC will pursue more investigations of potentially harmful vertical arrangements that, up until now, have been the minority of investigated cases.

Private enforcement

53 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 enforcement is possible in the sense that any person may submit a request for investigation of an antitrust violation and the SIC, if sufficient evidence for that effect is presented, is obligated to prosecute the offence. Non-parties to the agreement may request injunction-like measures, although they have never been adopted in antitrust investigations in Colombia. The remedy against antitrust violations consists of a fine of up to approximately US$30 million and the order to cease in the conduct. There is no established legal regime for claiming damages arising out of antitrust offences. Scholars have suggested that the ordinary tort regime or unfair trade practices law could be used for this purpose, but this has yet to be attempted in the country.

Other issues

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

No.

CARDENAS & CARDENAS ABOGADOS

Ximena Zuleta-Londoño **xzuleta@cardenasycardenas.com**
Alberto Zuleta-Londoño **azuleta@cardenasycardenas.com**

Cra 7 No. 71-52 Torre B, Piso 9
Bogotá
Colombia

Tel: +57 1 313 7800
www.cardenasycardenas.com

Denmark

Christina Heiberg-Grevy
Accura Advokatpartnerselskab

Antitrust law

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

In Denmark, the rules applicable to vertical restraints are laid down in the Danish Competition Act (Consolidated Act No. 700 of 18 June 2013) (the Act).

Section 6 of the Act prohibits agreements between undertakings that may affect trade within Denmark and have as their object or effect the prevention, restriction or distortion of competition within Denmark. The provision is the Danish equivalent to article 101 of the Treaty on the Functioning of the European Union (TFEU).

Where an undertaking holds a dominant position in a market to which the vertical agreement relates, the prohibition against the abuse of a dominant position in section 11 of the Act will also be relevant to the antitrust assessment. The provision is equivalent to article 102 of the TFEU. However, conduct falling within the article 102 prohibition is considered in *Getting the Deal Through – Dominance* and is therefore not covered here.

Of particular interest to the antitrust assessment of vertical restraints, the block exemption for categories of vertical agreements and concerted practices applies. See Governmental Order No. 739 of 23 June 2010 on the block exemption for categories of vertical agreements and concerted practices, the Vertical Block Exemption, which implements Commission Regulation (EC) No. 330/2010 of 20 April 2010.

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 Act does not define vertical restraints. However, section 6 of the Act contains a non-exhaustive list of both vertical and horizontal restraints covered by the Act, such as provisions on resale price maintenance, provisions to limit or control production, sales, technical development or investments and provisions to share markets or sources of supply, and so on. In general, the types of vertical restraints covered by the Act are similar to those subject to article 101.

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?

The purpose of the Act is to promote efficient resource allocation in society through workable competition for the benefit of consumers and undertakings (section 1 of the Act). Although economic efficiency is the leading principle, the Act also protects the liberty of trade and the interest of consumers.

Responsible authorities

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

The Competition Council (the CC) is the competent authority in matters concerning alleged infringement of section 6 of the Act. However, in more routine matters the Competition and Consumer Authority (the CCA), secretariat of the CC, makes decisions without referring them to the CC. The CCA is authorised to carry out dawn raids.

The decisions of the CC and the decisions that the CCA makes on behalf of the CC in respect of alleged infringements of section 6 may be appealed to the Competition Appeals Tribunal (CAT), whose decisions may again be appealed to the civil courts. The decisions of the CC cannot be appealed to the civil courts directly, hence the possibilities of appeal within the administrative system must first be exhausted.

Infringements of section 6 as a result of intentional or gross negligent behaviour are subject to fines. Upon request of the director of the CCA, the public prosecutor for serious economic and international crime is responsible for taking such cases to the civil courts as part of a criminal procedure where fines may be imposed.

From an enforcement point of view, the government and ministers do not play a role.

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?

A vertical restraint that has an effect on the Danish market will be subject to the Act, regardless of the location of the undertakings involved in the agreement causing such effect.

The Act has not been applied extraterritorially, but has been applied in a pure internet context (see question 31).

Agreements concluded by public entities

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

The Act applies to any form of commercial activity whether carried out by private or public entities. Furthermore, the Act applies in respect of aid from public funds granted to commercial activity.

Section 6 does not apply where an anti-competitive practice is a direct or necessary consequence of public regulation. An anti-competitive practice established by a local council shall only be considered a direct or necessary consequence of public regulation insofar as the practice is necessary to allow the local council to carry through the tasks assigned to it under current legislation.

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.

Governmental Order No. 760 of 23 June 2010 on block exemption for categories of vertical agreements and concerted practices in the motor vehicle sector, which implements the Danish text of EC Regulation No. 461/2010 of 27 May 2010, is the only sector-specific regulation.

General exceptions

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

The prohibition in section 6 of the Act does not apply to agreements between undertakings which have:

- an aggregate annual turnover of less than 1 billion kroner and an aggregate market share of less than 10 per cent of the relevant market; or
- an aggregate annual turnover of less than 150 million kroner.

Irrespective of whether the above criteria are met, the prohibition still applies in case of resale price maintenance, limitations on production or sale, market sharing or bid fixing and similar forms of bid rigging. Furthermore, the prohibition also applies where an agreement together with other agreements restricts competition.

Under section 8 of the Act, the CC may, upon notification, exempt agreements from the prohibition in section 6, where such agreements contribute to improving the efficiency of the production or distribution of goods or services and provide consumers with a fair share of the resulting benefits provided such agreements do not impose restrictions on the undertakings concerned that are not necessary to attain these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Agreements

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

According to the wording of section 6 of the Act, the prohibition on anti-competitive agreements applies to agreements, decisions made by an association of undertakings and concerted practices between undertakings. The Act does not contain a definition of these concepts, but they are to be construed in accordance with the case law established by the European Commission, the General Court, and the Court of Justice.

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?

No formal or legally binding agreement is required for section 6 of the Act to apply. An oral agreement or concerted practice based on a tacit or informal understanding or gentlemen's agreement between the parties is sufficient. The determining factor is that the parties must have expressed a common will to act in a certain way in the market. Common interest is not required and both parties do not need to benefit from the agreement. A unilateral statement from one party to another is, however, not sufficient unless the other party accedes to the statement under some form.

See for example, the CC decision of 24 November 2010, where the CC found that e-mail correspondence between Witt and certain of its largest dealers calling for price increases on specific models of robot vacuum cleaners constituted resale price maintenance.

Parent and related-company agreements

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

Pursuant to section 5 of the Act, the vertical restraints rules do not apply to agreements within the same undertaking or group. According to Governmental Order No. 1029 of 17 December 1997 vertical agreements within the same undertaking or group fall under section 5 of the Act provided that the subsidiaries are not free to independently determine their own behaviour in the market, but have to follow instructions from the parent company.

A company is a parent company if it:

- holds the majority of the voting rights in a company;
- has the right to appoint or remove the majority of the members of the company's board of directors;
- has the right to exercise a decisive influence over the company on the basis of the articles of association or any agreement with the company in general; or
- in another way as a shareholder exercises a decisive influence over such company.

Agreements between related companies of the same ultimate parent company are covered by the exemption in section 5 if a written agreement or the articles of association of the companies determine that they have a joint management or are under a decisive influence of this management provided, inter alia, that the joint management coordinates the behaviour of the participating companies on the market.

In the *Wewers* case of 7 November 2005, the CAT held that the exemption did not apply to a joint venture jointly owned and controlled by two parent companies, as neither of the parent companies had control over the joint venture. The coordination of prices between one of the parent companies and the joint venture was hence a violation of section 6 of the Act.

Agent–principal agreements

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

In general, section 6 of the Act does not apply to any agreement between a principal and its genuine agent (ie, one who bears no substantial financial risk in respect of the transactions in which it acts as an agent) insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal.

A non-genuine agency agreement (defined in accordance with EU practice) may, however, be caught by section 6(1) of the Act unless the Vertical Block Exemption applies.

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?

The Act does not define what constitutes an agent–principal relationship. However, the Commission's Vertical Guidelines provide guidance on what constitutes such an agent–principal relationship.

There are no recent authority decisions on what constitutes and agent–principal relationship for these purposes.

Intellectual property rights

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

The Vertical Block Exemption is applicable to vertical agreements containing provisions that relate to the assignment or use of IPRs, provided that such provisions are directly related to the use, sale, or resale of goods or services by the buyer or its customers and do not constitute the primary object of the agreement.

Vertical agreements that have as their main objective the licensing of IPRs fall outside the Vertical Block Exemption. In such events, the antitrust analysis includes the application of the Commission Regulation (EC) No. 316/2014 of March 2014 (Technology Transfer Block Exemption).

Analytical framework for assessment

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

The analytical framework applied by the Danish competition authorities is similar to the EU framework.

First, it is assessed on the basis of whether an agreement contains hard-core vertical restraints in contravention of section 6. Hard-core restrictions such as resale price maintenance and market sharing are unlikely to be exempted. In practice, such restrictions are considered as per se unlawful.

Second, if no hard-core restraints are identified, the agreement is assessed on the basis of whether it is aimed at or will result in an appreciable prevention of competition on the Danish market or a substantial part thereof, and in the affirmative, whether it is covered by a de minimis exception, an individual exemption (see question 8) or a block exemption.

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?

The Danish competition authorities will consider market shares when assessing vertical agreements, including in particular the market share of the supplier. The competition authorities will, however, also consider the general market structure, including competitors' market shares, barriers to entry, market maturity, the level of trade affected by the agreement and whether certain types of agreement or restriction are widely used in the market.

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?

With the amendment of the Vertical Block Exemption in 2010, the market share of the buyer is now always relevant when assessing the application of the block exemption on a vertical agreement (see question 18). So far, no guidance, decisions or court rulings have dealt with the impact of buyer market share.

Block exemption and safe harbour

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

The Vertical Block Exemption provides a safe harbour for certain agreements containing vertical restraints. Vertical agreements that do not contain any hard-core restrictions are automatically exempted from the prohibition in section 6 of the Act provided that the supplier's market share does not exceed 30 per cent of the relevant market where it sells the goods or services covered by the agreement and the buyer's market share does not exceed 30 per cent of the relevant market where it purchases the same goods or services.

Agreements that are not covered by the Vertical Block Exemption are not presumed to be illegal, but instead subject to an individual assessment.

The Vertical Block Exemption does not apply where the agreement falls within the scope of another block exemption regulation, notably the Technology Transfer Block Exemption.

The Technology Transfer Block Exemption comprises licensing agreements on patents, know-how, software copyright and mixed agreements. Provided such agreements do not contain any hard-core restrictions, the block exemption applies to agreements entered into between competing undertakings with a combined market share of maximum 20 per cent on the affected relevant technology and product market and agreements between non-competing undertakings if the combined market share does not exceed 30 per cent.

Types of restraint

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

While recommended resale prices and maximum resale prices are generally accepted, imposing minimum sale prices, binding resale prices, or in another way forcing trading partners not to deviate from recommended resale prices is considered a hard-core restriction. As such, it will almost always infringe section 6 of the Act, and is generally considered unlikely to qualify for exemption under section 8 of the Act.

In 2008, Valsemøllen, a wheat producer, was fined 1 million kroner as it had demanded its wholesalers to follow the supplier's prices for several years. Similarly, on 28 February 2007, Hempel, a manufacturer of marine paints, was fined 2 million kroner for having entered into agreements with its distributors, according to which the resale price should equal the supplier's net price plus 5 per cent.

See also the decision by the Copenhagen District Court of 26 November 2010 (*Lise Aagaard Copenhagen A/S*) where the supplier of Trollbeats (jewellery), through its request to a number of retailers to stop selling Trollbeats on the internet at discounted prices, was found to have violated section 6 of the Act and was fined 600,000 kroner. In addition, a leading employee was fined 25,000 kroner.

According to the *travaux préparatoires* of the Act the prohibition on binding retail prices also applies in cases where imposing binding retail prices cannot be considered as part of a general strategy of the company, but is rather targeted at one or more specific retailers.

See, for example, the *Witt* case of 24 November 2010 (see also question 10) and the decision by the Copenhagen District Court of 17 January 2012 (*Erik Jørgensen Møbelfabrik A/S*).

In the *Witt* case a supplier of robot vacuum cleaners with exclusive distribution rights for the Danish marked for certain models was found to have violated section 6 of the Act by entering into direct dialogue with its major retailers with the purpose of aligning prices to the recommended retail prices. Retailers not willing to maintain the recommended retail prices were in several instances punished with lower discounts and higher requirements for earning bonus. Finally, the fact that Witt tried to control the line of distribution of the different models to avoid sale of certain models to internet dealers and wholesalers in order to be able to control retail prices was found to constitute a violation of section 6 of the Act. The company was later in 2014 fined 1.1 million kroner. In addition, two leading employees were each fined 20,000 kroner.

In the *Erik Jørgensen* case a supplier of high-end Danish furniture was found to have violated section 6 of the Act by including provisions in its contracts with retailers requesting the retailers to only price and advertise the furniture with the recommended retail prices and by specific requests to the same effect to a number of retailers in respect of two specific products where the retailers had advertised the products at discounted prices The court found this behaviour to constitute concerted practice and agreements on the communication on prices by the retailers with the intent to limit competition on price and the company was fined 400,000 kroner and two leading employees were fined 20,000 kroner each. The court did not, however, find that Erik Jørgensen had required its retailers to respect their recommended retail prices as binding minimum prices. (See also the *Bestseller* case mentioned in question 22).

From December 2012 to December 2013, a total of six charges against companies for fixed resale prices initiated by the CA were closed by the companies accepting an administrative notice of a fine. The fines ranged from 1 million to 1.6 million kroner. In four of the cases, an administrative notice of a fine was also accepted by employees of the company who had been directly involved in the price fixing. The general level of fines in those instances was 20,000 kroner. In one case, the fine was set at 40,000 kroner, since the company was run as an owner-managed company and charges were only raised against the owner personally. Between January and December 2014, two charges against companies for fixed resale prices initiated by the CA were closed by the companies accepting an administrative notice of a fine of 100,000 kroner and 1.1 million kroner, respectively. In the latter case (the *Witt* case), an administrative notice of a fine of 20,000 kroner was also accepted by leading employees of the company who had been directly involved in the price fixing.

When determining the level of fines, weight is placed on the company's turnover, the number of incidences where price fixing has taken place and for how long. Furthermore, emphasis is being put on whether the company has been cooperative and in one instance it has also found to bear weight that for many years the company had implemented an extensive and well-documented compliance programme. It should be noted that the cases mentioned above mainly concerned violations that took place before 1 March 2013, when the level of fines was increased significantly. Therefore, the level of fines for such violations is expected to significantly increase in the future (see question 51).

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'?

No, but the Commission's Vertical Guidelines provide some guidance in this respect and will most likely be applied by the authorities if relevant. Furthermore, the Danish book trade for many years practised retail price maintenance based on a special exemption granted for 'cultural reasons'. Over the years, the exemption had been modified, gradually opening the market up for competition and on 1 January 2011 the exemption was repealed in its entirety.

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

Danish decisions or guidelines have not specifically addressed possible links between resale price maintenance and other forms of restraint. In general, each form of conduct is assessed separately, but the authority may attempt to address possible links between different forms of restraint in order to establish an infringement.

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

Efficiencies are considered only in respect of individual exemption under section 8 of the Act.

An example is the *Bestseller* case from 27 August 2003 concerning the clothing company Bestseller's agreements with concept stores. The CC found that the agreements constituted selective distribution agreements containing several elements that restricted competition and, furthermore, that the conditions concerning the concept stores' obligation to follow recommended resale prices, Bestseller's fixed prices covering sales between the concept stores internally and the concept stores' obligation to report sales prices and contribution margins for each item sold to Bestseller through the joint IT system constituted restrictions in conflict with section 6 of the Act.

Bestseller offered to remove the obligation to follow recommended retail prices and the provisions concerning fixed inter-store sales prices. However, Bestseller was not willing to change the concept stores' obligation to report sales prices and contribution margins to the joint IT system.

The CC found that the joint IT system contributed to a better distribution of the goods as it made it possible for store owners to establish new stores more quickly and with more chances of success, thereby enhancing the inter-brand competition. Furthermore, the CC found that the agreements secured for consumers easy access to suppliers and the possibility to exchange goods at any concept store. Thus, the customers were provided with a fair share of the resulting benefits. However, the CC found that the concept stores' obligation to report sales prices and contribution margins prevented an efficient abolition of the fixed prices. Therefore, the agreement did not fulfil the conditions for an exemption under section 8 of the Act. The CAT and the High Court of Western Denmark both confirmed the decision.

On 24 March 2010, following a revision of the selective distribution agreements to remove all restrictions on competition and an investigation by the CCA to rule out any tacit agreement to coordinate prices, Bestseller was allowed to use its joint IT system again provided that it ensured that the individual stores could not access each other's data and that Chinese walls were established internally between the department processing the data from the IT system and the department responsible for stores owned directly by Bestseller.

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.

The Danish authorities have not yet considered this type of arrangement. However, in general, any attempt to restrict the buyer's ability to decide its own price strategy is considered a hard-core restriction.

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.

The number of decisions from the CC on wholesale MFNs is not recent and rather limited.

In general, a wholesale MFN, which restricts competition, for example by restricting access to the market for competitors, may breach section 6 of the Act.

Some of the primary concerns in respect of such clauses pointed out by the CC is the access to market intelligence on competitors' prices, which the buyer receives as a result of the MFN, and the foreclosure effect on competitors who are not able to gain access to the market on different or better terms than those offered to the buyer.

In 2002, the CC found an MFN clause in a supply agreement between a manufacturer of ingredients and Guldbageren, a chain of retail bakeries, to be a violation of section 6 of the Act. The MFN obliged the supplier not to sell products to customers in Denmark with a total purchase less or equal to Guldbageren's at better prices than the prices offered to Guldbageren. The market share of Guldbageren at the wholesale market was estimated at 20 per cent. The CC found that the MFN was a restriction on the supplier's ability to compete, as the supplier was prevented from offering smaller customers special deliveries at favourable prices. Since the supplier was furthermore found to be a significant player on the supply market, the CC found that the MFN clause would furthermore hinder the competitors of Guldbageren in obtaining more favourable prices.

On this basis, the clause was found to significantly restrict competition and therefore violate section 6. Since the clause was not found to contribute to improving the efficiency of production or distribution, or provide consumers with any benefits, no exemption was available pursuant to clause 8.

Also, in 1999, when considering a distribution agreement between Mobilix A/S, a supplier of telecommunication services and its distributor Merlin A/S, the CC found an MFN to be a violation of section 6 of the Act. The MFN clause required Mobilix at any time to grant Merlin at least the same level of commission as Mobilix was granting its other distributors. Mobilix held no significant market share, but the CC found the MFN to constitute a differential treatment of Mobilix's distributors that was not validly based on differences in efficiency, as the adjustment of Merlin's provision was not based on cost considerations. The MFN was found to bring about a unification of the commission rates of the different distributors of Mobilix, which would limit the distributors' incentive to compete, which again would result in a lessening of the intra-brand competition.

As pointed out, these decisions are not recent, and it is questionable whether the outcome corresponds with the Vertical Block Exemption, which the CC does not seem to have taken into consideration in its assessment of the MFNs. However, the CCA is presently – in line with several other national competition authorities – looking into hotel booking portals' use of MFNs. So far, the outcome of this examination is uncertain.

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.

The Danish authorities have not yet considered this type of agreement. However, to the extent that such arrangement would limit price competition between online agents and increase barriers to entry and expansion for other online agents who may seek to gain market share by offering discounts to consumers, it cannot be ruled out that such arrangements may be found to be anti-competitive.

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.

The Danish authorities have not yet considered such restrictions. The CCA would, however, most likely look very closely at the views expressed by Commission and other national competition authorities when assessing such restrictions.

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.

The Danish authorities have not yet considered this type of agreement. However, to the extent that the supplier entering into such arrangement has a considerable market share, such arrangements may increase barriers to entry and expansion for other suppliers that may seek to gain market share by offering discounted prices to the buyers. Furthermore, such arrangements may limit price competition between the suppliers.

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?

Market sharing by territory is generally viewed as a hard-core restriction.

Restrictions on passive sales by meeting unsolicited orders are always considered as a hard-core restriction. Agreements falling under the Vertical Block Exemption may, however, prohibit active sales into an

exclusive territory allocated by the supplier to another buyer or reserved for the supplier himself, where such restrictions do not limit the onward sales by the customers of the buyer.

Individual exemption under section 8 of territorial restrictions will depend on, for example, the market position of the parties, the general context of the agreement, and so on.

29 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?

Restrictions on sales to certain groups of customers are considered a hard-core restriction.

However, under the Vertical Block Exemption it is possible to prohibit active sales to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit onward sales by the customers of the buyer. It is also possible to restrict sales to end-users by a buyer operating at the wholesale level of trade, restrict sales to unauthorised distributors by the members of a selective distribution system and restrict the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

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

There are no general guidelines on the assessment of such restrictions. Therefore, the exact object and effect of such restrictions must be assessed on a case-by-case basis. To the extent that such restrictions imply a market partitioning by territory or by customer, see questions 28 and 29.

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

Internet sale is assessed in accordance with the European Commission's Vertical Guidelines.

In a decision of 23 April 2008 (*Matas*), the CC found that a prohibition on internet sales by members of a selective distribution system constitute a hard-core restriction that cannot be exempted under the Vertical Block Exemption. With reference to paragraph 50 of the European Commission guidelines for vertical restraints, the CC held the prohibition on internet sales to be a restriction of passive sales contrary to article 4(c) of the Vertical Block Exemption. However, the CC did allow a set of guidelines containing qualitative requirements for the members' home pages and web shops whose purpose was to ensure protection of image, customer service, loyalty to the chain, compatibility with the marketing law, and so on.

Consistent herewith is the CA's decision of 30 September 2009, where the CA found it acceptable that a hearing aid manufacturer allows its dealers to sell hearing aids over the internet only if they offer the customers and end-users sufficient personal adjustments to the hearing aids.

It follows from the CC's decision of 20 December 2006 (*Fritz Hansen A/S*) that qualitative requirements for home pages and web shops must be laid down in advance in order to be enforceable. In this case, the supplier's right to approve the quality of a member's web shop prior to its launch was found to be a hard-core restraint as it could be practised contrary to article 4(c) of the Vertical Block Exemption.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

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

In general, purely qualitative selective distribution systems are considered to fall outside section 6 of the Act.

Selective distribution systems falling within the prohibition of section 6 may benefit from exemption either under the Vertical Block Exemption or according to an individual exemption under section 8 of the Act. Whether the conditions for an individual exemption are fulfilled depend on, for example, the market position of the parties, the general context of the agreement, and so on.

The criteria for becoming a selective distributor do not need to be published. However, the CC can order a dominant undertaking to submit its general trading terms concerning the relevant markets to the CC if a competitor has filed a legitimate complaint, if special conditions prevail on the market, or if the CC needs to acquire insight into the ways in which the dominant undertaking fixes its prices, discounts, and so on.

34 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?

If the selective distribution system does not contain hard-core restrictions and the criteria of the Vertical Block Exemption are met, the distribution system for any product will probably be block-exempt. If the Exemption does not apply, an individual assessment under section 6 and potentially section 8 of the Act will be necessary.

35 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?

See question 31. In addition, a supplier may also require that a distributor wishing to sell online also maintain a bricks-and-mortar store. Internet sales criteria may deviate from offline sales criteria to the extent that this is objectively reasoned.

36 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?

No.

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

The competition authorities will consider cumulative restrictive effects of multiple parallel vertical agreements in the same market.

Under article 3 of the Vertical Block Exemption, the CC can choose not to apply the block exemption if vertical agreements are found to have effects that are incompatible with the conditions in section 8 of the Act or if parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market.

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

No.

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

Under the Vertical Block Exemption, an obligation on the buyer to purchase more than 80 per cent of the buyer's total purchases of the contract goods and their substitutes from the supplier or from another undertaking designated by the supplier is viewed as a non-compete obligation, which may be block-exempt to the extent the duration of the obligation does not exceed five years.

Restrictions in agreements falling outside of the Vertical Block Exemption must be assessed under section 6 of the Act. An individual exemption under section 8 may be granted depending on the duration of the obligation, the percentage of total purchases covered, the market position of the parties, the general context of the agreement, and so on. See also the *Witt* case of 24 November 2010 (questions 10 and 19).

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

In general, restrictions on the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' are not a violation of the Act unless the supplier has a dominant position or very specific conditions prevail.

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

Such restrictions are assessed in accordance with the European Commission's Vertical Guidelines and with the case law established by the European Commission, the General Court and the Court of Justice.

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

See question 39.

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

Where the Vertical Block Exemption applies such restriction is in general accepted. Outside the scope of the Vertical Block Exemption, depending on the structure of the relevant markets and the market share of the parties, such restriction may be found to be a violation of section 6 of the Act, as this may have a foreclosure effect on competition preventing the competitors of the buyer from obtaining access to supply of relevant products.

The Danish authorities will assess such restrictions in accordance with the European Commission's Vertical Guidelines, and with the case law established by the European Commission, the General Court and the Court of Justice.

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

Where the Vertical Block Exemption applies, such restriction is in general accepted where the buyer has been granted an exclusive customer group or a geographic market.

Outside the scope of the Vertical Block Exemption, an individual assessment will be required in order to assess whether such clause will significantly restrict competition on the end-customer market. When assessing such restriction, the Danish authorities will base themselves on the European Commission's Vertical Guidelines and the case law established by the European Commission, the General Court and the Court of Justice.

45 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?

No.

Notifying agreements

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

Agreements containing vertical restraints can be notified to the CCA in order to obtain an individual exemption under section 8 of the Act (see question 8).

Notification pursuant to section 8 is not mandatory. However, it may be advisable to notify the CCA if there is uncertainty about the assessment of certain provisions in a vertical agreement, as an infringement of section 6 of the Act cannot be sanctioned from the time the agreement is notified until the CC's decision is announced.

Furthermore, upon notification pursuant to section 9 of the Act, a non-intervention statement from the CC may be obtained to the effect that the CC states that, according to the facts before it, an agreement, decision or concerted practice shall be considered outside the scope of the prohibition set out in section 6 of the Act and that, accordingly, the CC sees no grounds for intervening.

The CC can refrain from considering a notification according to sections 8 or 9 if an agreement may appreciably affect trade between EU member states.

Notifications according to sections 8 or 9 must comply with Governmental Order No. 171 of 22 February 2013. Decisions made by the CC following a notification are binding on the CC unless, in respect of non-intervention statements, the basis of the facts changes or the decision has been based on incorrect or misleading information. A non-intervention statement does not bind the Danish courts in cases concerning infringement of section 6 of the Act.

Decisions made by the CC and the CAT are published. Decisions made by the CCA on behalf of the CC are also published if considered to be of importance for the understanding of the application of the Act or otherwise considered to be of interest to the public. The duration of a case depends on the specifics of each case.

Authority guidance

47 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?

Though there is a formal procedure for notification, it is to some extent possible to receive informal guidance from the CCA.

Complaints procedure for private parties

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

The CC considers cases on its own initiative, upon notification or complaint, or as a result of a referral from the Commission or other competition authorities of the European Union. Private parties may file a complaint either formally in writing or by alerting the CC using a dedicated phone number or an encrypted connection ensuring the private party complete anonymity.

The CC decides whether there are sufficient grounds to initiate an investigation or make a decision in a case, including whether the consideration of a case should be suspended or discontinued.

Where a complaint concerns restrictions on competition that affect other EU member states, the CCA will assess whether the complaint should be referred to the Commission.

Enforcement

49 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?

There are no statistics available. However, most of the cases related to vertical restraints concern retail price maintenance (see question 19).

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

According to the Act, any anti-competitive provisions are void unless otherwise exempted.

The nullity is automatic and is not dependent on any prior decision to that effect. The agreement as a whole is void only if the prohibited provisions cannot be severed from the remaining provisions of the agreement.

In a case of 15 April 1997, a Danish producer of cart-control systems and a French distributor entered into an exclusive distribution agreement. The agreement stated that the distributor should refrain from manufacturing or selling (or both) any other cart-control systems based on a pure deposit concept under the duration of the agreement and three years thereafter. The distributor breached the non-compete obligation during the term of the contract. The Supreme Court held that the provision under which the non-compete obligation should last for three years after the term of the contract infringed the prohibition on anti-competitive agreements. However, the Supreme Court stated that the remaining part of the agreement could be enforced. Thus, the producer was awarded damages as a result of the distributor's breach of the non-compete obligation within the agreed notice period.

51 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?

Criminal sanctions such as fines can be imposed by a court of law only in connection with a criminal procedure. The criminal procedure is initiated by the public prosecutor for serious economic and international crime upon request from the director of the CCA. (See question 4.)

In cases in which the maximum penalty is a fine, the CCA may, with the consent of the public prosecutor for serious economic and international crime, issue an administrative notice of a fine indicating that the case can be settled without a trial if the offender admits being guilty and is willing to pay the fine within a specified time limit.

The CC can, inter alia, issue an order to terminate infringement of section 6, for example by way of orders to terminate agreements or trading conditions in full or in part, orders of price control or orders to supply. However, the CC cannot impose structural remedies.

Furthermore, it is possible for the CC to close a case via binding commitments undertaken by the parties. The Act does not deal with liability for damages. However, a party can bring proceedings before the court seeking damages in respect of loss resulting from a breach of the competition rules.

The Danish courts follow the same principles when setting a fine as those applied by the European Commission, though at a much lower level. No sentencing guidelines exist. However, according to the *travaux préparatoires* of the 2012 amendment of the Act (see act No. 1385 of 23 December 2012, taking effect on 1 March 2013) a less serious breach of the Act by a legal entity should result in a fine of up to 4 million kroner. A more serious breach should result in a fine of 4 million to 20 million kroner, whereas a very serious breach should result in a fine of 20 million kroner or more.

Furthermore, a new section 23(5) has been added to the Act stipulating that the specific sentencing for a breach of the Act by a legal entity should take into consideration the turnover of the group of that legal entity in order to ensure that a fine will constitute a considerable cost for the company relative to the turnover of the group of which it is a part.

In order to ensure consistency between national and EU rules, it is stated in the *travaux préparatoires* that a legal entity should in general not be given a fine which exceeds 10 per cent of its total average group turnover per year.

Also, guidelines for the level of fines for physical persons have been set out in the *travaux préparatoires*. According to these a less serious breach of the Act undertaken by a physical person should result in a fine of at least 50,000 kroner. A more serious breach should result in a fine of at least 100,000 kroner whereas a very serious breach should result in a fine of minimum 200,000 kroner.

Sentencing in respect of both legal entities and physical persons should also take into consideration the duration of the breach; a distinction should be made between a breach of shorter duration (less than one year), a breach of medium duration (one to five years) and a breach of long duration (more than five years). Breaches of a shorter duration will not result in an increase of the fine. Breaches of medium duration will result in an increase of the fine of up to 50 per cent, whereas a breach of long duration will result in an increase of the fine of 10 per cent per year.

The largest fine to date imposed by a Danish court on an undertaking is 5 million kroner (concerning abuse of a dominant position); and the largest fine imposed by the court on the management is 25,000 kroner.

The largest administrative fine imposed on an undertaking is 10 million kroner (bid rigging), whereas the largest administrative fine imposed on a natural person is 100,000 kroner.

Although sentencing is in the hands of the courts and will be influenced by the specific circumstances surrounding each individual case, with the effect that the levels indicated in the *travaux préparatoires* can be deviated from both upwards and downwards based on aggravating or extenuating circumstances, the adoption of Act No. 1385 of 23 December 2012 is expected to lead to an increase of the general level of fines for breach of the Act in the future.

Investigative powers of the authority

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

The investigative powers of the CCA are in general equal to those of the European Commission. However, the CCA does not have authority to access private homes.

A dawn raid can only be initiated once a court order has been obtained. The authority of the CCA consists of taking identical electronic copies of data on electronic media covered by the inspection and taking copied material with them for subsequent review. If the conditions of the undertaking or association make it impossible for the CCA to get access to or make copies of the relevant information on the day the inspection is carried out, the CCA can, furthermore, remove original information or electronic data for copying purposes and keep it for review for up to three working days.

If an undertaking's information is stored with or processed by an external data-processor, the CCA is entitled to gain access to the premises of the external data-processor for the purpose of reviewing and making copies of the relevant information.

The authority may demand information from suppliers domiciled outside Denmark.

Private enforcement

53 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 parties can bring damages claims before the civil courts. However, such cases have so far been limited in number. In addition, parties to agreements containing vertical restraints may bring damages claims before the courts. The court determines the amount of legal costs recovered by the successful party. In general, a private enforcement action takes about one to two years. If a case is taken to the Supreme Court, the process will be prolonged significantly.

Other issues

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

No.

ACCURA

Christina Heiberg-Grevy **christina.heiberg-grevy@accura.dk**

Tuborg Boulevard 1
2900 Hellerup
Denmark

Tel: +45 3945 2800
Fax: +45 3945 2801
www.accura.dk

European Union

Stephen Kinsella OBE, Patrick Harrison and Rosanna Connolly
Sidley Austin LLP

Antitrust law

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

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

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

- Commission Regulation (EU) No. 330/2010 of 20 April 2010, on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices (Vertical Block Exemption), providing that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption under article 101(3); and
- non-binding vertical restraints guidelines, setting out the manner in which the Vertical Block Exemption is to be applied and giving guidance on how vertical restraints falling outside the Vertical Block Exemption will be assessed (Vertical Guidelines).

Where a party to an agreement occupies a dominant position on one of the markets to which an agreement relates, article 102 TFEU (which regulates the conduct of dominant companies) may also be relevant to the antitrust assessment. However, conduct falling within article 102 TFEU is considered in the *Getting the Deal Through – Dominance* publication 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?

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

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

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

Legal objective

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

One of the key identifying features of EU competition policy has been its pursuit of a variety of different goals. In recent times, the Commission has openly stated its intention to focus more closely on the protection of competition as a means of enhancing consumer welfare and the pursuit of strictly economic goals in its application of article 101. However, the supranational nature of the European Union dictates that the Commission and the EU courts have also prioritised the furtherance of a single, integrated European market across the EU's 28 member states. This is reflected in paragraph 7 of the Vertical Guidelines, which states that: '[c]ompanies should not be allowed to re-establish private barriers between member states where state barriers have been successfully abolished.'

Responsible authorities

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

The Commission's Directorate General for Competition is the main administrative body responsible for applying article 101 at an EU level. However, national courts and national competition authorities in each of the European Union's 28 member states also have jurisdiction to apply article 101.

At an EU level, the College of Commissioners (ie, the 28 commissioners appointed by the European Union's 28 member states) adopts infringement decisions under article 101. In practice, however, it is only at the very final stage of the process leading to an infringement decision that the College of Commissioners is formally consulted. At all stages prior to that, decisions are driven by officials at the Directorate General for Competition. It is worth noting, however, that the Advisory Committee on Restrictive Practices and Dominant Positions, which is composed of national competition authority representatives, will also be consulted before an infringement decision is put to the College of Commissioners.

Jurisdiction

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?

article 101 applies to agreements that 'may affect trade between [EU] member states'. Where agreements do not affect trade between member states, but nonetheless have an impact on trade within a given EU member state, they may be considered under that member state's national competition rules (see relevant national chapters). The concept of 'effect on trade between member states' is interpreted broadly and includes 'actual or potential' and 'direct or indirect' effects (see the Commission Notice – Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty, OJ C101, 27 April 2004 (Guidelines on the effect on trade concept)). Where vertical restraints are implemented in just a single member

state, they may also be capable of affecting trade between member states by imposing barriers to market entry for companies operating in other EU member states. The question of whether a given agreement will affect trade between member states has to be addressed on a case-by-case basis. However, the Guidelines on the effect on trade concept clarify that, in principle, vertical agreements relating to products for which neither the supplier nor the buyer has a market share exceeding 5 per cent and for which the supplier does not generate EU-wide revenues exceeding €40 million should not be considered capable of having the requisite effect on trade.

Agreements concluded by public entities

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

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

Sector-specific rules

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.

Until recently, distribution agreements relating either: to the purchase, sale or resale of new motor vehicles or spare parts; or to the provision of repair and maintenance services by authorised repairers, were covered by a separate sector-specific block exemption. However, as of 1 June 2013, vertical agreements relating to the purchase, sale or resale of new motor vehicles have been analysed under the general Vertical Block Exemption Regulation (see question 18), meaning that only agreements for the distribution of spare parts and for the provision of repair and maintenance services continue to benefit from a separate sector-specific block exemption regulation. Other industry-specific block exemption regulations exist, but none is focused specifically on 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.

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

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

Agreements

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

The Commission and the EU courts have consistently interpreted the concept of 'agreement' under article 101 in a broad manner. In the 2004 judgment of the Court of Justice of the European Union (CJEU) in *Bayer v Commission*, it was held that, in order for a restriction to be reviewed under article 101, there must be a 'concurrence of wills' among the two parties to conclude the relevant restriction. This 'concurrence of wills' language has been used in a number of subsequent judgments regarding vertical agreements, including the CJEU's 10 February 2011 judgment in *Activision Blizzard v Commission*.

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

It is not necessary for there to be a formal written agreement. Rather, a 'concurrence of wills' (see question 9) reflecting an informal or unwritten understanding will suffice. The form in which that 'concurrence of wills' is expressed is, therefore, unimportant, so long as the parties' intention is clear.

The Commission's Vertical Guidelines also provide guidance on when explicit or tacit acquiescence of one party in the other's unilateral policy may amount to an 'agreement' between undertakings for the purpose of article 101. The Vertical Guidelines state that:

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

Parent and related-company agreements

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

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

Agent–principal agreements

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

In general, article 101 will not apply to an agreement between a 'principal' and its 'genuine agent' insofar as the agreement relates to contracts negotiated or concluded by the genuine agent on behalf of its principal. However, the concept of a 'genuine agent' is narrowly defined (see question 13).

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

Further, the Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1). Collusion could be facilitated where: 'a number of principals use the same agents while collectively excluding others from using these agents, or

when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals'.

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

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

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

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

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

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

The commitments accepted by the Commission included that Apple and the publishers would terminate e-book agency agreements which provided for publishers – as principals – to determine consumer prices (see questions 19 to 22) and which included most-favoured-customer clauses (see questions 24 and 25).

Although the Commission's investigation appears to have considered issues relating to the concept of genuine agency, the fact that the case was closed by the Commission accepting commitments means that there is no detailed discussion of the concept of genuine agency in an online environment.

Intellectual property rights

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

Where the 'centre of gravity' of a given vertical agreement is the licensing of IPRs, EU competition rules are applied somewhat differently. The relevant considerations go beyond the scope of this publication and include the application of the Commission's Technology Transfer Block Exemption (which was renewed in March 2014). The Vertical Block Exemption and the Commission's Vertical Guidelines will apply to agreements granting IPRs only where such grants are not the 'primary object' of the agreement, and provided that the IPRs relate to the use, sale or resale of the contract products by the buyer or its customers.

Analytical framework for assessment

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

article 101 may apply to vertical restraints (as defined in question 2) provided they are not:

- concluded by public entities carrying out non-economic activities (see question 6);
- 'genuine agency' arrangements (in most cases – see questions 12 and 13); or
- concluded among related companies (see question 11).

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

First, does the agreement lead to an appreciable effect on trade between member states of the European Union? (See questions 5 and 8.) If there is no effect on trade between member states, then article 101 will not apply (but member-state-level competition rules may apply).

Second, if there is an appreciable effect on trade between member states, does the vertical agreement contain a hard-core restraint? Hard-core vertical restraints are:

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

The Vertical Guidelines also state that certain restrictions on online selling can qualify as hard-core restraints (see questions 31, 32 and 35).

If the agreement contains a hard-core restraint, it:

- will not benefit from the safe harbour created by the Commission's De Minimis Notice (see question 8);
- will not benefit from the Vertical Block Exemption's safe harbour (see question 18); and
- is highly unlikely to satisfy the conditions of article 101(3).

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

Third, if the agreement contains no hard-core vertical restraints, are the parties' positions on the relevant markets sufficiently minor such that the Commission's De Minimis Notice may apply? If the criteria of the De Minimis Notice are met (question 8), then the Commission will not consider that the agreement falls within article 101(1) as it does not 'appreciably' restrict competition.

Fourth, does the agreement fall within the Vertical Block Exemption? (See question 18.) If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a safe harbour and thus not be deemed to infringe article 101. This safe harbour will apply in relation to decisions taken not only by the Commission but also by member state competition authorities and courts in their application of article 101.

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

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?

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

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

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

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

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

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

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

As noted in question 16 in relation to supplier market shares, the Commission may also take into account the cumulative impact of a buyer's agreements when assessing the impact of vertical restraints on competition in a given purchasing market. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101. Article 6 of the Vertical Block Exemption also allows the Commission, by regulation, to disapply the Vertical Block Exemption to parallel networks of similar vertical restraints where they cover more than 50 per cent of a relevant market.

Block exemption and safe harbour

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.

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

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

If the Vertical Block Exemption is to apply, neither the supplier's nor the buyer's market share can exceed 30 per cent on the relevant market for the products in question. The extension of this threshold to include buyer market shares in all cases (see question 17) has significantly reduced the number of vertical agreements that will qualify for protection under the Block Exemption Regulation's safe harbour.

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

Where the agreement contains hard-core restraints (see question 15), the safe harbour created by the Vertical Block Exemption will not apply at all. This means that other, lesser, restraints in the agreement that would otherwise have benefited from the certainty of protection provided by the Vertical Block Exemption will not be able to benefit from such protection.

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

Types of restraint

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

The Commission considers that the setting of minimum resale prices constitutes a hard-core restriction of competition. As such, it will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and is generally considered unlikely to qualify for exemption under article 101(3).

Of equivalent effect to clear-cut price-fixing restrictions are agreements fixing the maximum level of discount or making the grant of rebates or reimbursement of promotional costs conditional on adhering to certain price levels, amongst others. Setting maximum resale prices or 'recommended' resale prices from which the distributor is permitted to deviate without penalty may be permissible (provided these do not amount to fixed or minimum selling prices as a result of pressures from, or the offer of incentives by, the seller). Note, however, that the Commission can view such arrangements with suspicion on concentrated markets, as it considers that such practices may facilitate collusion among suppliers. Since the adoption of the Vertical Guidelines in 2010, the Commission has not adopted any decisions imposing fines in relation to resale price maintenance. However, in the 2012–2013 *e-books* case (see question 13), the Commission appears to have considered whether the publishers' ability to determine prices for e-books sold via online platforms might have constituted resale price maintenance. However, since the case was closed by way of the Commission accepting commitments, rather than adopting a full decision, the extent to which resale price maintenance might have been relevant to the Commission's case is not clear.

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'?

No Commission decisions have focused on this specific area. However, the Vertical Guidelines suggest that the Commission will actively consider arguments as to the efficiencies associated with resale price maintenance restrictions where such restrictions are of a limited duration, and relate to the launch of a new product or the conduct of a short-term low-price campaign. Nevertheless, since there have not been any recent Commission decisions focusing on resale price maintenance, it remains to be seen how the Commission's new approach in this area might be put into practice.

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

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

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

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

The Vertical Guidelines also note that direct or indirect means of price-fixing can be made more effective when combined with measures such as a price-monitoring system, the printing of a recommended resale price on the product itself or the enforcement of a most-favoured-nation clause (see question 25 and the discussion of the *e-books* case in question 13).

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

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

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

- the introduction of a new product;
- the conduct of a short-term low-price campaign that will also benefit consumers; or
- the sale of 'experience' or 'complex' products in relation to which it is necessary for the supplier to support retailers providing desirably high levels of pre-sales service.

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.

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

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 'most-favoured-nation' (MFN) restriction at the wholesale level – in isolation – will constitute a restriction of competition falling within article 101(1). In the event that such restriction were deemed to fall within article 101(1), it should nonetheless fall within the safe harbour created by the Commission's Vertical Block Exemption, provided that the other criteria for its application are met. However, there are indications that the Commission considers that wholesale MFN clauses might serve to restrict competition in certain circumstances. In 2005, the Commission closed its investigation into E.ON Ruhrgas/Gazprom when the parties agreed to remove territorial restrictions imposed on Ruhrgas, and a most-favoured-customer provision that obliged Gazprom to offer gas to Ruhrgas on similar conditions to the conditions on which Gazprom offered gas to Ruhrgas's competitors. The Commission's rationale for insisting on the removal of the most-favoured-customer clause was that it wanted competition to develop between distributors purchasing gas from Gazprom.

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.

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

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.

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

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.

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

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

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?

Restrictions preventing a buyer selling the contract products from one EU member state into another can be among the most serious infringements of article 101, attracting Commission fines of €102 million in 1998 for car manufacturer Volkswagen (reduced to €90 million on appeal) and €149 million in 2002 for computer games manufacturer Nintendo (reduced to €119 million on appeal).

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

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

Furthermore, where a supplier sets up a network of exclusive distributorships and prevents each buyer from 'actively' selling into a territory granted exclusively to another buyer (or reserved to the supplier itself), the Commission has accepted that this may be pro-competitive since it may lead to an increase in inter-brand competition.

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

The Commission's Vertical Guidelines also set out two very specific cases in which seemingly hard-core territorial sales restrictions may, on closer inspection, be deemed to fall outside the scope of article 101(1) or fulfil the conditions for exemption under article 101(3). First, restrictions on passive sales by other buyers where one buyer is the first to sell a new brand – or the first to sell an existing brand in a new market – and has to make substantial investments in order so to do, may fall outside article 101(1) for the first two years for which the buyer sells the contract goods. Second, where a buyer is engaged in genuine testing of a new product in a limited territory, restrictions on active sales outside that territory may not fall within article 101(1) for the period of genuine testing.

On 13 January 2014, the Commission announced that it had opened formal proceedings examining licensing agreements between several major US film studios and the largest European pay-television companies on the basis that the licensing agreements might hinder the provision of pay-TV services across EU borders. The Commission intends to investigate whether these licensing agreements, which grant the TV companies absolute territorial protection, infringe article 101. The Commission is investigating, in particular, whether the agreements hinder the ability of pay-TV companies to respond to unsolicited requests from potential subscribers in other member states, and whether these agreements restrict pay-TV companies from providing access to their services to existing subscribers who move or travel abroad.

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

Customer restrictions give rise to issues similar to those arising in relation to territorial restrictions (see question 28) and tend to be viewed by the Commission as hard-core restrictions. As such, absolute restrictions on a buyer's sales to particular classes of customer will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption and will seldom qualify for exemption under article 101(3). There are certain key exceptions to this rule.

First, as with territorial restrictions (see question 28), if the customer restriction applies only to active sales (ie, it does not restrict passive or unsolicited sales) to customers of a class allocated exclusively to another buyer (or reserved to the supplier itself), the arrangement may fall within the Vertical Block Exemption's safe harbour, provided its various conditions are met (including supplier and buyer market share below 30 per cent). However, according to the Commission's Vertical Guidelines, if such customer restrictions are imposed by suppliers having a market share in excess of 30 per cent, they are unlikely to qualify for individual exemption under article 101(3). Nevertheless, the Vertical Guidelines state that the case for an individual exemption in such cases is strongest where the dealer invests in specific equipment, skills or know-how, for new or complex products and where products require adaptation to the needs of individual customers.

Second, restrictions on a wholesaler selling direct to end-users may also fall within the Vertical Block Exemption's safe harbour.

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

Fourth, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors (see question 35).

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

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

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

However, objectively justifiable restrictions on the uses to which a buyer (or subsequent buyer) puts the contract goods are permissible and will not fall within article 101(1). The Commission's Vertical Guidelines suggest that this may be the case where the aim of a restriction is to implement a public ban on selling dangerous substances to certain customers for reasons of safety or health. Nonetheless, for such restrictions to be objectively justifiable, the supplier would likely have to impose the same restrictions on all buyers and adhere to such restrictions itself.

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

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

The Vertical Guidelines provide examples of the types of internet-related restrictions which will be deemed to amount to a hard-core restriction on passive sales outside of a buyer's allocated territory or customer group (see questions 28 and 29) and which will therefore prevent the application of the safe harbour set out in the Vertical Block Exemption. Such hard-core internet restrictions include:

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

However, in selective distribution systems (see questions 33 to 38), the Vertical Guidelines clarify that a supplier may require a buyer to:

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

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

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

In its 2001 *Yves Saint Laurent Parfums* investigation, the Commission noted in a press release that a ban on internet sales, even in a selective distribution system, was a restriction on passive sales to consumers that could not be covered by the Vertical Block Exemption. However, Yves Saint Laurent Parfums' selective distribution system was approved as it allowed authorised retailers already operating a physical sales point to sell via the internet.

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

In a press release dated 5 December 2013, the European Commission confirmed that it had carried out unannounced inspections in several member states at the premises of companies active in the manufacture and distribution of consumer electronic products and small domestic appliances. The press release indicates that '[t]he Commission has grounds to suspect that the companies subject to the inspections may have put in place restrictions on online sales of consumer electronic products and small domestic appliances. These restrictions, if proven, may lead to higher consumer prices or the unavailability of products through certain online sales channels'. At time of writing, there had been no further update on the case beyond the Commission's December 2013 press release.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The Commission's Vertical Guidelines do not distinguish between different types of internet sales channel, but they do provide some guidance on the use of third-party platforms. The Vertical Guidelines note that, in particular in a selective distribution context, a supplier may require that buyers use third-party platforms only in accordance with the standards and conditions agreed between the buyer and supplier for the buyer's use of the internet. A supplier may also require that customers do not visit the buyer's website through a site carrying the name or logo of a third-party platform if the buyer's website is hosted by that same third-party platform. To date, however, there have been no Commission vertical restraints decisions distinguishing between different types of online sales channel. However, the Commission's current investigation in the consumer electronics products and small domestic appliances sector may well deal with differential treatment of different types of online sales channel (see question 31).

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

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

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

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

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

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

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

In its October 2011 judgment in *Pierre Fabre Dermo-Cosmétique*, the CJEU considered the application of the *Metro* criteria on selective

distribution in the context of a ban on internet sales to consumers. The criteria for inclusion in the Pierre Fabre network of buyers were accepted to be objective and laid down uniformly for all buyers but the key question was whether a ban on internet sales could be justified by reference to the supplier's desire to protect the image of its products. The CJEU concluded that: '[t]he aim of maintaining a prestigious image of those products is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within article 101(1) TFEU.'

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

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

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

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

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

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

However, the Commission will regard as a hard-core restriction any obligation in a selective distribution system which dissuades authorised dealers from using the internet by imposing criteria for online sales which are not equivalent to criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales but they should pursue the same objectives and should achieve comparable results. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution methods. See also the cases discussed in question 31.

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

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

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

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

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

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

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

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

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

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

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

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

According to the Vertical Guidelines, 'exclusive purchasing' is most likely to contribute to an infringement of article 101 where it is combined with other arrangements, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 33), an exclusive purchasing obligation would have the effect of preventing the members of the system from cross-supplying to each other and would therefore constitute a hard-core restriction, falling within article 101.

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

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

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

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete obligation) may fall within article 101(1), though this will depend on the exact effects of the restriction in question which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the relative ease of market entry for other potential suppliers.

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

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

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

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

The Commission considers such clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products (see question 41). They are, therefore, subject to a similar antitrust assessment. In particular, the Commission identifies as equivalent to a non-compete obligation, the following:

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

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

In an exclusive distribution network, as a corollary to limiting the buyer's ability actively to sell the contract products into other exclusively allocated territories, the supplier often agrees not to supply the products in question directly itself and not to sell the products in question to other buyers for resale in the assigned territory. Although the Commission's Vertical Guidelines do not deal separately with the restrictions imposed on the supplier in this kind of arrangement, the Vertical Guidelines do acknowledge that the restrictions on the supplier and the buyer 'usually' go hand in hand. Such systems should therefore be assessed in accordance with the framework set out at question 28.

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

As noted in question 43, the Commission's Vertical Guidelines do not deal in great detail with restrictions imposed on suppliers. However, a restriction on a component supplier from selling components as spare parts to end-users or to repairers that are not entrusted by the buyer with the repair or servicing of the buyer's products is considered a hard-core restriction of competition. As such, these restrictions will almost always fall within article 101(1), will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will seldom qualify for exemption under article 101(3).

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

The Vertical Guidelines provide guidance on upfront access payments (fixed fees paid by suppliers to distributors in order to access their distribution network and remunerate services provided by the retailers), and category management agreements (where the distributor entrusts the supplier with the marketing of a category of products, including the supplier's products and the supplier's competitors' products). These arrangements will generally fall within Vertical Block Exemption Regulation when both the supplier's and buyer's market share do not exceed 30 per cent.

The Vertical Guidelines also deal with a supplier-specific restriction termed 'exclusive supply', which covers the situation in which a supplier agrees to supply only to one buyer in the entire European Union. The main anti-competitive effect of such arrangements is the potential exclusion of competing buyers, rather than competing suppliers. As such, the Vertical Guidelines explain that it is the buyer's market share that is most important in the assessment of such restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are below 30 per cent, and the exclusive supply agreements are shorter than five years, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption.

Notifying agreements

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

The Commission abolished its formal prior-notification system as part of the 'modernisation' reforms implemented by Regulation No. 1/2003 on 1 May 2004. Subject to the possibility of making requests for informal guidance in novel cases (see question 47), a notification of a vertical agreement is therefore neither necessary nor, in general, advisable. To this extent, companies are now obliged to form their own view on whether an agreement restricts competition for the purposes of article 101(1) and, if so, whether it qualifies for exemption under article 101(3).

Authority guidance

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

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

However, the Commission is highly selective in choosing the arrangements in relation to which it will give informal guidance and, given the existence of the Vertical Block Exemption and the Vertical Guidelines, it is unlikely that the Commission would issue individual guidance in relation to vertical restraints. In general, the Commission considers that parties are well

Update and trends

In 2014, the Commission closed a number of investigations regarding vertical restraints without adopting prohibition decisions. In essence, the Commission appears to have considered that the cases were either not of sufficient importance or too difficult to prove. Although in the course of 2015 the Commission may progress its investigations into territorial restrictions in the pay-TV sector, or online sales restrictions in relation to domestic appliances, the more important developments will likely come from the EU courts. The General Court in particular is set to hear a number of appeals in cases that touch on the crucial distinction between restrictions of competition 'by object' (where the Commission need not prove restrictive effects) and restrictions of competition 'by effect' (where the Commission has to prove restrictive effects). With the 2014 judgment in the *Cartes Bancaires* case appearing to advocate a restrictive approach to what might constitute a restriction of competition 'by object', but a 2013 judgment in *Allianz Hungaria* advocating a more expansive approach, upcoming judgments in cases such as *Lundbeck v Commission* will be eagerly awaited.

placed to analyse the effect of their own conduct. The authors are not aware of a case where the Commission has offered informal guidance to parties.

Complaints procedure for private parties

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

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

Enforcement

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

In the 14 years from 1 January 2001 to 1 January 2015, the Commission took around 17 vertical restraints infringement decisions under article 101. This includes only cases in which the Commission:

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

Since 2011, the Commission has opened (and not yet closed) formal investigations into consumer electronics and domestic appliances, cross border aspects of pay television, and aspects of the credit default swaps markets, all of which appeared to relate, in part, to vertical restraints.

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

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

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

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

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

In the 13 years from 1 January 2001 to 1 January 2014, the Commission imposed the following fines on the following companies in cases relating to vertical restraints (some of which were reduced or overturned on appeal): Peugeot – €49.5 million; Topps – €1.59 million; Yamaha – €2.56 million; Nintendo – €149 million; DaimlerChrysler – €71.8 million; Volkswagen – €30.96 million. In a number of cases, the Commission did not impose fines but instead required the companies to introduce behavioural or structural remedies, or both, for example:

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

While the Commission still actively enforces its rules on vertical restraints, especially in the motor vehicle sector, it is fair to suggest that market liberalisation, the reduction of anti-competitive state aid and the fight against cartels have been higher enforcement priorities in recent years. Since suppliers often organise distribution at a national level within individual member states, there has been more frequent enforcement of national and EU antitrust rules on distribution by member state-level competition authorities than by the Commission. However, in some individual cases the Commission may consider that it is better placed to enforce the EU rules on vertical restraints than individual, member state-level competition authorities.

Investigative powers of the authority

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

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

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

Private enforcement

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

Although the EU adopted a directive on antitrust damages actions in November 2014, with the express intention of making it easier to bring antitrust damages actions in the EU, private enforcement of antitrust breaches is still in its infancy. Private damages actions cannot be brought

before the Commission or before the EU courts and must instead be brought in the relevant courts of the member states having jurisdiction to hear the case in question. National rules on jurisdiction, recovery of legal costs, remedies and who can bring a claim vary widely across the European Union, with certain jurisdictions, such as the United Kingdom, being more claimant-friendly than others. The key case before the EU courts is *Courage v Crehan*, a case referred from the UK courts, in which the CJEU states that private parties must be able to claim damages in relation to infringements of article 101. The CJEU also clarified that parties to infringing agreements are themselves able to claim damages if, as a result of their weak bargaining positions, they cannot be said to be wholly responsible for the infringement.

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

Other issues

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

The most significant points of the European Union's system for the regulation of vertical restraints are:

- the absence of per se rules;
- the remnants of a formalistic approach as seen in the application of the Vertical Block Exemption which now stands as something of an anathema in a global antitrust environment dominated by guidelines, other 'soft laws' and more effects-based, rule-of-reason-type economic assessments;
- the importance it attaches to competition law as a tool for assisting in the development of the European Union's single market, as reflected in its decisions on territorial restrictions in cases such as Volkswagen and Nintendo; and
- the fact that the jurisprudence of the EU courts concerning the application of EU competition rules is binding on national-level enforcement agencies and courts in the European Union's 28 member states.

SIDLEY AUSTIN LLP
SIDLEY

Stephen Kinsella OBE **skinsella@sidley.com**
Patrick Harrison **pharrison@sidley.com**
Rosanna Connolly **rconnolly@sidley.com**

Woolgate Exchange
25 Basinghall Street
London EC2V 5HA
United Kingdom
Tel: +44 20 7360 3600
Fax: +44 20 7626 7937

NEO Building, Rue Montoyer 51
1000 Brussels
Belgium
Tel: +32 2 504 6400
Fax: +32 2 504 6401

www.sidley.com

France

Muriel Perrier
Vivien & Associés

Antitrust law

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

Legal rules, applicable to vertical restraints in France, prohibit agreements and concerted practices or behaviour between independent companies that prevent, restrict or distort competition in a market (article L420-1 of the French Commercial Code). There are no French 'block exemption' regulations or guidelines as is the case under EU law. However, the French competition authorities (the Competition Authority, which has replaced the Competition Council) apply the EU regulation and guidelines for the interpretation and implementation of French competition rules to vertical restraints (see in particular, Decision No. 02-D-01 of 22 January 2002, www.autoritedelaconcurrence.fr; Decision No. 03-D-53 of 26 November 2003). In the case of restriction of competition, an individual examination of the agreement on its own merits is carried out in order to determine whether an individual exemption may be granted (article L420-4 of the French Commercial Code).

French law contains specific rules prohibiting the abuse of economic dependency. Theses rules mainly apply to situations where one commercial partner dominates another, without having a dominant position as such within the meaning of the specific rules on dominant position. It is the behaviour of the dominating partner that can, in certain circumstances, be deemed abusive and thus prohibited.

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?

There is no legal definition of the concept of vertical restraint or a list of vertical restraints covered by the prohibition of article L420-1 of the French commercial code. As French competition authorities interpret French competition rules in light of the guidelines of the European Commission (as stated in question 1), the concept and types of vertical restraints subject to French competition law are similar to those defined under EU competition law.

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?

The aim of the competition rules is mainly economic (ie, to protect competition); through the protection of competition, it is consumer welfare that is intended to be secured. Employment, consumer or small business protection may be also taken into account in the assessment of compliance with French competition rules regarding vertical restraints.

Responsible authorities

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

The Competition Authority (previously the Competition Council) is the main body responsible for enforcing competition rules. For more details, please see question 51.

The Competition Authority may have to inform and obtain advice from specific sectoral regulators for the following matters: the Autorité de regulation des communications électroniques et des postes (ARCEP) for telecommunications matters, the Commission de régulation de l'énergie (CRE) for the energy sector, the Conseil Supérieur de l'Audiovisuel (CSA) for television and radio matters, and the Autorité de Contrôle Prudentiel for matters involving banks and financial institutions.

The Law on Modernisation of the Economy of 4 August 2008 has introduced the possibility for the Ministry of the Economy (instead of the Competition Authority) to examine practices having a purely local dimension. Such powers should remain residual insofar as their exercise implies that the practices concerned have not been already referred to the Competition Authority. The Ministry of the Economy will have injunction powers as well as settlement powers, and may refer matters to the Competition Authority in case of non-compliance by the companies affected by its decision.

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?

French competition rules apply to any vertical restraints likely to affect or restrict competition in the French territory or a part of it. As a consequence, practices or agreements from companies not located in France may be also subject to French competition rules if such practices or agreements have an effect in the French territory.

French competition rules have been applied in an internet context where the supplier wishes to prohibit the sale of its products both from its distributors having 'bricks and mortar' on the French territory and any other resellers in France (including the 'pure internet players' selling products in France only through a website).

Agreements concluded by public entities

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

Pursuant to article L410-1 of the French Commercial Code, competition rules apply to production and services activities, including those carried out by public entities. Public entities are subject to French competition rules relating to vertical restraints when they carry out economic activities. However, specific rules concerning the competence of the courts and competition authorities to examine such agreements or restraints may be applicable.

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.

French competition rules and rules relating to vertical restraints are applicable to all the sectors of economy and industry, without any exceptions.

General exceptions

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

French competition rules apply to agreements and practices likely to have an appreciable effect on competition in France.

In this respect, article L464-6-1 of the French Commercial Code sets out a de minimis threshold similar to the one set out by the EU law. Pursuant to this provision:

> *The Competition Authority may decide [...] that there are no grounds for continuing the proceedings when the practices referred to in Article L420-1 do not relate to contracts entered into pursuant to the Public Procurement Code and the cumulative market share of the companies or bodies which are parties to the challenged agreement or practice does not exceed [...] 15 per cent of one of the markets affected by the agreement or practice when it relates to an agreement or practice between companies or bodies which are not existing or potential competitors on one of the markets concerned.*

Nevertheless, there are four exceptions; article L464-6-1 does not apply to agreements and practices that contain:

- restrictions that, directly or indirectly, individually or together with other factors over which the parties may have influence, are intended to fix selling prices, limit production or sales, or divide up markets or customers;
- restrictions on unsolicited sales to end-users made by a distributor outside its contractual territory;
- restrictions on sales by the members of a selective distribution network operating as retailers on the market, regardless of the possibility of forbidding a member of the distribution network from working from an unauthorised place of business; or
- restrictions applied to cross-deliveries between distributors within a selective distribution network, including those between distributors operating at different commercial phases.

Agreements

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

Article L420-1 of the French Commercial Code applies only if the existence of an agreement or a concerted practice between at least two companies is established. However, there is no legal definition of agreement or concerted practice as such. Like the European Commission, the Competition Authority examines the agreement or concerted practices in the legal and economic context and may take into account the existence of network effects of similar agreements applied by other companies (Court of Appeal of Paris of 7 May 2002: 'the restrictive effect of agreements shall be assessed taking into account the nature and importance of the agreements on the market concerned, the existence of real possibilities for a new competitor to enter in the market, and the competition conditions on the market, ie, the number and size of the suppliers active on the market, the degree of market saturation, the customers' loyalty to the existing trademarks.').

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?

Antitrust law may be engaged by an informal or unwritten understanding provided that a concurrence of wills between the companies is demonstrated. The French competition authorities expressly refer to the *Bayer* judgment of the European Court of First Instance (now the General Court) (Decision No. 03-D-66, *Renault*, confirmed by the Court of Appeal of Paris, 29 June 2004 and the Supreme Court (Cour de Cassation), 12 July 2005).

Parent and related-company agreements

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

Vertical restraints between a parent company and a related company generally do not fall within the scope of prohibition of vertical agreements set out by French competition rules. Like EU law, French competition authorities consider that agreements or practices between intra-group companies, namely companies that belong to the same group, do not fall into the scope of the prohibition of anti-competitive agreements, as long as the subsidiary does not have any economic autonomy regarding its parent company. The concept of economic autonomy regarding the parent company also applies in case of agreements between related companies of the same parent company (see in particular Decision No. 03-D-01): this implies, however, that the parent company defines the strategy of the subsidiaries or takes the main commercial decisions (or both).

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?

French competition authorities apply principles derived from EU competition law to agent–principal agreements; thus, as a matter of principle, antitrust law does not apply to agent–principal agreements.

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?

French competition authorities consider that the agent must not have any economic autonomy regarding the principal in order for the relationship to constitute an agent–principal agreement and not fall into the scope of the prohibition of anti-competitive agreements (see in particular Decisions No. 06-D-18 and No. 06-D-23).

Intellectual property rights

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

Under French law, there are no specific rules that govern agreements related to intellectual property rights. Like EU law, French competition rules on vertical agreements apply only to vertical agreements that contain provisions relating to the grant of intellectual property rights to be used in connection with the use or sale of goods or services (eg, franchise agreements). Please note that agreements, the core purpose of which is related to intellectual property rights, may fall into the scope of EU regulation relating to technology transfer agreements.

Analytical framework for assessment

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

The analytical framework used by the French competition authorities is very similar to the EU framework.

First, French competition authorities check whether the vertical agreement contains a hard-core restraint; the hard-core restraints under French law are similar to those under EU law, for example, fixing of affixed or minimum resale price or restrictions on the territory in which the buyer can resell the products.

Second, if the agreement does not contain any hard-core restriction, the question is whether the vertical agreement is likely to affect or restrict competition in the French territory (appreciable effect on competition). It is considered that a vertical agreement entered into by a supplier and a buyer which each have a market share that does not exceed 30 per cent (provided that the other conditions laid down by the Competition authorities, pursuant to principles derived from EU law, are fulfilled) has limited negative effects on the market and that in any case, such effects are counterbalanced by the positive effects which such an agreement is able to induce.

If the agreement has an effect in the market, and the supplier's or the buyer's market share exceeds the 30 per cent threshold, it has to be determined whether conditions for an individual exemption under article L420-4 of the French Commercial Code are met or not. In this case, an individual examination of the agreement on its own merits is to be carried out.

It should be noted that the assessment made by the French competition authorities is carried out taking into account both the EU regulations and guidelines (applicable as a guide for the interpretation of French competition rules) and decisions taken by the European Commission and the European Court of Justice.

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?

The French competition authorities consider the market position of the supplier and assess the vertical agreement in the global and economic context and take into account the network effects of similar agreements applied by other competitors, and the question of whether it can lead to a foreclosure of the market. In one case (French Supreme Court, 18 November 1997; Decision No. 00-D-82 of 26 February 2001; Court of Appeal of Paris of 7 May 2002) the cumulative market share of the companies involved in the examined distribution agreements (with an exclusivity obligation) was 66 per cent; it was considered as insufficient as such to establish the foreclosure of the market. The Court of Appeal stated that there was no evidence of the existence of anti-competitive effects induced by the cumulative effect of parallel distribution agreements with an exclusivity obligation, particularly given that new companies entered the market.

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?

Before the implementation of Commission Regulation EU No. 330/2010, the Competition Authority considered the market position of the buyer insofar as the agreement included an exclusive supply obligation. In its decision No. 08-MC-01 regarding the distribution agreement between France Telecom and Apple for the marketing of iPhones in France, the Competition Authority has specifically considered the market position of the buyer (ie, France Telecom). It has considered that owing to the buyer's leading position and the fact that the market for mobile phones is oligopolistic, the exclusivity granted to the buyer (in particular its duration and scope) was likely to reinforce the market position of the buyer or weaken competition between buyers on this market.

In its legal opinion (which has not been rendered in the context of a litigation) No. 10-A-26 of 7 December 2010 concerning food distribution, the Competition Authority considered the market position of both the supplier and the buyer and assessed the vertical agreement in the global and economic context by taking into account the network effects of similar agreements applied by other competitors.

Block exemption and safe harbour

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

As already stated, there is no specific block exemption applicable as such under French competition law. However, the EU block exemption regulation for vertical agreements is applicable as a guide to vertical agreements that have a purely national impact.

Types of restraint

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

The buyer must remain free to determine its resale price. Any restriction on this ability through vertical agreements or practices is a hard-core restraint (Decision No. 93-D-50 of 23 November 1993). On the other hand, when the prices set out in the agreement are maximum or recommended prices, such prices are not prohibited as such, unless there is evidence of concerted practice between the resellers and the supplier (see Decision No. 06-D-04 of 13 March 2006 and judgment of the Court of Appeal of Paris of 26 June 2007, in connection with practices between manufacturers of luxury perfumes and their distributors; Decision No. 11-D-19 of 15 December 2011 and judgment of the Court of Appeal of Paris of 16 May 2013). The body-of-evidence method to demonstrate the existence of such price-fixing agreement is based on the following three main elements:

- discussion between suppliers and distributors of selling prices to consumers;
- actual application of these prices by the distributors; and
- implementation by suppliers of a pricing control system over the distributors.

Note in addition that if any person or company imposes a minimum on the resale price of a product or service, or on a trading margin, their actions may be punished by a fine, irrespective of the impact on competition.

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'?

French competition authorities have not considered 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. Insofar as the EU guidelines regarding this issue have changed, the Competition Authority might be ready to admit resale price maintenance in such specific contexts, if the companies concerned are able to demonstrate the efficiencies induced by such restriction.

Although decisions in that respect remain rare with no recent developments, French ordinary courts have admitted provisions included in a selective distribution agreement, which prevented the retailer from having 'discount' practices and a low price policy (Court of Appeal of Paris, 30 March 1992). Such provisions have been considered as justified as regards the will of the supplier to avoid advertising on rebates not in compliance with the brand status and the 'premium' character of the products. Therefore, the Competition Authority might be ready to rely on such case law and admit resale price maintenance in this specific situation, as the case may be, provided that such restriction is able to generate efficiencies.

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

To date, there have been no decisions from the French competition authorities in which links between resale price maintenance and other forms of restraints have been specifically analysed.

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

At the time of writing, there have been no decisions relating to resale price maintenance addressing the efficiencies that can justify such restrictions.

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.

Analysis from the French competition rules standpoint of such restriction is similar to the analysis to be made under EU antitrust law. In addition, article L442-6 of the French Commercial Code prohibits per se most-favoured-nation clauses pursuant to which the supplier and the buyer agree that the other party shall automatically benefit from the most favourable terms granted to competitors. The most-favoured-nation clause is therefore void and may give rise to damages and a civil fine regardless the position of the parties in the market and its real anti-competitive effects.

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.

See question 23.

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.

See question 23.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price is assessed.

To date, there has been no decision from the French competition authorities on either minimum advertised price policy or internet minimum advertised price clauses. It is likely that the French competition authorities will consider such clauses as hard-core restrictions if a large part of the distributors strictly apply the prices set by the supplier without offering discounts to their customers. In addition, checkout discounts that are related to the customers and not to the products themselves cannot be taken into account in assessing the distributors' power to freely determine their prices insofar as their pricing policy is analysed in consideration of the prices advertised at the point of sale, minus the discounts that apply to all customers (French Supreme Court, 11 June 2013). Furthermore, as promotional discounts and sales relative to consumers are strictly regulated in France, distributors are entitled to apply discounts under certain conditions; should those conditions not be met, the distributors have no choice but to apply the prices set by the supplier, which results in an anti-competitive practice.

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.

See question 23.

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?

Under French law, like in EU law, prohibition of resale in certain territories may lead to market partitioning, which is unlawful. The de minimis rule derived from article L464-6-1 of the Commercial code does not apply to such restriction. French competition authorities have considered unlawful contractual provisions preventing the buyer from making any sales outside its contractual territory, even if such sales were made following requests from the customers themselves ('passive' or unsolicited sales) (see in particular Decision No. 91-D-22 of 14 May 1991 and Decision No. 00-D-28 of 4 April 2000; Decision 12-D-10 of 20 March 2012). Nevertheless, like EU law, the supplier may restrict 'active' sales by the buyer in the territory that has been exclusively allocated to another buyer (the competition authorities check whether the market share of the supplier or the buyer is below 30 per cent; if so, the restriction is viewed as lawful without any further examination of its impact on the market).

29 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 shall be assessed in a similar way to territory restrictions (see question 28). In Decision No. 07-D-24 of 24 July 2007, the Competition Council considered as unlawful an obligation imposed on distributors to resell the products only to the customers allocated to them on an exclusive basis.

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

To date, there has been no decision from the French competition authorities on the specific issue of the restriction on the uses to which a buyer (or subsequent buyer) puts the contract products. However, it can be anticipated that the analysis would be similar to the analysis under EU law.

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

In the recent past, the Competition Authority examined several cases concerning restrictions to the sale of products on the internet imposed by suppliers operating selective distribution networks (Decision No. 06-D-24 dated 24 July 2006; Decision No. 06-D-28 dated 5 October 2006; Decision No. 07-D-07 dated 8 March 2007; Decision No. 08-D-25 dated 29 October 2008).

In these decisions, the authority considered that the prohibition on selling on the internet, as a matter of principle, of any products marketed as part of a selective distribution network, is anti-competitive (whatever the position of the supplier in the market is), unless exceptional circumstances exist. The recent rulings of the European Court of Justice whereby it answered a question referred for a preliminary ruling by the Court of Appeal of Paris (Court of Appeal of Paris, 29 October 2009) and of the Court of Appeal of Paris confirmed the aforementioned decisions of the Competition Authority (CJEU, 13 October 2011, case C-439/09, *Pierre Fabre Dermo-Cosmetique*; Court of Appeal of Paris, 31 January 2013). Subsequent to this decision, the Competition Authority rendered a decision against Bang & Olufsen for having prohibited its distributors from selling the brand's products online (Decision No. 12-D-23 of 12 December 2012 confirmed by the Court of Appeal of Paris, 13 March 2014).

Other major restrictions on selling on the internet have been deemed comparable to a straightforward prohibition on sales on the internet: the obligation for the distributors to have a website designated only for the sale of the products; the need to conduct a cosmetic diagnosis using video-conferencing equipment or by e-mailing digital photos; a ban on using the cosmetics brand as a key word in search engines; the obligation to have a payment point solely for dermo-cosmetic products; or the obligation to dispense advice not just in French but also in several other languages.

The Competition Authority has recently published an unfavourable opinion on the draft decree of the Minister of Social Affairs and Health regarding 'good practice' in the dispensing of medicines by electronic means by a pharmacist having a pharmacy (Legal Opinion No. 13-A-12, 10 April 2013). The authority considers that the text contains a significant set of restrictions for online sales of medicines that are not justified by public health considerations (such as the obligatory alignment of internet sales prices with pharmacy shop prices). It found that the development of online sales of medicinal products were thus restricted. The authority sets out in its opinion several recommendations such as extending online sales to all medicinal products not subject to prescription (ie, both medicinal products available freely in a shop and those available upon request to the pharmacist) and enabling pharmacists to offer both medicinal products and para-pharmaceutical products on the same website. The Minister of Social Affairs and Health removed the majority of the provisions considered as restrictive of competition and published the decree in June 2013. However, despite the authority's opinion and the decision of the French Council of State dated 17 July 2013, this text provides that only medicinal products that are available on self-service counters may be sold online.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The French Competition Authority considers that the suppliers operating selective distribution networks may refuse to supply 'pure internet players' and deal only with authorised distributors having both 'bricks and mortar' and a website (Decision No. 06-D-24 dated 24 July 2006; Legal Opinion No. 12-A-20 dated 18 September 2012).

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

Like EU law, French competition authorities consider selective distribution systems as justified and as not raising particular difficulties under French competition rules, provided that they meet a number of conditions:

- the use of selective distribution must be required to preserve the quality of the product and ensure its proper use (high-quality products, luxury products, technically complex products);
- selective distribution systems must be based on purely objective qualitative criteria, be implemented uniformly to all potential resellers, and shall not be applied in a discriminatory manner;
- the conditions imposed must be strictly proportionate to the nature of the product and to the achievement of that purpose;
- there must be no hard-core restrictions such as prohibition of competitive products, maintenance of resale prices or prohibition of passive sales; and
- particular attention is paid to the market position of the supplier.

In principle, quantitative criteria are not prohibited as such; they can be combined with purely qualitative criteria. Yet, as they constitute restrictions on competition, the supplier must be able to justify them as regards article L420-4, I, 2 of the Commercial Code and, in this respect, with regard to efficiencies induced by such a quantitative selection.

To date, the quantitative criteria have been authorised only in cases where the supplier has a market share below 30 per cent. Insofar as the EU guidelines regarding this issue have changed, the French Competition Authority may also take into consideration the buyer's market share in the near future.

Up to the French Supreme Court's decision to refer the question to the European Court of Justice on how to interpret the terms 'specified criteria' (Cour de Cassation, 29 March 2011), it had adopted a restrictive approach on this specific issue: it required that the criteria used by the supplier be precisely defined and able to ensure an objective application (Cour de Cassation, 28 June 2005, No. 04-15279, *Garage Gremeau v SA Daimler Chrysler France*). The European Court of Justice has ruled, however, that the specific criteria must be interpreted as referring to criteria whose precise content may be verified, but that it is not necessary for such a system to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates (CJEU, 14 June 2012). Subsequent to this EU decision, the French Supreme court has not yet rendered any decision.

The selection criteria do not have to be published as such or be included in a written agreement. This position is confirmed by the European Court of Justice, However, the supplier must be able to prove that the qualitative selection criteria are implemented in a non-discriminatory manner and that the quantitative selection criteria have been defined, which leads in practice to criteria for selection in a written agreement.

Refusal by a supplier to admit a distributor into its network may be challenged before the French ordinary courts, which decide whether the refusal is justified as regards the criteria set forth by the supplier. The candidate will, however, need to prove that it has made a serious proposal in view of integrating the selective distribution network (Court of Appeal of Versailles, 15 September 2011).

34 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?

See question 33.

35 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?

See question 29 on the straightforward prohibition on sales on the internet.

In addition, the Competition Authority has stated that online selling may be legitimately limited solely to approved retailers who have their own physical retail store. It also accepted that this form of selling should be subject to strict conditions, provided that 'the restrictions imposed on this form of selling are proportionate to the objective and comparable to those applicable within the approved distributor's physical sales outlet' (Decision No. 07-D-07 dated 8 March 2007; Legal Opinion No. 12-A-20, dated 18 September 2012). The main conditions deemed by the Competition Authority as acceptable in that respect relate to:

- the quality of the website as demonstrated by adherence to the brand's own graphic charter, or the requirement for a 'dedicated space' earmarked for the sale of products sold on the basis of specific advice (eg, pharmaceutical products);
- the availability of hotlines; and
- the supplier carrying out checks on any abnormal orders for an end-user (notably via an authorisation sought by the distributor).

One should note that the Competition Authority examines the possible cumulative effects that all the conditions imposed by the manufacturer for online sales may induce, and whether such conditions analysed together may prevent the distributors from entering the market (Legal Opinion No. 12-A-20, dated 18 September 2012).

36 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?

Ordinary courts regularly consider actions taken by suppliers in order to obtain injunctions against non-authorised distributors to stop selling the products. In such situations, the supplier must demonstrate that its network is a real selective distribution network and meets the conditions to be considered as a lawful selective distribution network (see question 29).

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

As with any vertical restrictions, the possible cumulative effects of multiple selective distribution systems operating in the same market are taken into account by the French competition authorities.

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

To date, there has been no decision from the French competition authorities on this specific issue.

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

The analysis from the French competition rules' standpoint of restrictions of the buyer's ability to obtain the supplier's products from alternatives sources is similar to the analysis to be made under EU antitrust law. (See chapter on the European Union.)

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

The analysis from the French competition rules' standpoint of restrictions of the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' is similar to the analysis to be made under EU antitrust law.

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

The analysis from the French competition rules standpoint of restrictions of the buyer's ability to stock products competing with those supplied by the supplier under the agreement is similar to the analysis to be made under EU antitrust law.

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

The analysis from the French competition rules' standpoint of the obligation for the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products is similar to the analysis to be made under EU antitrust law. In *Lafarge, Vicat* (Decision No. 07-D-08 of 12 March 2007 and Court of Appeal of Paris, 6 May 2008) the obligation for the buyer to purchase from the supplier a certain amount equivalent to at least 80 per cent of its annual needs, for a indefinite duration or for a duration exceeding five years (or an obligation tacitly renewable beyond the five-year period), was viewed as anti-competitive.

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

The analysis from the French competition rules' standpoint of restrictions of the supplier's ability to supply other buyers is similar to the analysis to be made under EU antitrust law.

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

The analysis from the French competition rules' standpoint of restrictions of the supplier's ability to sell directly to end-consumers is similar to the analysis to be made under EU antitrust law.

45 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?

To date there have been no decisions.

Notifying agreements

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

There is no procedure for notifying agreements containing vertical restrictions under French competition law. It is not possible to notify such agreements and to obtain any decision in that respect.

Authority guidance

47 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?

There is no possibility of obtaining official guidance from the competition authorities as to the antitrust assessment of a particular agreement. The parties themselves must make such assessment.

In practice, parties may be able to have informal discussion with officials of the Ministry of the Economy in limited circumstances, in particular in new and complex situations, and to obtain their views, but such views cannot be binding on the French Competition Authority.

Complaints procedure for private parties

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

Yes. Complaints from private parties concerning vertical restraints may be lodged with the French Competition Authority. The complaint must contain the full identity of the complainant, a description of the practices concerned and the rules that the complainant considers to be brought, as well as documents or elements likely to prove the existence of the alleged infringement as far as possible. In that respect, the complainant is not required to give proof of the alleged infringement, but it must be able to give some credible evidence to establish the likelihood of the alleged practice.

Generally, the procedure is quite long and may take several years. However, interim measures may be obtained in the meantime provided that criteria (in particular, the character of urgency about the situation) for such measures are met.

Enforcement

49 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?

Before 2011, nearly 10 decisions per year concerning vertical agreements or restraints were taken by the French Competition Council. In 2014, however, the Competition Authority rendered four decisions and one legal opinion. There are no enforcement priorities as such regarding vertical agreements.

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

Contractual provisions that contain prohibited vertical restraints are null and void, and therefore cannot give rise to any enforcement by the ordinary courts nor damages in case of non-compliance by the other party of such provisions.

Update and trends

In Decision No. 14-D-11 of 2 October 2014 concerning the sale of train tickets, the French Competition Authority obtained a series of commitments from the public entity SNCF that simplify and clarify the train-ticket distribution system. Travel agencies will now be able to apply conditions equivalent to those on voyages-sncf.com, in particular in terms of billing, payment and access to information. These commitments will allow agencies to differentiate themselves by services – since the price of the train tickets are regulated – by offering travellers diversified, more substantial offers (innovative reservation websites, tickets combining different types of transport, etc).

On 13 March 2014, the Court of Appeal of Paris, confirmed the decision of the French Competition Authority against Bang & Olufsen for having prohibited its distributors from selling the brand's products online (see question 31).

51 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 Competition Authority can impose fines of up to 10 per cent of the worldwide turnover of the group to which the company concerned belongs. It can also order the company concerned to take or refrain from taking measures in order to comply with French competition law, such as to delete the contractual provisions containing the prohibited vertical restraints.

The French Competition Authority published guidelines in May 2011 on the method relating to the setting out of financial penalties. The penalties are set in accordance with four criteria: the seriousness of the facts, the importance of the harm done to the economy, the situation of the sanctioned entity or undertaking or of the group to which the undertaking belongs, the reiteration, if any, of anti-competitive practices. The Competition Authority first sets the basic amount of the fine, the maximum of which is 30 per cent of the value of the sales. The Authority then adjusts the basic amount in order to take into account any mitigating or aggravating circumstances. In cases of reoffending, the basic amount may be increased by 15 to 50 per cent. The final amount of the financial penalty is checked against the legal maximum amount, which cannot exceed 10 per cent of the worldwide turnover of the group to which the company belongs.

The Competition Authority may also close the proceedings without imposing any fines if the company offers to take commitments to solve the competition concerns, provided that such commitments are taken before the statement of objections is sent to the company. The Competition Authority may also order the companies concerned to suspend the implementation of given contractual terms and conditions or to modify them.

The Competition Authority is not competent to award damages to companies or consumers, which are victims of prohibited vertical restraints. Such parties must introduce proceedings before the French ordinary courts (civil or commercial courts) in order to obtain damages as a result of prohibited vertical restraints. Ordinary courts may also grant provisional measures or order the cessation of the prohibited practice, except penalties. Such latter proceedings may constitute an alternative to the interim measures that can be asked of the Competition Authority. To date, such civil or commercial proceedings remain rare.

Investigative powers of the authority

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

The French competition authorities have investigative powers similar to those of the European Commission. They can request information and specific documents from the parties concerned as well as from third parties. They can carry out surprise on-site investigations, subject to the authorisation of a judge, and require the production of documents in connection with the purpose of the investigation. They can take a copy or seize the said documents and take oral and written statements and explanations of such documents.

Private enforcement

53 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?

As explained in question 53, companies that are victims of prohibited vertical restraints may bring damages claims or ask for injunctions before the ordinary courts. One should note that, under French law, as a matter of principle, disclosure of information is prohibited regarding another party or a third party gathered during the investigation of the Competition Authority unless justified by the rights of defence principle (French Supreme Court, 19 January 2010).

Nevertheless, on 24 August 2011, the Commercial Court of Paris ordered the Competition Authority to disclose non-confidential versions of documents relating to the settlement of an antitrust investigation in the context of a private damages action, on the legal basis of article 138 of the French Code of Civil Procedure.

As stated in its response to the European Commission on 30 April 2011, the Competition Authority is in favour, under certain circumstances, of a European model of class actions. To this end, a law was adopted very recently by the French parliament to set up a class action system (the law was adopted on 13 February 2014 but had not been published at the time of writing). However, the new rules will not enable the courts to award punitive or treble damages, but only damages based on the real prejudice suffered by the victim. Indeed, under French law, damages will only be awarded where any prejudice caused has a direct causative link with the alleged prohibited vertical restraint. This is a question of fact subject to the discretion of the court. Under French law, damages are generally of a lower amount when compared with damages awarded in many other countries, insofar as the reality and scope of the prejudice have to be demonstrated, specifically evaluated and linked to the practice concerned.

The parties to the agreement may also ask to the court to declare the provisions containing the prohibited vertical restraints as null and void.

Other issues

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

No.

Vivien & Associés

Muriel Perrier **muriel.perrier@va-fr.com**

3 rue de Monttessuy
75007 Paris
France

Tel: +33 1 45 02 39 50
Fax: +33 1 45 02 39 51
www.va-fr.com

Germany

Markus M Wirtz and Silke Möller
Glade Michel Wirtz

Antitrust law

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

Vertical restraints are subject to the Act against Restraints of Competition of 1958 (GWB) as amended on 26 June 2013 by the eighth amendment (8 GWB-Novelle). An English version of the GWB can be found on the website of the Federal Cartel Office (FCO) at www.bundeskartellamt.de. Horizontal and vertical restraints are uniformly regulated by sections 1 and 2 GWB, whereby section 1 articulates the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition; and section 2 provides for possible exemptions from this prohibition. Sections 1 and 2 GWB are comparable with article 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU), respectively. In addition, undertakings and associations of undertakings shall not threaten or cause disadvantages, or promise or grant advantages, to other undertakings to induce them to engage in conduct that would infringe provisions of the GWB.

Until 1 July 2005, vertical restraints were not subject to section 1 GWB and were not generally forbidden, apart from resale price maintenance and restrictions with regard to the conditions a party to a vertical agreement was allowed to impose on its own buyer. Certain vertical restraints could be prohibited if they qualified as abusive behaviour.

With regard to fines for acts that can be qualified as vertical restraints and were committed before the seventh amendment came into force (1 July 2005), the principle that the most lenient rule is decisive applies. According to this principle, no fine can be imposed for applying vertical restraints that were not forbidden before the seventh amendment. To avoid the imposition of fines, contracts that were already in force prior to 1 July 2005 must be adapted to the new legal situation.

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 GWB does not contain any definition of vertical restraints nor is its application limited to certain types of vertical restraints. One can, however, draw on the definition of vertical restraints in EU law as set out in article 1(1)(a) of the EU block exemption on vertical restraints. A vertical restraint can therefore be described as an agreement or concerted practice entered into between two or more undertakings that operate for the purpose of the agreement on different levels of the production or distribution chain and which relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

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?

By virtue of section 2(2) GWB, the EU block exemptions are also applicable in purely national German cases, the objectives pursued by the law on vertical restraints resemble those set out in article 101(3) TFEU and the EU block exemptions. Although the Commission used to take into account non-economic objectives in earlier decisions, it is increasingly concentrating on economic objectives with a focus on consumer harm.

Pursuant to section 20(1) GWB, refusal to supply small or medium-sized undertakings that are dependent on the relevant products may qualify as abusive behaviour. This provision shows the German legislature's intention to protect small and medium-sized undertakings. Also, in order to protect publishing houses and book stores, resale price maintenance for books, magazines and newspapers is expressly allowed in Germany.

Responsible authorities

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

The principal competent authority for the enforcement of the rules for agreements or concerted practices restricting competition including vertical restrictions is the FCO. Although the FCO is under the responsibility of the Ministry of Economics and Energy, it does not receive political orders and is independent in its decision-making. The FCO accommodates 12 independent decision divisions. Further information can be accessed through the FCO's website, www.bundeskartellamt.de. In addition, each federal state has its own competition authority for those cases in which the restraint has only effects on competition in this specific federal state. In practice, however, their role is rather limited.

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?

According to section 130(2) GWB, the GWB shall apply to all restraints of competition having an effect within the scope of application of the GWB (ie, Germany) and also if they were caused outside Germany. Therefore it is no precondition for the imposition of sanctions or remedies that the company in question has its seat, a branch or an office in Germany. It is not entirely clear if actual effects are required or if the likelihood of such effects suffices. In the context of the internet, the FCO has assumed jurisdiction in particular, where the restraint of internet dealing had an effect on price competition in the offline distribution of the respective goods in Germany.

Agreements concluded by public entities

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

According to section 130(1) GWB, the GWB is applicable to undertakings that are entirely or partly in public ownership or are managed or operated by public authorities. Exempted from the applicability of the GWB are the German Central Bank (Bundesbank) and the Reconstruction Loan Corporation (Kreditanstalt für Wiederaufbau).

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.

Sector-specific rules were abolished to a large extent by the seventh amendment to the GWB as of 1 July 2005. However, specific rules still exist for certain economic sectors and restrictions, namely agriculture (section 28 GWB), resale price maintenance for books, for newspapers and magazines (section 30 GWB) and the public supply of water (section 31 GWB). According to section 28 GWB, the prohibition of restrictive agreements in section 1 GWB shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations of agricultural producers which concern the production or sale of agricultural products, or the use of joint facilities for the storage, treatment or processing of agricultural products, provided that they do not fix prices and do not exclude competition. Furthermore, section 1 GWB is not applicable to vertical resale price maintenance agreements concerning the sorting, labelling or packaging of agricultural products. Section 30 GWB provides that section 1 GWB shall not apply to resale price maintenance by which an undertaking producing newspapers or magazines requires the purchasers of these products by legal or economic means to demand certain resale prices or to impose the same commitment upon their customers, down to the resale to the final consumer. Further, via section 2(2) GWB the EU block exemption regulations concerning individual sectors (such as the block exemption regulations regarding the motor vehicle sector or the insurance sector) also apply to purely national German cases.

General exceptions

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

The effects of the vertical restraint have to be noticeable. The criteria for noticeability have been set out by the FCO in its De Minimis Notice dated 13 March 2007. As regards vertical restraints the FCO will, according to the De Minimis Notice, abstain from initiating proceedings on the basis of section 1 GWB in those cases in which the market share of none of the undertakings party to a vertical agreement exceeds 15 per cent on any affected market and no hard-core restriction is given. If the vertical nature of an agreement is not entirely clear, a 10 per cent threshold, which usually applies only to horizontal restraints, is applicable instead.

The special exemption provided for in section 3 GWB for certain types of cooperation between small and medium-sized undertakings is applicable only to horizontal agreements, which was again emphasised by the FCO's information memorandum on the possible types of cooperation for small and medium-sized undertakings, published in March 2007.

Agreements

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

The GWB does not define 'agreement'. The interpretation of this term under German competition law and the interpretation of 'agreement' in article 101(1) TFEU are, however, the same.

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?

A formal or written agreement is not a precondition for the application of the antitrust rules to vertical restraints. Any form of communication that substitutes the risks of competition for cooperation between the relevant undertakings is sufficient.

As regards the finding of a concerted practice, the FCO applies a very strict policy. For instance, if the supplier approaches the retailer after the plain submission of recommended resale prices to address the price recommendations again, this renewed contact may qualify as an indication of a concerted practice if, following the discussions, the retailer actually raises its sales prices. Further, a supplier's statement over the phone that economically he cannot comprehend the buyer's resale price calculation may already be considered illegal if the buyer has to consider this statement as an attempt to influence its pricing policy.

Parent and related-company agreements

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

Agreements between undertakings belonging to the same group are under certain circumstances exempt from German antitrust law. This is the case if the undertakings in question form one economic entity and the subsidiary is restricted in its ability to autonomously decide on its market behaviour. According to section 17 of the Stock Corporation Act (AktG), an undertaking is dependent in this sense if another undertaking is in a position to directly or indirectly exert decisive influence over the dependent undertaking. Section 17(2) AktG establishes a presumption according to which an undertaking is regarded as dependent if a majority interest is held by another undertaking.

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?

The assessment of agency contracts depends on the qualification of the specific relationship between the principal and the agent as genuine or non-genuine agency agreement. Agreements between the principal and the agent restricting competition, for example, exclusivity agreements, are not covered by section 1 GWB if the relationship can be qualified as a genuine agency agreement. Hence, an agreement according to which the principal may reserve the exclusive right to use certain distribution channels (eg, the internet) does not infringe competition law.

Clauses in agency agreements that restrict inter-brand competition may, however, be subject to article 101(1) TFEU and section 1 GWB. According to the Commission, this is the case if the agreement contains (post-term) non-compete provisions. Under German law non-compete provisions during the term of the agency agreement are encompassed in the agent's duty to protect the principal's interests (section 86(1) German Commercial Code) and not covered by section 1 GWB. It is, however, not completely clear if under German law post-term non-compete clauses for the duration of more than two years after the termination of the agency agreement are also not subject to section 1 GWB in combination with section 90(a) of the German Commercial Code.

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?

In the view of the FCO and the German courts an agent–principal relationship may be qualified as genuine agency agreement if the agent is integrated in the business of the principal and if the agent does not bear any commercial or financial risk in relation to the activities for which it has been appointed as an agent by the principal. In such cases the agent is qualified as a mere auxiliary of the principal and the principal and its agent are regarded as forming one economic entity with the consequence that article 101(1) TFEU and section 1 GWB do not apply to agreements between them. There are no recent decisions providing additional guidance on the treatment of agent–principal relationships in general or in the online sector.

Intellectual property rights

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

Until the seventh amendment (1 July 2005), the GWB contained specific rules for licensing agreements with regard to certain IPRs. These rules are no longer in force. Exemptions to the prohibition of vertical restraints as set out in section 1 GWB apply under the EU block exemption for technology transfer agreements or, if the IPRs do not form the primary object of the agreement, the EU block exemption on vertical restraints, which by virtue of the reference in section 2(2) GWB, also apply to purely national cases.

Analytical framework for assessment

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

As set out above (see question 1), according to section 1 GWB agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited. This provision is not applicable to certain sector-specific agreements (see question 7), to agreements between affiliated undertakings (see question 11) and to genuine agency agreements (see questions 12 and 13). Furthermore, under certain conditions the De Minimis Notice may apply to vertical restraints (see question 8). Vertical agreements that are subject to section 1 GWB and do not fulfil the requirements of the De Minimis Notice may be exempted.

As regards the requirements for an exemption, section 2(2) GWB refers to the EU block exemptions. The most relevant block exemption in this context is the EU block exemption on vertical restraints. Where the parties to the agreement do not benefit from the EU block exemption on vertical restraints, it is necessary to conduct an individual assessment of the agreement at hand under section 2(1) GWB.

Should the agreement contain certain hard-core restrictions this is very likely to exclude the applicability of the De Minimis Notice, the EU block exemption on vertical restraints as well as an individual exemption under section 2(1) GWB. The following hard-core vertical restrictions under article 4 of the EU block exemption on vertical restraints will also be regarded as such by the FCO:

- restriction of the buyer's ability to determine sale prices;
- restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services;
- restriction of active or passive sales to end-users by members of a selective distribution system operating on the retail level; the restriction of cross-supplies between distributors within a selective distribution system; and
- restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

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?

Section 2(2) GWB refers to the EU block exemption regulations. In accordance with the EU block exemption on vertical restraints, a vertical agreement may benefit from the block exemption only if the seller's market share on the relevant sales market does not exceed 30 per cent.

Similar to the European Commission, the FCO takes into account cumulative effects arising from a parallel series of vertical restraints and leading to market foreclosure.

According to the FCO's De Minimis Notice of 13 March 2007 a market share of 5 per cent is applicable in order to determine whether a vertical restraint may generally have an appreciable effect on competition instead of the usual 15 per cent threshold for vertical restraints in cases where cumulative foreclosure effects may exist. There is a presumption that cumulative foreclosure effects are regularly given if 30 per cent or more of the relevant market is covered by agreements that have similar effects on the market.

The Federal Supreme Court held that large numbers of gas supply agreements between one supplier and many buyers covering the total or nearly the total of the purchasers' demand, thereby foreclosing the market for competitors, constitute an infringement of article 101 TFEU and section 1 GWB.

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?

As section 2(2) GWB refers to EU block exemption regulations, the changes of the EU block exemption on vertical restraints also apply at the national level in Germany. Hence, for a vertical agreement to benefit from the exemption, not only the seller's but also the buyer's market share is relevant. The market share of the buyer may not exceed 30 per cent on the relevant purchasing market.

Block exemption and safe harbour

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

As set out above (see question 7) German law only provides for specific exemptions with regard to the agricultural sector, resale price maintenance for books, newspapers and magazines and the public supply of water. Section 2(2) GWB refers to the EU block exemptions, however, which results in the applicability of the EU block exemption on vertical restraints. Section 2(2) GWB emphasises that the exemption criteria as set out in the EU block exemptions also apply to purely national cases.

Therefore, the changes at EU level apply in Germany.

Types of restraint

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

Resale price maintenance is subject to the prohibition in section 1 GWB. The term 'price' is interpreted broadly and also covers calculation schemes or rebates. The rules on resale price maintenance are equally applicable to both parties to the vertical agreement. The Federal Supreme Court decided, however, that for an infringement of section 1 GWB through resale price maintenance, a certain degree of substantiality has to be reached.

The FCO's current enforcement practice with regard to resale price maintenance is, however, very strict. According to the FCO the following measures always qualify as a restriction of the buyer's ability to determine its sale prices:

- agreements on maximum rebates which may be granted in relation to a given price level;
- agreements on maximum margins or a neutrality of margins (sliding price maintenance);
- the sponsoring of promotions if this is related to the retailer's adherence to certain recommended prices; and
- the communication of minimum prices or fixed prices in order forms if the retailer uses these forms without any modifications.

According to previous FCO decisions, a number of further measures also bear the risk of being qualified as infringements of section 1 GWB. While a supplier is allowed to submit a list with recommended sales prices to a retailer and to explain to the retailer the strategy in relation to the positioning and distribution of the product, every renewed contact with the retailer to address the recommended sales prices may already qualify as an indicator for a concerted practice infringing section 1 GWB. Other indicators include the compilation of price comparisons which shall be submitted to undertakings of the other market side or other measures of price-monitoring by the supplier, the provision of calculation samples or the marking of products by the supplier with recommended sales prices.

In relation to resale price maintenance agreements the FCO will also assess if the communication between a supplier and a retailer is aimed at or results in an indirect horizontal coordination of prices or other relevant conditions between the different retailers ('hub and spoke').

Resale price maintenance continues to be an enforcement priority of the FCO. In addition to past (and still ongoing) investigations, it can be observed that the FCO's activities regarding resale price maintenance practices are frequently linked to internet sales (see question 31 et seq).

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'?

Until the seventh amendment (2005) the GWB contained a specific provision prohibiting resale price maintenance. However, now article 4(b) of the EU block exemption on vertical restraints applies by virtue of the reference in section 2(2) GWB. The previous German provision was stricter than the present law as it was not restricted to prices, but also included fixing of

resale conditions. In addition, under the new system such an agreement needs to have an appreciable effect on the competitive process.

In a decision which was handed down under the previous stricter regime, the Federal Supreme Court held with regard to a sales campaign for chocolate bars ('one bar extra') that resale price maintenance did not constitute an infringement if it restricted the freedom of retailers for a short period of time only and to virtually no appreciable extent.

According to current enforcement practice as laid down in a guidance letter from the FCO, any support of promotional campaigns related to the adherence by the retailer to specific sales prices qualifies as an infringement of section 1 GWB. The guidance letter does not address exceptions, such as for product launches.

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

Previous decisions show that resale price maintenance is frequently linked to other forms of restraints, in particular, restraints of online sales. For instance, in 2009 the FCO fined contact lens manufacturer CIBA €11.2 million for requiring internet retailers not to sell certain contact lenses via the internet and to abstain from using online auction platforms such as eBay. In addition, internet retailers were offered rebates for respecting the recommended resale prices and faced disadvantages if they deviated too much from these recommendations.

The manufacturer of outdoor navigation systems Garmin was fined €2.5 million by the FCO in 2010 for a 'kickback programme' granting retailers with their own internet shops retroactive bonuses if they returned to a determined minimum sales price level. The retailers that continued selling at lower prices did not benefit from such retroactive bonuses.

In late 2012, the Federal Supreme Court upheld a decision according to which a statement by the seller – a producer of branded rucksacks and school bags that operates a selective distribution system – that economically he could not comprehend the buyer's price calculation could constitute illegal resale price maintenance. Although the seller had, following an explicit question from the buyer, not announced any negative consequences in case the buyer did not raise its resale prices, the court held that the buyer had to consider this statement as an illegal attempt to influence its pricing policy given the very low resale prices.

Moreover, in 2014, the FCO imposed fines in the amount of €8.2 million on Recticel, a manufacturer of mattresses for requiring resellers not to sell certain products below predetermined resale prices. Recticel had offered selected online resellers the opportunity to call themselves 'authorised Schlaraffia online dealers' and to use the respective trademarks for merchandising purposes, if they agreed to respect recommended resale prices for strategically important products. In the case of deviations, Recticel threatened to delay shipments or to prevent the dealers from using eBay or Google adwords.

In 2013, the FCO also organised a workshop on vertical restraints in the internet economy. A background paper for this workshop (an English version is available on the FCO's website www.bundeskartellamt.de) describes the FCO's approach regarding resale price maintenance and other restrictions of internet sales, such as most-favoured-nation clauses or bans of sales via online auction platforms. The paper stresses the negative effects of resale price maintenance. For further details regarding restrictions of online sales see questions 31 et seq.

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

Efficiencies in resale price maintenance cases are not frequently dealt with in decisions. With respect to a franchise system in which the franchisor forced the franchisees to resell at certain prices, the Federal Supreme Court held that the prohibition of resale price maintenance also applied within franchise systems. The court mentioned that there were no facts in the case that could justify a restriction of the franchisee's freedom to set its own prices, thereby implying that in certain situations such restrictions may be permissible. By contrast, where the franchisor bears all economic and financial risk, the prohibition of resale price maintenance does not apply (see the principal–agent relationship questions 12 and 13).

A letter by the FCO giving guidance on measures that may be regarded as vertical price maintenance does not address possible efficiencies but rather follows a very form-based approach.

In its proceedings against the manufacturer of gardening equipment Gardena and the manufacturer of household goods Bosch Siemens Hausgeräte the FCO dealt with efficiencies that could possibly stem from the dual-pricing systems applied by these manufacturers. They granted more favourable conditions to retailers (their customers) with respect to the retailers' offline sales to compensate the higher costs associated with offline sales (eg, trained sales personnel). However, the pricing and rebate systems were designed in such a way that they contained incentives for retailers to limit their online sales since they could obtain more favourable overall conditions the higher the percentage of offline sales. The FCO found that these dual-pricing systems constituted illegal incentives to reduce online sales. Efficiencies possibly stemming from the compensation of higher costs incurred by offline sales could not justify the restrictions. Rather, the manufacturers could have compensated the retailers for the costs stemming from offline sales by granting certain fixed subsidies, as such fixed payments may not have constituted disincentives regarding online sales.

Similarly, in a private litigation case the Düsseldorf Higher Regional Court dealt with the question (and answered it in the negative) of whether the dual-pricing system in question could generate efficiencies that could justify an exemption pursuant to section 2 GWB and article 101(3) TFEU.

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.

There does not seem to be any recent practice that explicitly deals with pricing relativity agreements. However, it is very likely that such a practice would be considered to be illegal by the FCO. An agreement between a supplier and a retailer by means of which resale prices are determined by reference to equivalent products of another supplier reduces inter-brand competition. Further, it deprives the retailer of the possibility to change the resale prices for A's products while leaving the resale prices for B's products unchanged.

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.

Since the seventh amendment of the GWB in 2005, the agreement between a supplier and a buyer of a most-favoured-nation clause that requires the supplier to treat the buyer as its most-favoured customer is no longer automatically illegal. Further, it does not constitute a hard-core restriction within the meaning of article 4 of the EU block exemption on vertical restraints. However, the block exemption may not apply to vertical agreements concluded between competitors.

While not per se illegal the FCO takes a very critical view regarding most-favoured-nation clauses. This is because an agreement that requires a supplier not to sell its products at lower prices to other customers can – according to the FCO – have negative horizontal effects.

The recent investigations against Amazon and the online booking portal HRS illustrate the FCO's position. According to the FCO the agreements between Amazon and marketplace sellers and between HRS and hotels respectively prevented them from offering lower prices (for the products sold via the market place or for hotel accommodation) elsewhere. Hence, the FCO concluded that these clauses restricted competition between other online portals and made the entry of new platforms considerably more difficult. The same aspect is dealt with in current proceedings against the travel booking portals Expedia and Booking.

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.

The recent investigations against Amazon illustrate that the FCO considers such agreements to be restrictive of competition between comparable online platforms and with regard to the entry of new online platforms. This approach is confirmed by the recent investigations against the online booking portal HRS and the current proceedings against Booking and Expedia.

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.

There is no explicit guidance dealing with minimum advertised price policy or internet minimum advertised price; however, since resale price maintenance in general and restrictions of online sales in particular are viewed very critically, it appears likely that any such advertising restrictions would be considered restrictive of competition and therefore illegal. If a retailer faces restrictions with regard to naming the resale prices of the advertised products, it can be assumed that the FCO or a court would consider such a restriction illegal. In this context it should further be noted that the FCO considers restrictions of the optimisation of online search engines (ie, restrictions of dealers' attempts to appear at the top of search results when potential customers use online search engines) hard-core restrictions.

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.

Since the seventh amendment in 2005, the requirement of a buyer not to purchase the contract products on more favourable terms from other suppliers is no longer per se illegal. Rather, it may qualify for an exemption pursuant to the EU block exemption on vertical restraints as long as it is not linked with resale price maintenance (or another hard-core restriction).

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?

Until the seventh amendment (1 July 2005) such agreements were usually only subject to control of abusive behaviour. Today a restriction with regard to the territory into which a buyer may resell its contract products is regarded as covered by the prohibition of anti-competitive agreements as set out in section 1 GWB, but may be exempted by section 2 GWB in combination with the respective EU block exemption. There are no specific differences between the German and the EU approach. Generally speaking, outside a selective distribution system the restriction of active sales may qualify for an exemption pursuant to the EU block exemption on vertical restraints, whereas restrictions of passive sales are viewed as hard-core restrictions.

29 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?

Restrictions on the customers to whom a buyer may sell products are generally forbidden pursuant to section 1 GWB, but may be exempted by section 2 GWB in combination with the respective EU block exemption. The German approach is therefore consistent with the EU approach. Generally speaking, outside a selective distribution system the restriction of active sales may qualify for an exemption pursuant to the EU block exemption on vertical restraints, while restrictions of passive sales are viewed as a hard-core restriction. In its recent investigations into Gardena (a manufacturer of gardening equipment) and Bosch Siemens Hausgeräte (a manufacturer of household appliances) the FCO considered dual-pricing systems that contained incentives to reduce online sales to constitute hard-core restrictions within the meaning of article 4(b) of the EU block exemption on vertical restraints (restriction of customer groups) that did not qualify for an exemption from the cartel prohibition.

In a case dealing with private damages, the Düsseldorf Higher Regional Court also found a dual-pricing system that contained incentives to restrict sales to certain customers (such as online shops) to infringe competition law since wholesalers were induced to direct sales to privileged retailers to the effect that intra-brand competition from other retailers was restricted. Moreover, the requirements for an exemption pursuant to section 2 GWB were not met since the defendant failed to show how the restriction could generate efficiencies and whether consumers would adequately benefit from any such efficiencies. Various courts also found restrictions of sales via online platforms illegal (see question 31).

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

Until the seventh amendment to the GWB such restrictions were only subject to control of abusive behaviour, but are now subject to section 1 GWB and generally forbidden. Field-of-use restrictions may be exempted according to section 2 GWB in combination with the relevant EU block exemption. There are no noticeable differences between the German and the EU approach to field-of-use restrictions.

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

The FCO has not published any official guidance with regard to the assessment of sales via the internet. It is possible, however, to infer certain key principles from the FCO's published decisions, case reports, activity reports as well as court decisions. It is generally considered a hard-core restriction in Germany to impose a complete ban of internet sales on distributors. Furthermore the FCO found certain quantitative restrictions as being anti-competitive and not qualifying for an exemption. These include a restriction of the permitted turnover volume achieved with internet sales. The same applies to threats to impose delivery stops on distributors or to engage in other exclusionary conduct if the distributors sell products on the internet at lower price levels than the recommended prices. Certain qualitative criteria may qualify for an exemption. According to the FCO and jurisprudence of the German courts it is also permissible to require a distributor to maintain a physical store – in addition to the internet shop – if the nature of the product requires certain guidance and service (see question 34).

In different decisions the FCO also emphasised that incentives to reduce sales via the internet are considered hard-core restrictions. In 2013, the FCO terminated separate proceedings against the manufacturer of gardening equipment Gardena and the manufacturer of household appliances Bosch Siemens Hausgeräte after they had agreed to abolish the dual-pricing systems they had concluded with retailers and that contained incentives to reduce sales via the internet. A similar dual-pricing system was held to be illegal by the Düsseldorf Higher Regional Court in private litigation. Restrictions of sales via online auction platforms are also viewed critically.

In 2013 and 2014, different courts dealt with restrictions of internet sales including bans of sales via online auction platforms imposed on distributors including the members of selective distribution systems. In one case, the court concluded that prohibiting sales of the members of its selective distribution system via eBay, but at the same time supplying a discounter chain, was illegal because the seller had applied stricter criteria to online sales than to offline sales.

Further, in 2013, the FCO also hosted a workshop that dealt with vertical restraints in the internet economy. A background paper that addresses various aspects of vertical restraints in the online economy is published on the FCO's website www.bundeskartellamt.de (English version available). The paper provides an overview of the current practice, in particular regarding resale price maintenance, dual-pricing, restrictions of online sales in selective distribution systems and price parity clauses used on online platforms. For more details regarding differential treatment of different types of internet sales channels see question 32.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

In recent years, the (differential) treatment of different types of internet sales channels has been subject to a number of court decisions and investigations by the FCO.

In one decision, the FCO stopped contact-lens producer CIBA from agreeing with retailers to abstain from reselling certain types of contact lenses via the internet as a whole, and via online auction platforms in particular. This restriction was qualified as a hard-core restriction within the meaning of article 4(b) or (c) of the EU block exemption on vertical restraints. In a recent investigation regarding Adidas, the FCO took the view that the per se ban of sales via online platforms as imposed by Adidas on members of its selective distribution system was not permissible. The FCO pointed out that a per se ban of sales via online marketplaces could not be qualified as a qualitative criterion necessary for maintaining product and distribution quality, but that it would rather result in the entire exclusion of certain distribution channels. The restriction did not qualify for an exemption because it did not generate sufficient efficiencies, consumers

did not adequately participate and it was not indispensable. In particular, addressing any possible free-riding problems was considered not to suffice to outweigh negative effects. Similarly, the FCO considered a ban of sales via third-party online platforms, which the manufacturer of consumer audio products Sennheiser had imposed on the members of its selective distribution system, to be illegal. In the particular case, retailers were not allowed to sell the contract products via the third-party platform Amazon marketplace, while at the same time Amazon was one of the authorised retailers. Further clarification with regard to restrictions of sales via certain online sales channels can be expected from the decision in the still pending FCO case regarding Asics.

In recent years, various courts have also dealt with restrictions of sales via different internet sales channels, such as auction platforms. While some courts found that the prohibition of sales via eBay could be permissible in a selective distribution system to safeguard brand image provided the selective distribution criteria were applied in a non-discriminatory manner (in the particular case the ban was held to be illegal because of a discriminatory application of these criteria), other courts concluded that the ban of sales via the Amazon marketplace would constitute a hard-core restriction within the meaning of article 4(c) of the EU block exemption regulation on vertical restraints. In this regard, a court stated that the point of view of the European Commission as expressed in paragraph 54 of the Guidelines on vertical restraints – the possibility of restricting sales via third-party platforms that show the platform's logo – would neither be compatible with article 101 TFEU nor with article 4(c) of the EU block exemption on vertical restraints. The court further noted that – in any case – a German court would not be bound by these guidelines. Another court concluded that outside selective distribution systems a ban of sales via online platforms constituted a hard-core restriction within the meaning of article 4(b) of the EU block exemption regulation on vertical restraints.

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

Selective distribution systems may be subject to the prohibition of agreements restricting competition as set out in section 1 GWB. They may be exempted according to section 2 GWB in connection with the relevant EU block exemptions. A specific feature of German law is that the refusal to supply certain distributors that are dependent on the relevant products may be qualified as discriminatory and therefore as abusive behaviour under section 20(1) and (2) GWB, even if the supplier is not dominant but only has a strong position in the relevant market in particular by virtue of the importance of its products. The refusal to supply may, however, be justified if the dependent distributors do not meet the qualitative criteria of a selective distribution system. In a recent decision a German court has decided that a supplier of branded luxury goods may also refuse to supply retailers based on a quantitative selection as long as the selection criteria are objective and applied in a non-discriminatory manner.

34 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?

In accordance with EU competition law the implementation of a selective distribution system may fall outside article 101(1) TFEU and section 1 GWB. This is specifically the case where the selective distribution system is necessary to preserve the quality or the proper use of a certain product, for example, because of its technological complexity, its luxury or brand reputation or strong safety implications, and where the members of the selective distribution system are chosen with regard to their professional qualification, the qualification of the sales personnel and the quality of the sales facilities. Additionally, the qualitative selection criteria have to be applied in a non-discriminatory manner and must be adequate. In a recent case a court held that the protection of a particular brand image may justify the implementation of a selective distribution system. The objective criteria are, for instance, not applied in a non-discriminatory manner if the supplier prohibits sales via online auction platforms but at the same time supplies a discounter chain.

35 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?

Generally speaking, a restriction imposed on members of a selective distribution system according to which the existence of a physical store is a precondition for the admissibility of sales through the internet is considered permissible. In addition, internet sales criteria and offline sales criteria generally have to be comparable.

Some German courts in private litigation have ruled that it is legal to impose certain quality standards on the members of a selective distribution system if the products subject to this selective distribution system have a certain brand image. In particular it was held permissible to request the distributor's internet shop to adhere to quality standards. Further, courts have held in previous cases that it might be admissible to prohibit sales through an internet auction platform if this is necessary to ensure the quality standards of the selective distribution system (ie, if the platform does not meet these quality standards). In another case in which the supplier had prohibited sales via eBay, but at the same time sold considerable amounts of the contract goods via a discounter chain, a court held that the requirement that criteria for online and for offline sales have to be comparable was not met. Other courts took the view that a ban of sales by members of a selective distribution system via online marketplaces (such as the Amazon marketplace) might constitute an illegal hard-core restriction within the meaning of article 4(c) of the EU block exemption regulation on vertical restraints.

Recently, the FCO scrutinised a ban of sales via online marketplaces imposed by Adidas on the members of its selective distribution system and concluded that the per se ban did not qualify for an exemption from the cartel prohibition. Such a restriction was considered to constitute an exclusion of certain distribution channels rather than a necessary qualitative criterion to ensure product and distribution quality. Addressing possible free-riding problems could not outweigh the negative effects of this restriction. The FCO further considered a similar ban of sales via online platforms imposed by the manufacturer of consumer audio products Sennheiser on the members of its selective distribution system to infringe competition law. In the particular case, Amazon was an authorised retailer while other retailers were prevented from selling via the third-party platform Amazon marketplace. In this context, the FCO raised the question as to whether an authorised member of a selective distribution system can be considered to be a third party within the meaning of paragraph 54 of the European Commission's Guidelines on vertical restraints (where the European Commission deals with restrictions of sales via third-party platforms that show the logo of the platform). In addition, in a recent decision the European Court of Justice held that the EU block exemption on vertical restraints does not apply to a clause in a selective distribution agreement that de facto prohibits internet sales by authorised dealers. Such restrictions may, however, be subject to an individual exemption pursuant to article 101(3) TFEU. Since the block exemption regulation applies to purely national cases this judgment may also affect future decisions at the national level.

36 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?

There are court decisions dealing with this issue. However, the focal point of these decisions is the Act against Unfair Competition (UWG). In one case a German car manufacturer tried to stop a dealer from selling and advertising cars that had been reimported from other EU member states at prices that were below the price level in Germany. The manufacturer claimed that the dealer was only able to do so because the dealer acquired such cars based on the breach of the conditions of the selective distribution system. However, the manufacturer could only succeed with its claim if the dealer had enticed a member of the selective distribution system to breach the contract, but not if it only took advantage of a member breaching the contract by selling cars to the outsider.

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

The FCO takes cumulative effects arising from a parallel series of vertical restraints and leading to market foreclosure into account. A cumulative market foreclosure effect according to the FCO's De Minimis Notice generally exists if 30 per cent or more of the affected market is covered by parallel networks of suppliers' or distributors' agreements for the sale of goods or offer of services, which have similar effects on the market.

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

In accordance with EU law suppliers may commit themselves to supplying only one dealer or a particular number of dealers in a certain territory. They are also allowed to impose restrictions on dealers that are members of selective distribution systems with regard to the location of their business premises. It qualifies as a hard-core restriction, however, to prohibit supplies to end-customers in other territories (but this does not apply to wholesalers who actively or passively sell the relevant products to end-customers in other territories). To restrict the supply of other dealers who are members of selective distribution systems is, irrespective of the supply level, completely forbidden.

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

Exclusive purchasing agreements are subject to the prohibition of anti-competitive agreements set out in section 1 GWB, but may be exempted according to section 2 GWB in connection with the relevant EU block exemptions. There are no differences between the EU and the German system.

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

There are no specific rules in German law dealing with this issue, so general rules apply. This means that a restriction of the buyer's ability to sell 'inappropriate' products must not restrict competition or will require an exemption, for example, under the EU block exemption.

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

Non-compete clauses are generally subject to the prohibition of anti-competitive restraints as set out in section 1 GWB. The applicability of section 1 GWB may, however, be restricted in cases in which the non-compete clause is necessary for the realisation of the contract. Such non-compete clauses are comparable to ancillary restraints in EU law. Restrictions that are not necessary for the realisation of the contract in this sense may be exempted by section 2 GWB in connection with the relevant EU block exemptions, which are also applicable to purely domestic German cases.

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

Whether the requirement to purchase from one supplier a specific amount or minimum percentage of a certain product has to be regarded as a non-compete clause and therefore covered by section 1 GWB, can be determined by referring to article 1(1)(d) of the EU block exemption on vertical restraints, according to which this is the case if more than 80 per cent of the requirements of the relevant product have to be bought from one specific supplier. For the assessment of non-compete clauses, see question 41.

With regard to the highly concentrated German energy sector, the FCO decided and the courts confirmed that a supply agreement entered into for at least two years that covers 80 per cent or more of the customer's gas or electricity requirement, or a supply agreement entered into for at least four years that covers 50 per cent or more of the customer's gas or electricity requirement is invalid. The same holds true for cumulative contracts with one customer, exceeding the thresholds with regard to time or quantity, as well as for gas or electricity supply agreements containing tacit renewal clauses.

The requirement to purchase a full range of the supplier's products can also result in market foreclosure and therefore constitute an infringement of section 1 GWB. A key example of such an agreement or concerted practice is tying, according to which the supplier makes the sale of one product conditional upon the purchase of another distinct product. Such an agreement constitutes an infringement of section 1 GWB unless it is objectively justified or in line with a commercial custom. In contrast, if a tying requirement is imposed unilaterally by a dominant undertaking and not by means of an agreement or concerted practice, it may amount to abuse of a dominant position within the meaning of section 19 GWB.

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

There is no explicit guidance in this regard. Since pursuant to section 2(2) GWB the EU block exemption on vertical restraints also applies to purely national cases, the (few) constellations in which it covers restrictions of the supplier are also relevant under German law.

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

There is no explicit guidance in this regard. Since pursuant to section 2(2) GWB the EU block exemption on vertical restraints also applies to purely national cases, the (few) constellations in which it covers restrictions of the supplier are also relevant under German law.

45 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?

No.

Notifying agreements

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

The German antitrust regulations do not provide for any formal notification procedure with regard to vertical restraints. In accordance with the EU system, parties to a vertical agreement cannot apply for a formal exemption decision but have to assess the requirements for an exemption as set out in section 2 GWB by themselves. They may, however, apply for a decision based on section 32(c) GWB (see question 47).

Authority guidance

47 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?

According to section 32(c) GWB, the FCO may – similarly to a decision based on article 10 of EC Regulation No. 1/2003 – decide that there are no grounds to take any action if, on the basis of the information available, the conditions for a prohibition pursuant to (inter alia) section 1 GWB and article 101(1) TFEU are not fulfilled. These decisions are, however, not of huge practical relevance for vertical restraints as it is completely at the FCO's discretion to render such a decision at all and the FCO is very reluctant to do so. Furthermore, a section 32(c) GWB decision is only binding on the FCO itself and not on third parties or courts. Another possibility is to approach the FCO for informal guidance on the relevant question, which the FCO is regularly willing to provide.

Complaints procedure for private parties

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

The GWB does not provide for any formal complaint procedure for third parties with regard to vertical restraints. Any undertaking or person may, however, approach the FCO with information on possible infringements of the antitrust laws through vertical restraints. The decision to open formal proceedings is at the FCO's discretion.

Update and trends

Vertical restraints remain one of the focal points of the FCO's activities and are subject to several court decisions in private litigation. In its thorough investigations against several retailers and manufacturers of branded products concerning retail price maintenance and hub-and-spoke practices that were initiated in January 2010 the FCO started sending statements of objections in the second half of 2014. These extensive investigations are expected to be terminated in early 2015.

In 2014, restrictions of sales via online auction platforms and internet marketplaces were among the most intensely discussed aspects and there are still uncertainties as to which restrictions manufacturers may impose on independent retailers. Based on the various decisions by courts and the FCO, at least total bans of sales via online platforms will likely be considered to be illegal. The FCO's point of view is, for instance, illustrated by its investigations against Adidas and Sennheiser. Further guidance can be expected after the FCO will have closed the still pending case involving Asics. In private litigation, different courts qualified the prohibition of sales via online auction platforms or online marketplaces as illegal hard-core restrictions. One court stated that paragraph 54 of the European Commission's Guidelines on vertical restraints (that appears to permit bans of sales via third-party platforms that show the logo of this platform) is not compatible with article 101 TFEU and the rationale of article 4(c) of the EU block exemption regulation on vertical restraints and that, eventually, it is not binding for a German court.

As regards price parity clauses, in early 2015, the Düsseldorf Higher Regional Court approved the FCO's approach in the *HRS* case and confirmed that price parity clauses restricted competition because they deprived hotels of the ability to offer lower prices in direct sales or to other booking portals. The court allowed the further appeal to the Federal Supreme Court since the relevant questions are of general interest. In particular, similar investigations by the FCO are still pending with regard to the online booking platforms Expedia and Booking and price parity clauses are also subject to investigations in other European countries.

Enforcement

49 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?

As the EU block exemption on vertical restraints is also applicable to purely German cases by virtue of section 2 GWB, most vertical restraints apart from hard-core restraints are permitted up to market shares of 30 per cent (with the possibility of an individual exemption above this market share pursuant to section 2 GWB and article 101(3) TFEU). In recent years, the FCO was specifically active with regard to legal or contractual or indirect resale price maintenance and the restriction of internet sales. In recent years, the FCO handed down a number of decisions regarding internet sales, exclusivity agreements and resale price maintenance. In January 2010, it started proceedings against a number of retailers and producers of branded products in the areas of coffee, confectionery and pet food, suspecting maintenance of artificially high prices for these products through vertical arrangements. In the course of these proceedings the FCO extended the investigations to other product areas, in particular, to the product areas beer, baby food, baby care and personal hygiene (meanwhile, investigations against some market participants in certain product areas have been closed, while others are still ongoing). Further, in August 2012, the FCO fined the electronic tool manufacturer TTS Tooltechnic for threatening the members of its selective distribution system with disadvantages if they did not adhere to the recommended resale prices. In 2013, the FCO handed down a fining decision against the producer of cosmetics Wala Heilmittel for making the admission to its selective distribution system dependent on the adherence to its recommended resale prices. Further, the manufacturer of gardening equipment Gardena and the manufacturer of household appliances Bosch Siemens Hausgeräte agreed to terminate their pricing and rebate systems, which the FCO considered to be anti-competitive because they contained incentives to limit online sales and thus constituted hard-core restrictions within the meaning of article 4(b) of the EU block exemption on vertical restraints. In 2014, the FCO further imposed fines on the mattress manufacturer Recticel for allowing retailers to call themselves authorised dealer if they agreed not to sell certain mattresses below predetermined prices. Moreover, the sports equipment manufacturer Adidas agreed to terminate the ban of sales via online marketplaces that it had imposed on the member of its selective distribution system after the FCO had taken the view that it regarded such restrictions to be illegal. Likewise, the manufacturer of electronics equipment Sennheiser agreed to terminate comparable practices.

In addition, price parity agreements used by Amazon and the online booking portal HRS were subject to review by the FCO. The Düsseldorf Higher Regional Court, the court competent to handle appeals against decisions of the FCO, confirmed the FCO's approach in the *HRS* case, stating that price parity clauses restrict competition among different hotel booking platforms and with regard to direct marketing of these hotels. The court allowed an appeal to the Federal Supreme Court for further clarification.

The fact, that restrictions of online sales remain an enforcement priority of the FCO is also illustrated by the fact that it held a workshop regarding vertical restraints in the internet economy in 2013 and published a background paper in this context.

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

Agreements that are contrary to section 1 GWB and are not exempted on the basis of section 2 GWB are prohibited by law and therefore, according to section 134 of the German Civil Code (BGB), null and void. According to section 139 BGB, the invalidity of one part of the agreement is usually regarded as an indication of the invalidity of the whole agreement. Section 139 BGB further provides, however, that the invalidity of the whole agreement will not be presumed if there is evidence that the agreement would also have been concluded without the invalid part. Whether this condition is fulfilled has to be assessed on a case-by-case basis. Where the invalid part is separable from the whole agreement and the agreement contains a severability clause, a presumption applies that the remaining parts shall remain valid.

51 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 FCO may issue a cease-and-desist order according to section 32 GWB requiring the undertakings to bring to an end the infringement of section 1 GWB, any other provision of the GWB or article 101 TFEU. Furthermore, according to sections 81 and 82 GWB, the FCO or the respective regional competition authorities have the power to impose administrative fines. The FCO or the regional cartel authorities are also competent to order the skimming-off of economic benefits gained through the intentional or negligent violation of section 1 GWB or article 101 TFEU through vertical restraints (section 34 GWB) to the extent to which this economic benefit has not already been skimmed off by the imposition of a fine. The administrative fine may be as high as €1 million and if imposed on undertakings as high as 10 per cent of the undertaking's turnover in the business year preceding the administrative decision. The undertaking's turnover comprises the worldwide turnover of all natural and legal persons acting as one economic entity. In 2013, the FCO issued updated guidelines on the setting of fines, an English version of which can be found on the FCO's website at www.bundeskartellamt.de.

In 2008, the FCO imposed an administrative fine of €10.34 million on Bayer Vital for influencing the sales price of non-prescription medicines by granting a certain rebate only when the pharmacies adhered to Bayer Vital's sales price recommendations. The FCO further imposed a fine of €465,000 on five producers of pharmaceuticals as well as on the Federal Association of the Pharmaceutical Manufacturers and nine state associations of pharmacists. Agents of these undertakings and institutions had asked pharmacies not to charge prices for OTC drugs lower than the prices recommended by the producers.

In 2009, contact-lens manufacturer CIBA was fined €11.2 million because it had offered incentives to internet retailers that followed the recommended prices and had monitored deviations. The FCO also fined hearing aid manufacturer Phonak €4.2 million for stopping deliveries to an internet retailer undercutting the recommended sales prices. The manufacturer of outdoor navigation systems Garmin was fined €2.5 million by

the FCO in 2010 for a 'kickback programme' granting retailers with their own internet shops retroactive bonuses if they returned to a determined minimum retail price level.

In 2012, the FCO imposed fines amounting to €8.2 million on tool manufacturer TTS Tooltechnic after it required the members of its selective distribution system to comply with the recommended resale prices. The manufacturer of cosmetics Wala Heilmittel was fined €6.5 million in 2013 for vertical price-fixing practices. In 2014, fines in the amount of €8.2 million were imposed on mattress manufacturer Recticel. The total amount of fines imposed by the FCO in 2014 exceeded €1 billion.

Investigative powers of the authority

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

The cartel authority may conduct any investigations and collect any evidence required. The FCO may request the disclosure of information by way of an informal or a formal information request from the parties themselves or third parties, may search business premises based on orders of the Local Court of Bonn, seize documents and interrogate witnesses or experts.

Private enforcement

53 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?

Intentional or negligent infringements of section 1 GWB may lead to liability for the damage caused by these infringements (section 33(3) GWB). Companies engaging in vertical restraints that infringe section 1 GWB are obliged to compensate other undertakings that suffered economic damage from the respective anti-competitive behaviour. Further, they may be ordered to terminate anti-competitive conduct (section 33(1) GWB).

Claimants must be affected by the infringement. In case of a vertical restraint, they will usually be members of the opposite market side, for example, suppliers or customers. Typical cases may involve distributors that are in a position to argue that the vertical restraint has been imposed on them by the other party due to a weak negotiation position. The party winning the lawsuit can expect to be compensated for legal costs and to receive interest on the damages. If the FCO investigates a case, the parties suffering loss through vertical restraints may prefer to wait for the FCO decision before claiming private damages as the outcome of the decision establishes with binding effect whether the behaviour in question can be qualified as an anti-competitive vertical restraint. For instance, in 2013, the Düsseldorf Higher Regional Court awarded damages in the amount of approximately €800,000 to an online dealer of sanitary equipment (the further claim regarding additional €1.6 million was dismissed). In addition, the court held a manager to be liable for the payment of damages as well. These damages claims were preceded by a decision by the FCO in 2011.

However, there is also stand-alone private enforcement. This is illustrated by a recent judgment by the Federal Supreme Court that ordered a producer of branded school bags to abstain from inducing a member of its selective distribution system to raise its resale prices. The buyer had applied for a cease-and-desist order with the competent civil court. In 2013 and 2014, different courts handed down judgments in the context of selective distribution systems (regarding branded school bags and digital cameras). Also in this context restrictions of online sales are playing an increasing role. Due to the still limited experience with the newly introduced section 33(3) GWB, no reliable information on the possible time frame for damages proceedings can be given, but proceedings will normally take months, if not years.

In addition, section 33(2) GWB provides for the possibility of industry associations to bring law suits if they meet certain institutional criteria and represent a significant number of member undertakings that offer products or services competing with those of the defendant. In 2013, the possibilities of consumer associations to bring actions were improved. It remains to be seen whether the recently enacted European directive on antitrust damages actions will bring about considerable changes to national German law.

Other issues

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

No.

GLADE MICHEL WIRTZ
CORPORATE & COMPETITION

Markus M Wirtz **m.wirtz@glademichelwirtz.com**
Silke Möller **s.moeller@glademichelwirtz.com**

Kasernenstrasse 69
40213 Düsseldorf
Germany

Tel: +49 211 200 520
Fax: +49 211 200 52100
www.glademichelwirtz.com

Greece

Christos Golfinopoulos
Golfinopoulos Law Office

Antitrust law

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

The legal source that sets out the antitrust law applicable to vertical restraints is Law No. 3959/2011 on Protection of Free Competition (the Law), which entered into force on 20 April 2011 and replaced Law No. 703/1977 on Control of Monopolies and Oligopolies and Protection of Free Competition. It has been amended by Law No. 4013/2011 (15 September 2011). The text of the law and its amendment is available in Greek on the Hellenic Competition Commission's (the HCC) website at www.epant.gr/nsubcategory.php?Lang=gr&id=240.

In line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly 81(1) of the EC Treaty), article 1(1) of the Law prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings, that have as their object or effect the prevention, restriction or distortion of competition within the Greek territory.

Agreements, decisions or concerted practices that fall within the prohibition of article 1(1) are exempted under article 1(3) of the Law, provided the agreement, decision or concerted practice under examination:

- contributes to the improvement of production or distribution of goods or to the promotion of technical or economic progress;
- ensures at the same time a fair share of the resulting benefits to consumers;
- contains only those restrictions absolutely necessary for the attainment of the above objectives; and
- does not allow the undertakings concerned to eliminate competition in a substantial part of the relevant market.

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 prohibition of article 1(1) of the Law extends to agreements consisting, particularly, in:

- directly or indirectly determining selling or purchase prices or any other trading condition;
- limiting or controlling production, supply, technological development or investments;
- sharing of markets or sources of supply;
- applying dissimilar trading conditions to equivalent transactions, in a way that hinders the operation of competition, in particular the unjustifiable refusal to sell, purchase or enter into any other transaction; or
- making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Restrictions between undertakings operating at a different level of the production or distribution chain, whose object or effect may fall within any of the prohibitions listed above, constitute vertical restraints covered by antitrust law. The list is indicative and therefore non-exhaustive. The most common vertical restraints dealt with by the HCC include resale price maintenance, territorial and customer restrictions, and exclusive supply and dealing.

In practice, the HCC has applied by analogy the criteria set out in EC Regulation No. 2790/1999 on the application of article 101(3) TFEU to categories of vertical agreements and concerted practices and the relevant European Commission Guidelines on Vertical Restraints (see HCC announcement (17 December 2001) on the application of EC Regulation No. 2790/1999 at www.epant.gr/img/x2/categories/ctg277_3_1196950972.pdf). Article 1(4) of the Law now explicitly provides that the provisions of the EU Regulations on the application of article 101(3) TFEU shall apply by analogy when examining the application of article 1(3) of the Law to agreements, decisions and concerted practices that are not likely to affect trade between member states.

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?

As is evident from the wording of article 1, the objective pursued by the Law is economic, namely the protection of competition. In this respect, consumer benefit is also taken into consideration when applying article 1(3) of the Law.

Responsible authorities

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

The HCC is responsible for enforcing article 1 of the Law (article 14 of the Law). The HCC is an authority with legal personality, administrative and economic independence, under the supervision of the Minister of Economy, Competitiveness and Marine (formerly Minister of Development) and is subject to parliamentary control. It consists of eight regular members, which include the President, the Vice-President and four rapporteurs. The HCC staff is organised under a directorate-general for competition and an independent office of internal affairs. The directorate-general for competition further consists of four directorates, the legal services directorate, two operational directorates and the administrative and financial support directorate, plus a media sector unit and a research and processing of information unit. The HCC President's office and the legal support office also report directly to the President.

Since 2009, it is only the HCC, acting in plenary session, and not the minister, that may allow the block exemption of categories of agreements on the basis of article 1(3). The supervising minister may apply to the HCC for interim measures, which may only be adopted by the HCC, either following such an application or ex officio. Further intervention of the minister is limited to administrative and organisational matters of the HCC.

Actions for annulment of the HCC's decisions may be brought before the Athens Administrative Court of Appeals.

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 article 46 of the Law, article 1 covers all restrictions of competition that have or may have any impact or effect within Greek territory, regardless of factors such as the place of execution of the agreement, or the parties' domicile or establishment.

Agreements concluded by public entities

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

Under article 6(1) of the previous Law No. 703/1977, the provisions of the Law explicitly applied to public undertakings and public utilities companies. It was also possible by ministerial decision, issued following an HCC opinion, to exclude such undertakings or categories of such undertakings from the application of the Law, for reasons of their greater importance to the national economy. Both provisions have been omitted from Law No. 3959/2011. Since there is no exception, the provisions of the Law will apply to public undertakings and public utilities companies in connection with their economic activities.

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.

No particular rules exist with regards to the assessment of vertical restraints in specific sectors of industry. Where appropriate for the analysis, the HCC will normally refer to the provisions of the existing EC Regulations (eg, in the motor vehicle sector).

General exceptions

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

On 2 March 2006, the HCC issued a Notice on agreements of minor importance (de minimis), available at www.epant.gr/img/x2/categories/ctg250_3_1200308071.pdf. In this notice, the HCC uses market-share thresholds to quantify what is not an appreciable restriction of competition under article 1 of the Law, in which case such agreements shall not be caught by the prohibition of article 1(1) of the Law. The Greek De Minimis Notice follows the European Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 81(1) of the EC Treaty (post-Lisbon, article 101(1) TFEU) (OJ C 368, 22 December 2001, page 13).

The general rule is that, according to the HCC's view, an agreement between undertakings does not appreciably restrict competition within the meaning of article 1(1) of the Law in the following situations:

- if the aggregate market share held by the parties to the agreement does not exceed 5 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings that are actual or potential competitors on any of these markets (agreements between competitors); or
- if the market share held by each of the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings that are not actual or potential competitors on any of these markets (agreements between non-competitors).

Furthermore, the Notice offers guidance on the calculation and application of these market share thresholds in various situations. Agreements containing hard-core restrictions, as defined in point 11 of the Notice such as price fixing and market sharing, cannot benefit from an exemption under the Notice.

Agreements

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

There is no definition of 'agreement' in the antitrust legal texts. By reference to settled case law of the Court of Justice of the European Union, the HCC accepts that in order for there to be an 'agreement' within the meaning of article 1(1) of the Law, it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that common intention is expressed is irrelevant, so long as it expresses the parties' intention to behave on the market in accordance with the terms of the 'agreement'. The concept is based on a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (Decision 385/V/2008, by reference to EU case law 41/69, *Chemiefarma v Commission*, T-41/96, *Bayer v Commission*, T-208/01, *Volkswagen v Commission*). The HCC's assessment may vary in each case depending on whether a network of interrelated or similar agreements exists in the relevant market.

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?

The form of the agreement is irrelevant. It may be an oral agreement, an agreement that was entered into by the parties 'silently' or an agreement that was not concluded in the specific form required by law. The form in which the agreement is manifested is unimportant so long as it constitutes the faithful expression of the parties' intention.

The HCC has found that agreements existed – as opposed to unilateral conduct falling outside the prohibition of article 1(1) of the Law – in situations where the distributors adapted their behaviour according to requests, circulars and guidelines that were communicated to them by their supplier. According to the HCC, the purpose of such communications was to specify the contractual terms of an informal (oral) long-term and uniform distribution network. 'Gentlemen's agreements' are also considered to accurately express the joint intention of the contracting parties. The mere participation of an undertaking in a meeting where an informal agreement or general consensus was reached may be sufficient to conclude that it was party to that agreement, in the absence of any public indication to the contrary.

Parent and related-company agreements

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

The HCC applies the 'single economic entity doctrine', by reference to case law of the EU courts (Court of Justice and General Court), according to which vertical agreements between parent and subsidiary are not caught by the prohibition of article 1(1) of the Law, as they are considered to constitute an allocation of roles, efforts or functions within a single economic entity. The HCC will also examine whether the parent company directly or indirectly exercises control over a related undertaking, namely whether it has the power to exercise more than half the voting rights or has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or has the right to manage the undertaking's affairs.

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?

Article 1 of the Law applies to agency agreements whereby the agent undertakes at least some of the risk or costs associated with carrying out its obligations under the agreement, for example, transport costs, advertising costs, costs for storage and maintenance of stock as well as financing or investment costs. The determining factor is whether the agent operates autonomously as an independent distributor carrying the related commercial and financial risks of his business, is free to decide his business strategy and is able to recover the investment costs that occurred in execution of the 'agency' agreement. Such cases are considered by the HCC, the Greek

courts and commercial legal theory as non-genuine agency or distribution agreements, which are caught by article 1(1) of the Law.

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?

In contrast with non-genuine agency agreements (see question 12), antitrust rules do not apply to agent–principal relationships where the agent acts in the name and on behalf of the principal, so that the agent itself bears no business risk resulting from the agent–principal agreement and has no business independence (Case No. 392/V/2008). In such cases, the agent is not considered as an economically independent undertaking, hence article 1(1) of the Law does not apply. In Case No. 430/V/2009, the HCC found that the undertakings under question were genuine agents (and therefore antitrust rules did not apply) since they did not purchase any of the contract goods for resale and they did not undertake any of the risks, costs or investments characterising independent distributors (see question 12).

Intellectual property rights

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

If the granting of IPRs is not the main object of the agreement under examination, the HCC will apply the antitrust law on vertical restraints. The clauses that concern the transfer of IPRs must not have the same object or effect with any of the prohibited restrictions on vertical restraints. The HCC's practice and case law to date offer no significant guidance. It is expected to follow the relevant EU legislation and case law on this point.

Analytical framework for assessment

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

In its analysis on vertical restraints, the HCC largely follows EU legislation and case law. This applies not only to the general legal framework but also to the competitive assessment of particular types of restraints. It is common for the HCC in its decisions to cite and apply the analysis relied on by the European Commission, the General Court and the Court of Justice of the European Union.

In that context, the HCC will consider those vertical restraints that have as their object the restriction or distortion of competition in the relevant market as most serious and will consider them as unlawful per se. Such restraints primarily consist in restricting the buyer's ability to determine resale prices (either by imposing fixed prices or maintaining minimum resale prices), allowing for absolute territorial protection by imposing restrictions on passive sales or restricting members of a selective distribution system supplying each other or end-users.

HCC practice has not always been uniform. According to early case law, agreements containing hard-core restrictions such as those mentioned above would escape the prohibition of article 1(1) where the parties' market share and turnover in the relevant market were insignificant, thus allowing for a conclusion that no restriction or distortion of competition was likely to occur in the relevant market. However, since the formal introduction of the De Minimis Notice (see question 8), hard-core restrictions such as those mentioned in point 11 of the Notice cannot be exempted and will always be considered unlawful per se.

Further, the HCC will examine whether an agreement falls within the exemption of article 1(3) of the Law. Agreements, decisions and concerted practices or categories thereof falling into the scope of article 1(1) of the Law are not prohibited, provided that all the conditions of article 1(3) are met (see question 1).

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?

The HCC has largely exempted agreements under article 1(3) of the former legal regime (Law No. 703/1977, in force until 20 April 2011) containing restrictions other than those considered as unlawful per se, mainly on the basis of the low market shares of the undertakings concerned in the relevant market – which in the vast majority of cases were below the de minimis threshold -– while reserving its right to withdraw the benefit of the exemption if market conditions change in the future. Incidentally, the HCC has considered whether long-term restrictions were necessary for the achievement of pro-competitive objectives and allowed consumers a fair share of the benefit.

The HCC has examined in a number of cases the legality of non-compete clauses by reference to market shares. If the market share of the supplier is above 30 per cent or the duration of the restrictions is longer than five years, the HCC will carefully examine the legality of the individual restraint in the context of the facts of each case. Restrictions of duration from two to five years may also fail to qualify for an exemption, especially if the supplier has a dominant position in the relevant market. Normally, if the supplier has a dominant position, if there exists a very dense exclusive distribution network with small areas assigned to each distributor or if exclusive distribution is combined with exclusive supply, non-compete clauses are unlikely to qualify for an exemption. Competing suppliers' market shares have also been taken into account in the context of examining the cumulative foreclosure effect of similar exclusive distribution agreements between few players in both the upstream and downstream markets.

When assessing individual restraints, the HCC closely follows the available guidance and precedents from EU legislation and case law, while it often cites the analysis for individual restraints in the European Commission's Vertical Guidelines.

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?

The HCC considers that buying power may amplify the anti-competitive effects of restrictions in exclusive distribution agreements that are imposed by important buyers on one or several suppliers.

Buying power has been taken into account in the context of examining the cumulative foreclosure effect of similar exclusive distribution agreements between few players in both the upstream and downstream markets (Case 455/V/2009). Market shares between 27 and 45 per cent were sufficient to indicate significant buying power in a market where all the other competitors' market shares were below 10 per cent.

Following the adoption of EU Regulation No. 330/2010, which introduced a safe harbour buyer marker share threshold of up to 30 per cent, the HCC will apply the same criteria when assessing individual restraints.

Block exemption and safe harbour

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

No block exemption or safe harbour exists in the sense of EC Regulation No. 2790/1999 and EU Regulation No. 330/2010. However, in order to ensure a uniform application of national and EC law, the HCC interprets article 1 of the Law to vertical restraints by reference to the provisions of the EC Regulation, the EC guidelines on vertical restraints and relevant case law, as explicitly provided by article 1(4) of the Law.

Types of restraint

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

Price-fixing and setting minimum prices, whether directly or indirectly, are unlawful (see question 15). Such restrictions constitute the most serious violations of the antitrust law and may not fall within the exemption under article 1(3) of the Law. Indicative prices were also found to fall within the retail price maintenance restriction in cases where the supplier had the right under the agreement to claim compensation in the event of non-compliance of the retailer with the indicative price catalogue. Most of HCC's fining decisions for unlawful vertical restrictions concern price-fixing and setting minimum prices. Regarding HCC's enforcement activity, see question 52.

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'?

There is no relevant guidance. The HCC is expected to follow the relevant EU legislation and case law on this point.

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

When examining a cartel case in the dairy products sector, the HCC decided to consider the vertical agreements between dairy companies and distributors separately and in isolation from the horizontal agreements between the same dairy companies, adopting separate fining decisions in each case.

In one case (376/V/08), the HCC examined an agreement between Greece's main public social security organisation (IKA) and a number of banks for the collection of the employers' contributions. The parties had agreed to a fixed fee for the banks' intervention of €1 per transaction and three working days' value. The HCC found that this term fell within the prohibition of article 1(1) of the Law, as it constituted direct price-fixing; however, it decided to exempt the agreement (individual exemption) under article 1(3) of the Law (not on the basis of a rule-of-reason analysis) due to the efficiencies that arose out of the agreement such as:

- the use of an automated and effective interbanking system, where the uniform fee structure guaranteed the secure and smooth operation of the system and removed the burden of separate and time-consuming negotiations between the parties involved;
- all users of the system saved time and resources through the simplified procedures of the system; and
- the agreement concerned only the fees that IKA had to pay to the banks (and not the employers' costs), it was a result of a separate negotiation between IKA and the banks and respected the public policy principles (single fee paid from a public sector body to all the banks in exchange for comparable transactions).

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

The HCC considers that cost efficiencies resulting from the mere exercise of market power should not be taken into account, especially when examining agreements containing hard-core restrictions such as resale price maintenance. The burden lies on the undertakings concerned to prove that their distribution system may bring about benefits that satisfy the conditions for an exemption.

In Case No. 376/V/08, the HCC exempted under article 1(3) of the Law a price-fixing agreement between the IKA and a number of banks, taking account of the efficiencies that arose out of the particular agreement (see question 21).

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.

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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.

Most-favoured-customer clauses have been considered in cases of selective distribution systems as restrictive of competition and thus unlawful (Case 66/89), on the basis that buyers unable to fulfil those terms set by the supplier will find themselves at a competitive disadvantage to the rest of the resellers of the same products in the relevant market.

In the highly concentrated electricity market, the obligation on the supplier not to supply other buyers on most favourable terms where the buyer holds a dominant position was considered as a significant barrier to entry (Case 458/V/2009). Nevertheless, the agreement qualified for an exemption under article 1(3) of the previous Law on the grounds that the market share of the particular supplier was insignificant (below 1 per cent) and the duration of the agreement was short (three years).

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.

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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.

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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.

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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?

Agreements that directly or indirectly have as their object the restriction of sales within the territory of the buyer or to customers to which the buyer may sell its products or services are considered serious restrictions of competition and will be found unlawful per se (see question 15).

However, a supplier may restrict the active sales of his direct buyers in the territory or to groups of customers which have exclusively been allocated to another buyer or which have been reserved for the supplier. These restrictions may not extend to passive sales within that territory or to those groups of customers. Passive sales restrictions result in market partitioning, impede intra-brand competition and may lead to maintaining price differentials within territories or group of customers, either in the wholesale or in the retail level of trade, and are treated as hard-core restrictions by the HCC and the Greek courts (see, for instance, Athens Administrative Court of Appeals Judgment No. 1244/2011).

29 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?

See question 28.

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

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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

The HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No relevant guidance exists to date.

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

Clauses that are considered necessary for the establishment and effective operation of selective distribution systems and require an agreement between supplier and distributor such as product marketing, advertising promotions, obligation to purchase a production line or to stock minimum

quantities, have been found to fall outside article 1(1) of the Law. The supplier may rely on these conditions to refuse a distributor to enter into the selective distribution system, provided these are applied uniformly to all authorised distributors and there is an objective justification for the refusal.

Regarding vertical restraints that are caught by antitrust law, the HCC applies the general analysis described in this chapter, closely following the EU legislation and case law.

34 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?

Selective distribution systems are more likely to comply with antitrust law when they relate to branded products of high quality and brand image or technically complex products. Because of the nature of the products concerned, certain objective restrictions will normally be allowed, especially those that may guarantee wide distribution of said products and strengthen their brand image, such as the qualities of the distributor (technical capabilities and professional qualifications), the premises of the distributor (appearance, etc), the protection of the product (storage and packaging conditions) and after-sales support.

35 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 HCC's practice and case law to date offer no relevant guidance. It is expected to follow the relevant EU legislation and case law on this point.

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

The HCC has ruled on selective distribution cases either following a notification of the agreement at the time of its conclusion or following complaints by distributors against suppliers for violation of contractual obligations or for refusal to supply. Hence, there is no particular guidance on this point.

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

In its early case law (66/89), the HCC had to re-examine a selective distribution agreement to which negative clearance was initially granted, following the notification of a significant number of similar agreements covering an important part of the relevant market, thus changing the conditions of competition as a result of the cumulative effect of those agreements.

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

In Case No. 332/V/2007, the HCC noted, by reference to a contractual obligation on distributors to sell the products only through retails shops, that selected distributors must be free to conduct active or passive sales to end-users in the area of another member of the selective distribution network, even if they are not allowed to open a retail shop in that area.

In the motor vehicle sector, the HCC has examined distribution agreements whereby members of a selective distribution network were restricted to reselling the products in particular geographical areas and found such agreements to be in line with the provisions of the Commission Regulation 1475/1995, according to which exclusive and selective distribution clauses were regarded as indispensable measures of rationalisation in the motor vehicle industry.

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

The HCC considered such restrictions in a number of franchise agreements and declared them illegal (most recently in its decision dated 30 December 2014 on the Germanos franchise network; also cases 51/1997 and 128/98). To the extent that the contract products are available through an authorised distribution channel that is not controlled by the supplier, any prohibition on the buyer's ability to obtain products from alternative sources will be found to restrict competition and will be considered invalid.

The HCC has examined exclusive supply clauses in conjunction with exclusive distribution and single-branding obligations imposed by a dominant supplier on its buyers at the wholesale level and found those restrictions to result in market partitioning, since the combination of such exclusivity clauses had the result of removing intra-brand and interbrand competition (Case No. 520/VI/2011; also the decision of 30 December 2014 on the Germanos franchise network, see question 42). Restrictions on cross-supplies between the franchisees in combination with imposition of exclusive supply obligations have also been declared illegal, even where the franchisor's market share is below 30 per cent, since such restrictions remove the benefit of the block exemption under article 4(b) of EU Regulation No. 330/2010 (Case No. 495/2010).

'English clauses', under which the buyer must notify their supplier and may accept a competing offer from another supplier only if the terms of that offer are more favourable, have been found to be abusive as akin to non-compete clauses (Case No. 434/V/2009).

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

The HCC's practice and case law to date offer no relevant guidance.

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

This question was considered by the HCC in the context of a selective distribution system. It found that refusal of entry into the system was contrary to article 1(1) of the Law, insofar as the only justification behind the refusal was that the candidate distributor would not comply with the restriction not to stock competing products (Case No. 271/2004).

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

The HCC considers such clauses as non-compete restrictions and follows the European Commission analysis on this point (Case No. 520/VI/2011). In Case No. 551/VII/2012, the obligation to purchase minimum yearly quantities, where such quantities exceeded the actual yearly needs of the buyer, amounted to an exclusive purchase obligation and was considered as likely to violate article 1(1) of the Law. However, in the context of franchise agreements, the HCC accepts that such restrictions do not fall within the prohibition of article 1 of the Law, even where the supplier imposes on the franchisee the obligation to purchase all of its products from the franchisor for the whole duration of the agreement. The justification is that these restrictions are considered necessary for the preservation of the identity and the reputation of the franchise network. Similarly, clauses where reasonable minimum turnover targets are imposed have occasionally been examined and have been found to be proportionate in the context of franchise agreements. Such restrictions have been accepted as lawful cases of default, granting the supplier the right to terminate an agreement. To the contrary, obligations on franchisees to purchase their products solely from the franchisor and not from other franchisees within the same network have been found to constitute a serious restriction of competition (decision of 30 December 2014 on the Germanos franchise network).

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

In cases of exclusive supply, the HCC will consider the market position of the supplier and the buyer in the relevant markets as well as the term of exclusivity (Case No. 267/2004). A 10-year duration exclusivity clause was found to restrict the buyer's ability to source its supplies from other suppliers as well as the opportunity to potential suppliers to provide their goods or services to the buyer, and as such, it was caught by the prohibition of article 1(1) of the Law. Where the buyer holds a dominant position in the relevant (upstream or downstream) market, the obligation on the suppliers to supply exclusively such buyer shall be considered as restrictive of competition and declared unlawful (Case No. 538/VII/2012).

The application of article 1(3) may be justified, even for a 10-year term, where that period is necessary for the contracting parties to recover the costs of significant investments in a very competitive market. Factors such

as the level and the expected pay-off of the investment, the parties' market shares, the level of expected innovation, as well as estimated consumer benefit will also be taken into consideration. The HCC largely relies on the analysis of the European Commission and the EU courts on this point.

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

The HCC's decisions have not dealt with this particular question. The HCC is expected to follow the guidance from the relevant EU legislation and case law.

45 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?

Not applicable.

Notifying agreements

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

With the entry into force of Law No. 3959/2011 on 20 April 2011, the formal notification procedure under article 21 of the previous Law No. 703/1977 was abolished.

Authority guidance

47 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?

There is currently no legal provision or informal procedure allowing interested parties to obtain guidance on the legality of a particular agreement.

Complaints procedure for private parties

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

Under article 36(1) of the Law, any natural or legal person has the right to file a complaint against an infringement of article 1 of the Law and article 101 of the TFEU. The HCC has published general criteria for the prioritisation of the cases before it and generally has discretion as to which complaints to pursue.

Enforcement

49 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?

Vertical restraints cover a very small part of the HCC's workload, with just a few decisions issued each year.

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

The specific restrictions of the agreement are null and void. The validity of an agreement is not affected where the HCC considers the unlawful clauses to be independent of the rest of the contract. Under article 181 of the Greek Civil Code, the remaining clauses of the agreement are valid and enforceable if the parties would have entered into the agreement even without the clauses that were declared unlawful.

Update and trends

There has been little enforcement activity from the HCC in the area of vertical restraints in the past two years. In a press release dated 30 December 2014, the HCC announced its decision to impose fines totalling €10.2 million on Germanos, the telecoms retail sale chain subsidiary of Cosmote, for resale price maintenance and a restriction of cross-supplies between distributors and franchisees within its selective distribution system – both vertical restrictions that constitute serious infringements of competition law. The infringements lasted for a period exceeding 20 years (from 1990 to 2012).

No significant amendments are expected to the law any time soon.

51 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 HCC itself has the power to impose penalties, fines and pecuniary sanctions that are provided for in the provisions of the Law. In finding of a breach of article 1 of the Law or article 101 of the TFEU, the HCC may by decision:

- address recommendations;
- order the undertakings or the associations of undertakings concerned to bring the infringement to an end and refrain from it in the future;
- impose behavioural or structural measures, which must be necessary and expedient for the termination of the infringement and proportionate to the type and gravity of the infringement;
- impose a fine to the infringing undertakings or associations of undertakings or to those that do not comply with commitments undertaken, pecuniary sanction or both, in case of continuation or repetition of an infringement;
- threaten with a fine in case of continuation or repetition of an infringement; and
- impose the fine threatened, when by decision it finds the continuation or repetition of an infringement or the non-fulfilment of a commitment.

If, during an investigation the HCC considers that a violation of article 1 is likely to exist, it may also accept commitments from the undertakings concerned to end the suspected violation, making those commitments binding for them, even if only for a short time.

The fine for a violation of article 1 of the Law may reach 10 per cent of the turnover of the undertaking for the year during which the violation ceased. When a violation committed by an association of undertakings is linked with the activities of its members, the fine threatened or imposed may reach 10 per cent of the total turnover of its members. If the violation continues until the time of the decision, it is the turnover for the previous financial year that is taken into account. The Law does not clarify whether it is the national or the worldwide turnover that will be taken into account; however, to date the fines imposed have been calculated on the basis of national turnover. A fine of €10,000 per day may be imposed in cases of delay to comply with a decision, according to its provisions. A notice on the calculation of fines is available at www.epant.gr/img/x2/categories/ctg253_3_1193315361.pdf.

The HCC may also impose a fine of up to 10 per cent of the gross turnover of an undertaking for the current or the previous year when the violation occurred, in cases of non-compliance with a previous decision.

The legal representatives of the undertakings concerned as well as those persons responsible for carrying out the relevant decisions are held jointly and severally liable, with their own personal property, to pay the fine. An additional fine ranging from €200,000 to €2 million may be imposed on the above individuals if they participated in preparing, organising or committing the infringement.

The HCC may also order interim measures ex officio or following a request from the minister of development, in cases where a violation of article 1 of the Law or article 101 of the TFEU is likely, and there is an urgent case to avert imminent risk of irreparable damage to the public interest. A fine of €10,000 per day may be imposed in cases of non-compliance with such a decision.

In one of its most publicised cases on vertical agreements, the HCC imposed (December 2007) total fines of €28.5 million on supermarkets and dairy processors for resale price maintenance and passive sales restrictions.

However, no particular trend can be established regarding the HCC's fining policy, considering the very few fining decisions on vertical restraints cases that the HCC has adopted to date. In those cases, the level of fines ranged up to 2 per cent of the national turnover of the undertaking concerned.

It should also be noted that the Law provides for criminal sanctions. Those who, whether individually or as representatives of legal entities, violate article 1 of the Law or article 101 of the TFEU face a fine ranging from €15,000 to €150,000. If the infringing act concerns undertakings that are actual or potential competitors, the fine ranges from €100,000 to €1 million and a sentence of imprisonment of at least two years also applies.

Investigative powers of the authority

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

The HCC may conduct investigations on its own initiative following a complaint or following a request by the minister of development.

Acting within its investigative powers, the president of the HCC or an HCC official duly authorised by him may request information in writing from any person, undertaking or public authority. Failure by a natural person or an undertaking to fully comply with such an information request within the time limit set by the HCC may incur a fine of at least €15,000 and up to 1 per cent of the national turnover of the undertaking that failed to provide the information.

Furthermore, in order to investigate a possible breach of article 1(1), HCC officials, entrusted with the powers of tax inspectors, have the authority to:

- inspect and receive copies or extracts of any kind of books, information, communications and documents of the undertakings concerned, even if they are in possession of their directors or any other personnel, regardless of their physical or electronic form or place of storage;
- confiscate books, documents and other evidence as well as electronic means for the storage and transfer of data that constitute professional information;
- inspect and collect information and data of mobile terminals, portable devices and their servers, even if they are located outside the buildings of the undertakings under investigation;
- conduct investigations at the offices and other premises and means of transportation of the undertakings concerned;
- secure any business premises, books or documents during the investigation;
- conduct searches at the private homes of managers, directors, administrators and, in general, persons entrusted with the management of a business, provided there is reasonable suspicion that books or other documents which belong to the undertaking concerned and are relevant to the investigation are kept there; and
- take sworn or unsworn testimonies, ask for explanations and record the relevant answers.

Obstructing the HCC's investigation or refusing to present the requested documents and information and provide copies incurs a fine of between €15,000 and €100,000. It is not uncommon that the HCC asks for the public prosecutor to be present during investigations.

Private enforcement

53 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?

The legal basis for bringing an action for damages in Greece is article 914 of the Civil Code establishing tort liability, under which anyone can claim damages provided the following conditions are met:

- unlawful act;
- fault (intent or negligence);
- damage; and
- causal link between the unlawful act and the damage.

The civil courts have jurisdiction to hear such actions and may adjudicate compensation and reasonable pecuniary satisfaction in case of moral damage (article 932 of the Civil Code). Compensation may be awarded in the form of pecuniary damages or in natural restitution, depending on the specific circumstances of the case (article 297 of the Civil Code).

It may take up to two or three years for a court ruling on a private enforcement action in the first instance. The successful party may recover the legal costs that were necessary for supporting their action and minimum legal fees, according to the limits set by law.

Other issues

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

Article 18a of Law No. 146/1914 on unfair competition prohibits abusive behaviour towards economically dependent undertakings in vertical relationships, irrespective of the existence of a dominant position. For this reason, it is often referred to as part of the vertical agreements legal framework.

GOLFINOPOULOS
LAW OFFICE

Christos Golfinopoulos **christos@golfinopoulos.com**

Pantanassis 64
26221 Patras
Greece

Tel: +30 2610 272 628
Fax: +30 2610 272 553
www.golfinopoulos.com

Hungary

Chrysta Bán
Bán, S Szabó & Partners

Antitrust law

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

Vertical restraints are regulated under chapter IV of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (the Competition Act). Chapter IV on Prohibition of Agreements Restricting Economic Competition regulates both horizontal and vertical agreements restricting competition. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly articles 81 and 82 of the EC Treaty), as well as all Commission regulations, including the new Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices, Commission Regulation (EU) No. 267/2010 of 24 March 2010 on the same in the insurance sector and Commission Regulation No. 461/2010 of May 2010 on the same in the motor vehicle sector also have direct application in Hungary. Government Decree No. 205/2011 (X.7) regulates the rules of certain group exemptions from the general prohibition of vertical restraints. Regulations listed under question 7 are also relevant in the field of vertical restraints. Below we discuss only the relevant Hungarian regulations in force as of 1 January 2015.

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?

Agreements and concerted practices between companies, as well as the decisions of the social organisations of companies, public bodies, unions and other similar organisations of companies and unions with the purpose of preventing, restricting or distorting economic competition, or which may display or in fact display such an effect, are prohibited. The prohibition, in particular, applies to the following:

- fixing retail prices or defining other business conditions, directly or indirectly;
- restricting manufacture, distribution, technical development or investment or keeping them under control;
- dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific consumers from the purchase of certain goods;
- dividing the market, excluding any party from selling, and restricting the choice of means of sales;
- preventing any party from entering the market;
- discriminating against certain partners with respect to transactions of an identical value or of the same nature which causes disadvantage to certain business partners in the competition; and
- rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract.

The above practices are prohibited in horizontal and vertical contexts. No specific definition of vertical restraint is given in the Competition Act. The above activities or types of agreements do not provide an exhaustive list of the prohibited activities, but constitute the most common restrictions of trade prohibited by law.

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?

The primary purpose of the law is to protect competition and consumers' welfare; nevertheless, as a side effect it also protects the survival of smaller businesses and through this – indirectly – employment relations as well.

Responsible authorities

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

Enforcement of prohibitions on anti-competitive vertical restraints is delegated to the Office of Economic Competition, which is an independent organ established by law. The government and ministers do not have authority over the enforcement of antitrust matters.

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?

Generally, Hungarian competition law applies to the market conduct of any natural and legal persons and unincorporated business associations, regardless of their domicile, displayed in the territory of Hungary, unless otherwise provided for by law. The market conduct displayed by companies abroad also falls under the scope of the Competition Act and other antitrust regulations, if the effect of such conduct manifests itself within Hungary.

Agreements concluded by public entities

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

Public or state-owned entities are not exempted from antitrust law in Hungary.

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.

Specific regulations apply to horizontal and vertical restraints in different industries as follows:

- Government Decree No. 86/1999 (VI.11) on exempting certain groups of technical transfer agreements from the general prohibition of restraints;
- Government Decree No. 202/2011 (X.7) on exempting certain groups of specialisation agreements from the general prohibition of economic restraints;

- Government Decree No. 204/2011 (X.7) on exempting certain groups of the motor vehicle after-market sector from the general prohibition of restraints;
- Government Decree No. 203/2011 (X.7) on exempting certain groups of agreements in the insurance sector from the general prohibition of restraints; and
- Government Decree No. 206/2011 (X.7) on exempting certain groups of agreements in the field of research and development.

General exceptions

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

Agreements concluded between non-independent companies are exempted from the prohibitions. Companies belonging to the same company group and that are controlled by the same companies are considered non-independent.

Agreements of minor importance are not subject to the general prohibition. An agreement is of minor importance if the total joint share of the parties concluding the agreement and of the companies that are not independent from such parties does not exceed 10 per cent in the market in question, except if the agreement pertains to the fixing of the purchase or selling prices between competitors, or the dividing of the market among competitors.

Certain groups of vertical restraints are exempted by the government by decree from the general prohibitions of the Competition Act (see as listed under questions 1 and 7). The general prohibition does not apply to an agreement if:

- it improves the efficiency of production or distribution, or promotes technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the end-user;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; or
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

The rule of minor importance does not apply to an agreement that is able to create an environment, in conjunction with other agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted.

Group exemptions established by a government decree from the prohibition of restrictive market practices shall not apply to an agreement if the conditions laid down above are not satisfied as a result of the impact it creates in the particular market in conjunction with other similar agreements.

Agreements

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

Agreements are not defined in the Competition Act or other relevant regulations. For the purposes of competition law agreements, written or oral, in the sense of civil law agreements are not required to establish an illegal act; concerted practices can be found to be against the law as well.

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?

No formal written agreement is required to establish that the vertical antitrust rules have been violated. Oral agreements, unwritten understandings and concerted practices or behaviour of the parties may also qualify as vertical restraint of trade.

Parent and related-company agreements

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

Rules on the prohibition of vertical restraints do not apply to agreements between companies that are not independent. Companies that belong to the same company group and those that are controlled by the same companies are considered non-independent. A company is regarded as part of the same group of any company that:

- it controls independently;
- controls it independently;
- is controlled by a company referred to in the second point above; or
- is controlled jointly by any two or more of the companies referred to under the above points and the company.

A company has direct control over another if it:

- holds over 50 per cent of the shares, stock or voting rights in the other company;
- has the power to designate, appoint or dismiss the majority of the executive officers of the other company;
- has the power, by contract, to assert major influence over the decisions of the other company; or
- acquires the ability to assert major influence over the decisions of the other company.

A company has indirect control over another company when the latter is controlled, whether independently or jointly, by one or more companies under the control of the former.

True joint ventures (with 50–50 control) do not belong to either of their parent groups (ie, they are considered to be unrelated to its controllers).

Agent–principal agreements

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

In accordance with section 1(8) of Act CXVII of 2000 on independent commercial agency agreements, the rules of the Competition Act will also apply to those agency agreements that restrict competition. Typically, if the agent acts on behalf of the seller and enters into agreements that benefit and oblige the seller directly, then the relationship between the seller and the agent is not considered as restricting competition.

On the other hand, if the agent acts on its own behalf (for example, it makes its own investments, takes title over the products, keeps its own stock of the goods, participates in the promotion of the products and bears significant costs or risk of the business itself) it may be considered as a distributor (retailer), in which case rules on prohibition of vertical restraints shall apply.

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?

See question 12.

Intellectual property rights

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

Antitrust law, including certain group exemption rules, also apply to the transfer or licensing of intellectual property rights, where the grant of such rights is ancillary to the sale or resale of a product.

Analytical framework for assessment

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

Agreements and concerted practices between companies that are aimed at the prevention, restriction or distortion of economic competition, or that have or may have such effect, are prohibited. The most typical activities and types of agreements prohibited by law are named by the Competition Act and listed in question 2.

All the above-listed, and similar agreements and activities restricting economic competition, are prohibited unless they fall under the scope of an exemption established by law. Exemptions from the prohibition of vertical restraints are of different legal character:

- agreements between companies that are related (not independent from each other) are always exempted from the prohibition (see details under question 11); and

- agreements that fall under the de minimis rule are also exempted. This exemption applies to agreements between companies whose total joint market share (together with the controlled companies' market shares) does not exceed 10 per cent, provided that the agreement does not establish:
  - fixing purchase or retail prices between competitors; or
  - dividing the market among competitors.

Consequently, in vertical relationships, if the seller and the purchaser are not competitors, and their joint market share does not exceed 10 per cent, they may even fix retail prices or apply territorial restrictions.

Several vertical agreements fall under the general vertical group exemption rules or one of the specific industrial group exemption regulations (motor vehicle sector, insurance sector, technical transfer agreements, etc. See question 7). These exemption rules apply only to the extent and on the condition that the agreement in question meets the specific standards and requirements established by the relevant group exemption regulation.

An agreement containing vertical restraints may still be exempted from the prohibition if the parties can prove that:

- it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the consumer;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; and
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

The burden of proof to show that an agreement is exempted from the prohibition lies with the party who relies on the exemption.

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?

In the event the seller's market share exceeds 30 per cent on the relevant market, the general group exemption rules do not apply. In addition to this, the Office of Economic Competition in its investigations always thoroughly researches the entire market, the market share of the different market participants, horizontal and vertical market structures and the behaviour of the competitors. The investigations also question how the behaviour of the individual company, together with the similar activity of the competitors, affects the market. Because of a change to the Competition Act passed in 2005 (section 16/A), the group exemption rules cannot be applied to an agreement if, owing to the cumulative effects of similar agreements, the goals and conditions of the group exemption rules (see question 8) are not realised on the market. In such cases the agreement is not exempted from the anti-competitive restraint rules for the future, but no fine can be imposed against the company at the time of the investigation. The cumulative effects of similar agreements of the competitors were examined in a vertical relationship, eg, in case Vj-28/2007/42, where different beer distribution agreements were investigated.

Another economic factor always thoroughly investigated is under what conditions and how easily a new market participant (competitor) can establish a competing company in the given industry.

Competition possibilities between the local market participants and foreign competitors, especially within the EU region, are a target of higher scrutiny since Hungary is a member state of the European Union. Even if sales concentrate only on the Hungarian market, it is likely that the Office of Economic Competition will find that the situation has an effect on interstate trade, due to the fact that sometimes intensive sales – even if only within the territory of Hungary – may limit the realistic chance of foreign competitors to enter the Hungarian market.

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?

The buyer's market share has always been an important and relevant factor and has been thoroughly investigated in cases of exclusive supply obligations. Since the entry into effect of Government Decree 205/2011 (X.7) on the general group exemptions from the prohibition of vertical restraints (General Block Exemption Decree), the possibility of applying the group exemption rules is excluded in the event the market share of the buyer exceeds 30 per cent on the market of purchasing the relevant products or services.

Block exemption and safe harbour

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

As discussed in questions 1, 7 and 8, the government, based on the authorisation of the Competition Act, established certain block exemption rules in the field of general commercial relationships, the motor vehicle sector, the insurance sector, the transfer of technology, technical specification the research and development agreements. Agreements that fall under the scope of one or the other block exemption rules are exempted from the general prohibition of horizontal or vertical restraints, provided that the agreement in question meets in all respects the rules and requirements of the given block exemption regulations. In the following we address only the most important rules of the General Block Exemption Decree on exempting certain groups of vertical agreements from the prohibitions on vertical restraints.

The General Block Exemption Decree provides exemption status only to those vertical agreements that meet all of the following requirements:

- the seller's market share on the relevant market does not exceed 30 per cent;
- the market share of the purchaser does not exceed 30 per cent of the relevant market; and
- the goal of the agreement, directly or indirectly, in itself or together with other elements under the control of the parties, is not:
  - the limitation of the purchaser in establishing its own resale prices independently, except that the parties may establish a recommended or a maximised retail price; or
  - the limitation of the purchaser in establishing its territory of sale or the scope of its customers, except:
    - limitation of active sales to territories and customers maintained and delegated to other exclusive distributors, or maintaining the right of seller to enter into sales transactions;
    - limitation of a wholesaler to sell to end-customers;
    - limitation of sales in a selective distribution system to non-authorised distributors;
    - limitation of the purchaser to sell spare parts to customers who would use such spare parts for the manufacture of similar goods;
    - limitation of the members of a selective distribution system in their active and passive sales to end-customers;
    - limitation of the members of a selective distribution system to sell to each other; and
    - limitation of the seller to sell spare parts to end-customers, repair shops or other service providers.

Should the agreement fail to meet any of the provisions listed above, then the agreement is not eligible for exemption under the General Block Exemption Decree. In addition to the above, certain provisions cannot validly be agreed upon. In accordance with these:

- agreements including an obligation on the purchaser not to manufacture, purchase, sell or resell competing goods, or that it has to purchase more than 80 per cent of its merchandise exclusively from the seller, may not validly be agreed upon for an indefinite term or for a term exceeding five years;
- the purchaser may not validly be limited in its purchasing, sales or retail activities following the termination of the distribution agreement (some exemptions apply); and
- members of a selective distribution system may not be limited in selling competing products of certain competitors.

Types of restraint

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

Retail price-fixing is generally prohibited. The only way to influence the level of retail prices by the seller is to establish a recommended retail price, as long as there is no pressure whatsoever by the seller to force the application thereof as an actual retail price, or, alternatively, to set a maximum retail price by the seller or the parties together.

In Case No. Vj-147/1999 the Competition Office ruled that the distributor may legally recommend retail prices to the retailer, as long as the latter is free to take it into account when establishing its own prices freely. Suppliers are allowed to distribute the list of recommended prices in a printed form or put it into an advertisement. They are forbidden, however, to follow any practice that would exercise any pressure on the retailer to follow the recommended prices.

In its further decisions No. Vj-187/1996 and Vj-166/2006, the Competition Office confirmed the above ruling and added that threatening the retailer, for example, with the termination of the distribution agreement in case of not following the recommended price list or a constant reminder to thereto each qualifies as a breach of law.

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 very few cases handled in this field in Hungary do not suggest any policy established by the Competition Office in this regard. Nevertheless, in decision Nos. Vj-57/2007/432 and VJ-7/2008/178 the Competition Office rejected the legality of the price-fixing between the parties made with the goal of introducing a new product on the market. According to the reasoning the same goal can be achieved with less restrictive methods and solutions in practice. Consequently any vertical retail price arrangement would be likely to be considered illegal, unless it falls under one of the statutory exemptions.

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

Cartel cases are always rigorously investigated, covering all potential factors of the forbidden restraints and all different elements of the market behaviour of the affected companies. Each case that is investigated for potential retail price-fixing is investigated together with other factors of vertical restraints, including territorial sales restrictions and potential related horizontal restraints. We are unaware of any case where the authorities attributed a positive effect to a restraint. In decision No. Vj-147/1999 the Competition Office ruled that a selective distribution system combined with retail price maintenance frees the manufacturer of any pressure to improve or enhance the effectiveness of its manufacturing practice.

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

We are unaware of any decision addressing this possibility.

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.

It would qualify as a retail price-fixing that is in breach of competition regulations.

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.

MFN treatment agreements are forbidden by the Commercial Act No. CLXIV of 2005 in the event that the commercial entity has 'significant market power'; that is to say, if its annual turnover (together with its group companies' turnover) exceeds 100 billion Hungarian forints. Regardless of the annual turnover of the company, MFN treatment may qualify under certain circumstances as restraint of trade under the Competition Act.

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.

There are no local regulations or court cases issued in connection with online trading.

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.

There is no special rule or decision in this regard; the general rule would apply, according to which the supplier may provide only maximum price or recommended retail price to its buyer.

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.

See question 24.

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?

Generally, restricting the purchaser from selling in certain territories is not allowed; however, the seller may appoint another exclusive distributor to a certain territory, or may maintain a certain territory to itself, in which case limitation of active sales to those territories by the purchaser is allowed.

29 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?

Generally, restricting the purchaser from selling to certain customers is not allowed, yet limitation of sales is allowed in the following cases:

- sales to a certain group of customers retained for the seller or delegated to another exclusive distributor;
- in case of a selective distribution system, sales to non-contractual retailers can be excluded;
- purchasers may be limited in selling spare parts to customers who would use such spare parts for the manufacturing of similar goods; and
- a wholesaler may be restricted from selling to end-customers.

In decision No. Vj-19/2002 the Competition Office ruled that the group exemption rule may still apply if the retailer undertakes not to sell directly to end customers or it undertakes that it will not exercise active sales outside its own territory, that is, it will not establish a branch, product storage or initiate any active sales outside its own territory. Nevertheless, such undertakings and practices may not affect the possibility and reality of passive sales outside of the territory.

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

In general, it might be concluded that sellers or purchasers may not be restricted in selling spare parts for servicing, repair and maintenance purposes. On the other hand, sale and resale may be restricted when spare parts would be sold to purchasers who would manufacture goods out of the spare parts similar to that of the goods sold by the seller.

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

To our best knowledge so far no decision of the Office of Economic Competition has addressed the question of sales via the internet in the field of vertical agreements.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

See question 29.

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

The General Block Exemption Decree allows the establishment of a selective distribution system under which only approved companies can be members of the distribution system and such members may legally undertake an obligation that they do not sell to retailers who are not approved members of the network and that they do not carry out active sales activities on the territory of another member of the network. However, passive sales to end customers may not be restricted. The selective system may be established based on a quantitative or on a qualitative basis. In a quantitative system the seller may set the maximum number of retailers, while in a qualitative system the seller has to enter into an agreement with all retailers who meet the qualitative requirements and apply for a membership in the network.

In its decision Vj-158/2005/148 the Competition Office ruled that it was illegal for the distributor to not publish the technical and other requirements and criteria for becoming a distributor. Since it did not publish these criteria, the court decided, there was no objective criteria system under which it could have been decided on objective terms who can become a member of the servicing network, meaning that the distributor had a chance to avoid entering into a contractual relationship with certain servicing companies without due reason.

34 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?

In our view, in the field of motor vehicle distribution it is more likely that the market participants and the distribution agreements will comply with the relevant regulations. Motor vehicle wholesalers are usually large multinational companies selling under the same terms in the European Union, and are therefore familiar with the legal regulations and more likely to introduce similar systems in different EU countries, with the goal of complying with antitrust and group exemption rules. They are big enough to have in-house lawyers or outside legal counsel who can assist the distribution structure and terms.

35 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?

So far no specific legal regulations or case law exist that regulate internet sales in the field of vertical sales agreements.

36 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?

We are unaware of any such decisions.

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

Yes, the Competition Office in its investigation makes a broad survey and examines the potential cumulative effects of similar activities of the competitors.

In decision No. Vj-141/2004 the Competition Office declared that, in general, cumulative restrictive effects can be established when different distribution networks acting in parallel make it likely that penetration of the market is limited, or result in a limitation of competition on the market. This usually occurs when parallel selective distribution systems covering most of the territory of the market apply unreasonable selection criteria, not justified by the nature of the product, or they apply unreasonable discriminative practices in connection with the different forms of distribution of the products.

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

In decision No. Vj-19/2002 the Competition Office ruled that the group exemption rule may still apply if the retailer undertakes not to sell directly to end customers or undertakes that it will not exercise active sales outside its own territory, that is, it will not establish a branch, product storage or initiate any active sales outside its own territory. Nevertheless, such undertakings and practices may not affect the possibility and reality of passive sales outside of the territory. The decision also included that the applied restrictions in effect limited passive sales as well, which was ruled illegal. The reasoning included that the exclusive distributorship, as long as legally established, should ensure for the distributor the economic benefit derived from the exclusivity.

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

Under the General Block Exemption Decree the retailer may be required to purchase its stock exclusively from the seller, provided that the seller's market share does not exceed 30 per cent on the relevant market. Further, an agreement containing exclusivity may not be concluded for an indefinite term or for a term longer than five years. This latter rule also applies for agreements under which the purchaser has to purchase more than 80 per cent of its entire sales (calculated on the previous business year's figures) from the same seller. Selective distribution agreements may not contain an obligation on the purchaser under which products of certain competitors may not be purchased and sold by the purchaser.

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

We are unaware of any such assessment.

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

See question 39.

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

See question 39.

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

Generally, restricting the purchaser from selling to certain customers is not allowed, but the limitation of sales is allowed in the following circumstances:

- sales to a certain group of customers may be retained for the seller or delegated to another exclusive distributor;
- in a selective distribution system, sales to non-contractual retailers may be excluded; and
- purchasers may be limited in selling spare parts to customers who would use such spare parts for the manufacturing of similar goods.

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

A wholesaler may be restricted from selling to end-consumers.

45 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?

We are unaware of decisions implementing further restrictions.

Notifying agreements

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

There is no formal procedure under which agreements containing vertical restraints can be notified with the Office of Economic Competition, nor can a negative clearance procedure be initiated.

Authority guidance

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

The Office of Economic Competition does not issue negative clearance opinions or provide any other preliminary opinion in connection with individual agreements containing restraints. All decisions of the Office issued in actual cases are published and they may include useful findings and guiding interpretation on different questions. Occasionally the Office issues non-binding guidelines on certain interpretation issues that are also very informative.

Complaints procedure for private parties

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

Private parties may initiate a proceeding of the Office of Economic Competition either by completing a form questionnaire available for this purpose (report) or by informing the Office of their complaint. The reporter must complete the questionnaire and provide the fact pattern that is the basis of its complaint. The reporter may request anonymity. The investigator acting on behalf of the Office has to decide within 60 days (which can be extended by another 60 days) whether to initiate official investigation proceedings or to decline the case and reject it as one without basis. The reporter may challenge the rejecting resolution at the competent court within eight days. Complaints that do not qualify as a report are treated as a complaint. Decisions rejecting a complaint may not be challenged in court.

Enforcement

49 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?

The Office of Economic Competition is rarely involved in cases of vertical restraints. During 2003 there were four vertical restraints cases out of a total of 20 cartel cases. This figure was eight out of 28 in 2004; 11 out of 25 in 2005; five out of 19 in 2006; and three out of 15 in 2007. In 2008, out of the 21 cartel cases there were only two vertical cartel proceedings, while in 2009 out of the 20 cartel proceedings three were vertical restraints cases. Fines were imposed only in very few cases. It seems that the priority of the authority is to make the participants of the proceedings undertake to modify their agreement or behaviour in order to comply with the law.

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

It is a general rule of the Hungarian legal system that contracts that violate the law are null and void. If certain provisions of a contract are illegal, only those provisions will be declared null and void. The entire contract will be nullified only if the parties would not have entered into the contract without the inclusion of the illegal provisions in question. Therefore, there is a legal possibility for one party of the contract containing an illegal vertical restraint to challenge the validity and enforceability of a certain provision or the entire contract at court, but it will not necessarily nullify the entire contract.

51 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 Office of Economic Competition may impose a fine on the wrongdoer in its own authority, without consulting courts or other organs. In addition to imposing a fine, the Office may:

- declare the activity illegal;
- order the termination of the illegal act or illegal circumstances; and
- order the carrying-out of certain obligations.

The sanctions that the Office of Economic Competition may apply in cases of vertical restraints are the following:

- declaration of the activity or agreement illegal;
- obligation to stop the illegal activity; and
- imposition of a fine, the amount of which is limited to 10 per cent of the net sales revenue of the company group in the previous business year.

There have been few decisions made in connection with vertical restraints and even fewer imposed fines. It can be concluded that in the field of vertical restraints the actual trend of the Office of Economic Competition is making the parties modify their agreement and bring it into compliance with the law, rather than imposing a fine.

Investigative powers of the authority

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

The investigators of the Office of Economic Competition may:

- demand the handing over of any evidence and provide all information from the parties and any third party that is relevant in the case;
- prepare copies of written documents or any media or data-storage device;
- seize any evidence;
- enter into and search sites or motor vehicles; and
- use police assistance for the above if necessary.

Bán, S Szabó & Partners

Chrysta Bán **cban@bansszabo.hu**

József nádor tér 5–6
1051 Budapest
Hungary

Tel: +36 1 266 3522
Fax: +36 1 266 3523
www.bansszabo.hu

Private enforcement

53 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?

According to the Competition Act (sections 11(3) and 88/A) any consequences that are attached by the Competition Act to any infringement of the prohibition of horizontal and vertical restraints apply concurrently with the legal consequences prescribed by the Civil Code in connection with contracts that violate the provisions of the legal rules. Section 88/A emphasises that civil law claims – which would include damages claims as well – arising in connection with agreements illegally restraining competition may be brought in the form of private enforcement directly before the courts of general civil law competence. Private enforcement of civil law claims, including damages claims, would be available for parties to the contract as well as to third parties in the event they can prove damages and causal connection between the illegal contract and the damage suffered. Such damages claims may be successful if the party in violation of law cannot excuse itself from the wrongdoing by proving that it acted in accordance with the generally expected care under the given circumstances (general rule of negligence).

Between parties that are both parties to an illegal contract, the rule of contributory negligence may be an important factor in case of a damages claim. There are not yet enough court cases at this point that would allow an analysis of the situation and or a conclusion regarding when a court may accept a damages claim under such circumstances.

Private enforcement actions may take several years since the court in charge has a notification obligation to the Office of Economic Competition, which may interfere with the proceedings.

Other issues

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

No.

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India

Amit Kapur, Farhad Sorabjee and Amitabh Kumar

J Sagar Associates

Antitrust law

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

The Competition Act 2002 (CA02) is the primary source of antitrust law in India and deals with competition-related issues such as anti-competitive agreements, abuse of dominance, mergers and acquisitions and so on. There are sectoral regulatory laws such as the Electricity Act 2003, the Petroleum and Natural Gas Regulatory Act 2007 and the Telecom Regulatory Authority of India Act 1997, which deal with competition-related issues within their respective sectors in addition to entry and price regulation. Section 3(4) of CA02 prohibits any agreement among enterprises or persons at different stages or levels of the production and supply chain pertaining to production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, which causes or is likely to cause appreciable adverse effects on competition (AAECs) in India.

Since India is a common law jurisdiction, in addition to statute, judgments are an important source of law. The Competition Commission of India (CCI), the statutory body constituted under CA02, assumed its statutory role in May 2009. In a short period of time, both the CCI and the appellate authority (Compat) have delivered significant decisions that have contributed to the jurisprudence.

The CCI has notified certain regulations for the implementation of CA02:

- the Competition Commission of India (General) Regulations 2009;
- the Competition Commission of India (Procedure for engagement of experts and professionals) Regulations 2009;
- the Competition Commission of India (Meeting for transaction of business) Regulations 2009;
- the Competition Commission of India (Lesser Penalty) Regulations 2009;
- the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011;
- the Competition Commission of India (Determination of Cost of Production) Regulations 2009; and
- the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations 2011.

The CCI has also brought out booklets on certain provisions of the law as part of its advocacy initiative.

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?

- Section 3(4) of CA02 contains an illustrative list of agreements that constitute vertical restraints and covers any vertical agreement that causes or is likely to cause AAECs in markets in India. The list includes the following restraints:
- tie-in arrangement – includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- exclusive supply agreement – includes any agreement restricting in any manner the purchaser in the course of its trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- exclusive distribution agreement – includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- refusal to deal – includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; and
- resale price maintenance (RPM) – includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Any type of vertical restraint not contained in the list may also attract the prohibition if found to cause or be likely to cause an AAEC.

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?

The stated objective of CA02 is to 'prevent practices having AAEC, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto' keeping in view the economic development of the country. As such, besides the protection of competition, the other important objectives of CA02 are the protection of consumer interests and the economic development of the country – which may include employment, infrastructure and diverse aspects of economic development. In this context, section 18 of CA02 clearly prescribes the duties of the CCI, which include elimination of anti-competitive practices, promotion of competition, protection of consumer interests and ensuring freedom of trade.

Responsible authorities

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

The CCI is the authority primarily responsible for enforcing prohibition of anti-competitive practices, including vertical restraints. The Office of the Director-General (DG) is the investigative authority responsible for the investigation pursuant to directions of the CCI, which submits its findings for decision-making to the CCI. Appeals against orders of the CCI lie before the Compat. Appeals against the orders of the Compat lie to the Supreme Court of India. CA02 bars the jurisdiction of civil courts in competition matters.

The central government retains the power to:

- grant exemption under section 54 of CA02;
- issue binding directions to the CCI on matters of policy under section 55 of CA02; and
- supersede the CCI under certain circumstances under section 56 of CA02.

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?

The test to determine whether a vertical restraint is anti-competitive and attracts the jurisdiction of the CCI is whether the practice has or is likely to cause an 'AAEC' in India. If the AAEC of the practice is in India, whether the parties are situated in the country or outside is irrelevant. Further the definition of 'person' in section 2(l) includes a body corporate incorporated outside India. Extraterritoriality of the jurisdiction of the CCI is confirmed by section 32 of CA02.

While AAECs in India will be a condition precedent for the assumption of jurisdiction by the enforcement agencies, its application in a pure internet context cannot be precisely determined.

Agreements concluded by public entities

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

The law applies to public entities and government departments engaged in commercial activities and the exemption for sovereign functions is strict, specific and limited. Indian law follows competitive neutrality in respect of ownership. The definition of enterprise includes a government department not discharging sovereign functions; a person is defined to include natural and juridical persons, statutory authorities, companies, trusts, etc. Only sovereign functions of the government including all activities carried on by the departments of the central government dealing with atomic energy, currency, defence and space are expressly excluded by law.

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.

CA02 does not provide sector-specific provisions nor are there any rules or regulations to this effect. CA02 applies across sectors without any sector-specific regulations or rules.

Other sectoral regulators are empowered to promote competition in their respective sectors. For instance, the Central Electricity Regulatory Commission is empowered to issue appropriate directions to a licensee or a generating company if such undertaking abuses its dominance or enters into an anti-competitive agreement in the electricity industry (section 60 of the Electricity Act, 2003). Similarly, section 11 of the Telecom Regulatory Authority of India Act, 1997 mandates the Telecom Regulatory Authority of India to facilitate competition and promote efficiency in the telecoms sector. Also sections 11 and 12 of the Petroleum and Natural Gas Regulatory Board Act 2006 empower the Petroleum and Natural Gas Regulatory Board to foster fair trade and competition. However, these provisions do not have any detailed legal framework to determine whether there has been violation of the competition principles.

The CCI may consult other statutory authorities (including sector regulators) in a matter involving a violation of a statute that concerns a different regulatory authority. A reciprocal obligation is cast upon other regulatory authorities to consult the CCI on competition law issues that may arise in matters before them.

General exceptions

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

Under CA02, there are two exceptions to the general prohibition against anti-competitive agreements, namely:

- reasonable restrictions as may be necessary for protecting intellectual property rights conferred by Indian laws; and
- those exclusively for export of goods or services.

In addition, the central government has been empowered under section 54 of CA02 to exempt from the application of CA02:

- any class of enterprise if such exemption is necessary in the interest of security of the state or public interest;
- any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; and
- any enterprise which performs a sovereign function on behalf of the central government or a state government; such exemption may be granted only in respect of activity relating to the sovereign function.

The central government has not exercised this power insofar as vertical restraints are concerned.

Agreements

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

'Agreement' has been defined very widely under CA02. Section 2(b) of CA02 defines 'agreement' to include any arrangement or understanding or action in concert regardless of whether such arrangement, understanding or action is:

- formal or in writing; or
- intended to be enforceable by legal proceedings.

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?

The definition of 'agreement' under section 2(b) of CA02, applicable for assessment of vertical restraints, includes formal written agreements as well as any informal arrangement or understanding or action in concert irrespective of the same not being in writing and not being intended to be enforced in law. However, the conduct examined by the CCI includes formal written agreements of exclusive supply and exclusive distribution agreement as well as informal arrangement or understanding in the form of a tie-in.

Parent and related-company agreements

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

Although 'related company' has not been defined under CA02, the term 'group' in relation to undertakings has been defined to mean two or more enterprises that, directly or indirectly, are in a position to:

- exercise 50 per cent or more of the voting rights in the other enterprise (26 per cent substituted by 50 per cent by notification No. S.O.481(E), dated 4 March 2011, which is valid for a period of five years);
- appoint more than 50 per cent of the members of the board of directors in the other enterprise; or
- control the management of the affairs of the other enterprise.

The CCI recognised the concept of a 'single economic entity' in the matter of *Exclusive Motors Pvt Limited v Automobili Lamborghini SPA* (Case No. 52/2012 dated 6 November 2012) where it observed that an agreement between two companies belonging to the same group cannot be considered an agreement for the purposes of CA02. Further, recently in *Shri Shamsher Kataria v Honda Siel Cars India Ltd & Ors* (Case No. 03 of 2011 dated 25 August 2014) (*Auto Parts* decision) the CCI was of the opinion that the exemption of a single economic entity stems from the inseparability of the economic interest of the parties to the agreement and generally, entities belonging to the same group, eg, holding-subsidiary companies are presumed to be part of a 'single economic entity' incapable of entering into an agreement; however, the presumption is not irrebuttable as observed by the CCI in the aforementioned decision.

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?

Section 3(4) of CA02 applies to an agreement between different entities operating at different levels in the production and supply chain, and would

apply to agent–principal agreements under the following circumstances, which are illustrative:

- limitation on the territory in which the agent may sell goods or services;
- limitation on the customers to whom the agent may sell the goods or services;
- limitation on the number of customers in the market;
- prices and conditions at which the agent must sell or purchase goods or services;
- provisions preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory; and
- provisions preventing the agent from acting as an agent or distributor of undertakings that compete with the principal (single branding provisions).

It is noteworthy that the Supreme Court of India, in a judgment relating to the now repealed Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act), the precursor to CA02, had applied the rule-of-reason test to an exclusive distribution agreement involving territorial limitation (*Tata Engineering and Locomotive Co Ltd (Telco) v The Registrar of Restrictive Trade Agreement* (1977) 2 SCC 55).

A judgment of almost similar effect was made in another case wherein the Supreme Court, relying on the judgment in *Telco*, rejected the findings of the MRTP Commission (*Mahindra and Mahindra Ltd v Union of India (UOI) and Anr* (1979) 2 SCC 529); however, in *Hindustan Lever Ltd v The Monopolies and Restrictive Trade Practices Commission* (1977) 3 SCC 227, the Supreme Court took a contrary view and struck down certain clauses of a stockist agreement as being restrictive trade practices. The Supreme Court noted that the clause conferred too much discretion on Hindustan Lever Limited and hence it warranted being struck out as being 'wholly unreasonable'.

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?

There is no specific provision in CA02 dealing with this issue and the judicial interpretation is yet to evolve. Under the current scheme of CA02, the terms 'enterprise' and 'person' include more than one entity. Generally, an agent and a principal are treated as two distinct entities or persons under different laws, such as under the Indian Contract Act 1872 (section 181):

- an agent is a person employed to do any act for another, or to represent another in dealings with third person; and
- the person for whom such an act is done, or who is so represented, is called the 'principal';
- for the purposes of taxation, a principal and its agent are considered separate entities.

Thus, ordinarily the antitrust law on vertical restraints should apply to agent–principal agreements unless they are a single economic entity.

To date, the CCI has not delivered any decision dealing with the agent–principal relationship in the online sector.

Intellectual property rights

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

Yes, as mentioned earlier, CA02 has provided for a general exemption with respect to any reasonable restrictions that may be imposed for protecting any intellectual property rights conferred by six Indian laws being:

- the Copyright Act 1957;
- the Patents Act 1970;
- the Trade and Merchandise Marks Act 1958;
- the Geographic Indications of Goods (Registration and Protection) Act 1999;
- the Designs Act 2000; and
- the Semi-Conductor Integrated Circuits Layout-Design Act 2000.

However, the exemption in section 3(5) of CA02 does not extend to abuse of dominance provisions.

The CCI does treat vertical restraints concerning intellectual property rights more liberally. The CCI, for instance, while assessing a franchise agreement (*Official Beverages v SAB Miller India, SKOL Breweries Limited*, Case No. 81 of 2012 dated 31 May 2013) made a general observation that a franchisor is permitted to impose reasonable restrictions on a franchisee to protect the intellectual property that has been licensed to the franchisee under the agreement. However, in this case, the CCI did not analyse the specific restraints that may be permitted. In the *Auto parts* decision, the CCI dismissed the claims put forward by original equipment manufacturers (OEMs) that any vertical restraints on the suppliers and authorised dealers of the respective OEMs were reasonable and aimed solely at protecting their intellectual property, as permitted under section 3(5) of the Act. The CCI was of the view that protection of section 3(5) was only available to intellectual property that is protected or is in the process of being protected under Indian IP law, as opposed to intellectual property that is legitimately registered and granted overseas. Since most OEMs operate under intellectual property licensed to them by their overseas parent companies, the CCI denied the protection of section 3(5) of the Act to these commercial arrangements.

Analytical framework for assessment

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

While Indian law presumes that certain specific horizontal agreements cause adverse effect on competition, there is no such presumption in the case of vertical agreements. Such a presumption is always rebuttable on facts although the burden is heavy on the person challenging it. Indian civil and commercial laws require evidentiary standard of the balance of probabilities, that is, the proposition is more likely to be true than not true.

Vertical restraints, on the other hand, are subject to the rule-of-reason test. It is noteworthy that the Supreme Court, while interpreting the MRTP Act, acknowledged the persuasive value of US courts in applying the rule of reason to vertical agreements under section 1 of the Sherman Act 1890. While assessing vertical agreements under the antitrust law, CA02 provides for an effects-based analysis. While making such assessment, section 19(3) of CA02 provides for six factors all or any of which the CCI must look into while determining whether an agreement is anti-competitive:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services; and
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

It is noteworthy that the first three factors are those which undermine competition and the other three factors are pro-competitive. Thus, on balance, if the anti-competitive effects outweigh the pro-competitive effects, the agreement is likely to be declared to be an infringement.

However, in the case of *Automobiles Dealers Association, Hathras v Global Automobiles Ltd* (Case No. 33 of 2011 dated 3 July 2012), the CCI held that it would be prudent to examine all the factors together to arrive at a net impact on competition even though the language in section 19(3) states that the CCI shall have due regard to 'all or any' of the aforementioned factors. Further, recently in the *Auto parts* case, the CCI held that the IPRs claimed by the OEMs validly held by their overseas parent corporation are territorial in nature and the particular right is vested upon the holder of such IPR only in a given jurisdiction and therefore, cannot be granted upon the OEMs operating in India by entering into a Technology Transfer Agreement, unless such rights have been granted upon the OEMs pursuant to the provisions of the statutes specified under section 3(5)(i) of the Act. The exemption available under section 3(5) was therefore not extended to OEMs as they also failed to furnish details of registration of certain designs and patents in India.

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?

In terms of sections 3 and 19(3) of CA02, relevant market and market shares have not been included as specific factors to ascertain the legality of agreements. However, to assess the legality of individual restraint, the

concepts of both relevant market and market shares of players/suppliers thereof assume significance.

As seen in the case of the *Automobiles Dealers Association* (cited in question 15), while examining the effect of the impugned exclusivity dealership clause in the market for two-wheelers, the CCI placed reliance on the fact that with barely 50 dealers across the country and less than 1 per cent market share in terms of sales volume, the opposite party could hardly be said to be in a position to create entry barriers for potential manufacturers or foreclose competition in the market or drive out existing competitors.

In addition, in the case of *Sonam Sharma v Apple Inc and Ors* (Case No. 24 of 2011 dated 19 March 2013), the CCI rejected the allegations of contravention of section 3(4) of CA02 by Apple on the basis of insignificant market shares of the parties to the agreement (both the supplier and buyer). The CCI observed, inter alia, that the smartphone market in India was less than a tenth of the entire handset market and that Apple had a less than 3 per cent share in the smartphone market in India.

The CCI also looked at market shares of other suppliers in the same case, observing that none of them had a market share exceeding 30 per cent and hence the tie-in arrangement was unlikely to result in an AAEC.

However, in the recent *Auto Parts* decision the CCI, while examining the legality of vertical restraints imposed by OEMs on local suppliers and authorised dealers, did not consider the market share of the suppliers. In this case the CCI found each OEM a monopolist player, owning a 100 per cent market share in the aftermarket for spare parts, diagnostic tools and repair services for their own brand of cars.

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?

Although the law is silent about the impact of a buyer's market share on competition assessment, it may become a relevant consideration since the ability of the supplier will be greatly reduced when confronted by a buyer with significant market power. A widely accepted practice may not be relevant in determining whether it is in breach of competition law, but it may perhaps be considered for determining the quantum of penalty. Indian jurisprudence is yet to evolve on this issue.

Block exemption and safe harbour

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

The Indian law does not provide for block exemption and does not have any safe harbours. The only exemptions recognised under CA02 are:

- export-related agreements;
- protection of intellectual property rights; and
- power of central government under section 54 to exempt any class of enterprise for reasons of:
  - national security or public interest;
  - any practice or agreements to uphold commitments made under a treaty; or
  - an enterprise discharging sovereign functions.

It is expected that safe harbours will evolve through cases that are decided by the competition authorities.

Types of restraint

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

Under section 3(4) of CA02, RPM is a vertical restraint subject to a rule-of-reason test and prohibited only when the anti-competitive effects outweigh the pro-competitive effects on the evaluation of the factors provided in section 19(3). This has also been observed by the CCI in the following cases: *M/s Shubham Sanitarywares vs Hindustan Sanitarywares & Industries Ltd & Ors* (Case No. 99 of 2013 dated 5 February 2014), *ESYS Information Technologies Pvt Ltd v Intel Corporation* (Case No. 48 of 2011 dated 16 January 2014) and *Amit Auto Agencies v King Kaveri Trading Co* (Case No. 57 of 2013 dated 8 October 2013).

CA02 defines RPM to include any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller.

In *M/s Shubham Sanitarywares*, the CCI held that the dealership agreement between M/s Shubham Sanitarywares and HSIL for distribution of ceramic tiles and sanitary wares was not in contravention of section 3(4)(e) of CA02 as the agreement provided for a maximum retail price and the dealer was at a liberty to give discounts, so no minimum sale price was prescribed. There was also an allegation of differential discount policy followed by HSIL being a violation of section 3(4)(e) but same was rejected by the CCI on the ground that differential discount policy was based on the difference in the quantity of demand made by each of the category of buyers (ie, lower discount for retail buyers and higher discount for bulk buyers).

In *ESYS Information Technologies*, the CCI held that the concerned dealership agreement between ESYS and Intel for the distribution of IT components was not in contravention of section 3(4)(e) of CA02, as the agreement allowed the distributors to set their own price to sell Intel products and hence the same did not constitute RPM. Therefore, suggesting a recommended retail or resale price should be acceptable as long as the reseller is free to charge a lower price.

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'?

Except as mentioned above (question 19), the CCI has made no decisions on RPM nor are there any guidelines to this effect. It may reasonably be expected, based on the OECD guidelines and international precedents, any RPM restrictions may pass muster if they apply:

- for a limited period to the launch of a new product or brand;
- to a specific promotion or sales campaign; or
- specifically to prevent a retailer using a brand as a 'loss leader' if the same is for protecting intellectual property rights, more specifically for protecting the brand or trademark.

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

Decisions relating to RPM have made no observations to this effect. Nor are there any guidelines to this effect.

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

Decisions relating to RPM have made no observations to this effect. Nor are there any guidelines to this effect.

However, in the case of *ESYS Information Technologies* (discussed in question 19), while examining the impugned clause in the distribution agreement, the CCI was of the view that monitoring the downstream market price of its own products cannot by itself be said to be anti-competitive.

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.

To date the CCI has made no observations nor are there any guidelines on this issue.

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.

To date most-favoured-nation clauses (MFNs) have not been examined by the CCI. However, MFN provision may create a foreclosure effect and if such foreclosure is significant enough to cause an AAEC in the market, the arrangement may be considered anti-competitive. The CCI will need to examine evidence which would suggest that such MFN clauses would in any manner create barriers to new entrants in the relevant market, drive existing competitors out of the market or foreclose competition into the market to ascertain the presence of an AAEC.

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 investigations by global competition regulators into the sale of e-books seem to have highlighted the issue of MFN clauses. However, in India, no decisions or orders on this issue has been made nor are there any guidelines to this effect.

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.

The authorities have made no decisions nor are there any guidelines to this effect.

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.

The CCI has not delivered any decisions concerning 'most-favoured supplier' clauses. However, if brought before the CCI, it will generally be assessed under section 3(4) as this is a vertical relationship. As stated earlier, vertical agreements under CA02 are subject to a rule-of-reason analysis under section 3(4) of CA02. Such an agreement would be in contravention of CA02 only if it causes or is likely to cause AAECs in India. The factors that would determine such a finding are listed under section 19(3) of CA02 and have been enumerated in question 24. Therefore, whether a practice is held to be anti-competitive will depend largely on the market position of both the buyer and the supplier. If the market position of the party can be regarded as dominant, the analysis would also fall under section 4 of CA02 (dealing with the offence of abuse of dominance).

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?

Restricting the territory into which a buyer may resell contract products is covered under section 3(4)(c), 'exclusive distribution agreements', and would have to be assessed in the context of the considerations provided in section 19(3).

If any such agreement is assessed to cause or to be likely to cause an AAEC in the market, it would be seen as an anti-competitive agreement.

29 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?

Restricting customers to whom a buyer may resell contract products is an anti-competitive agreement if it causes appreciable adverse effects on competition, as provided under section 3(4)(c) of CA02, subject to the exceptions regarding the protection of intellectual property rights and for purposes of export.

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

As mentioned above, jurisprudence on the issue has yet to evolve in India. A vertical agreement of this nature would be assessed on the basis of the rule-of-reason test as per the criteria provided under section 19(3) of CA02, as explained above. Also, any restriction in furtherance to an IPR granted under a statute in India, so long as it is reasonable, may be imposed and be in consonance with the provisions of CA02. If the agreement involves the grant of intellectual property rights, certain restrictions on usage may be allowed under section 3(5) of CA02.

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

Competition law in India is relatively new. CA02 does not have any express prohibition or restriction on buyers using the internet for advertising or selling. However, any restriction on sales via internet imposed by an enterprise having market power and without objective justification may violate the provisions of CA02. The CCI has not issued any decisions or guidance to date in relation to restrictions on buyers using the internet for advertising or selling.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The authorities have made no decisions nor are there any guidelines to this effect.

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

Selective distribution systems being in the nature of vertical agreement under section 3(4)(d) would be assessed on the basis of the rule-of-reason test as per the criteria provided under section 19(3) of CA. Thus, if there is an objective criterion for selection that is non-discriminatory, such a system may be permitted. There is no legal requirement to publish the criteria for selection.

34 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?

A vertical agreement of this nature would be assessed on the basis of the rule-of-reason test as per the criteria provided under section 19(3) of CA02. At times, the product may be such that it warrants a selective distribution system, for example, pharmaceutical products.

35 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?

CA02 does not have provisions specifically dealing with internet sales in selective distribution systems. To date no decisions or guidelines have been issued on the issue.

36 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 *Ashish Ahuja vs Snapdeal.com & SanDisk Corporation* (Case No. 17 of 2014 dated 19 May 2014) the CCI observed that the insistence by SanDisk that the storage devices sold via online portals should be bought from its authorised distributors by itself cannot be considered as abusive as it is within the rights of a manufacturer to protect the sanctity of its distribution channel. Further, in a quality-driven market, the brand image and goodwill are important concerns and it is a prudent business policy to to discourage/ dis-allow the sale of products emanating from unknown/ unverified/ unauthorised sources. However, the aforesaid case was closed by the CCI for non-existence of a prima facie case.

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

There are no precedents to suggest whether the CCI would take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market. However, nothing bars the CCI from doing so.

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

The CCI has not dealt with the issue concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products in either of its orders nor issued any guidelines regarding the same.

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

An agreement restricting the buyer's ability to obtain the supplier's products from alternative sources, that is, an exclusive supply agreement, would be assessed on the basis of the rule-of-reason test as provided under section 19(3) of CA02. If the supplier is found to be a dominant player in the upstream market, it may be subject to inquiry for abusing dominance by imposing unfair or discriminatory condition on the sale of goods under section 4 of CA02.

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

Restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' would be assessed on the basis of the rule-of-reason test as per the criteria provided under section 19(3) of CA02. In case the supplier is found to be a dominant player in the upstream market, it may be subject to inquiry for abusing dominance by imposing unfair or discriminatory condition in the sale of goods under section 4 of CA02. In such a situation the supplier can also be subject to inquiry for abuse of dominance by indulging in practices resulting in denial of market access.

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

Restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement, that is, an exclusive supply agreement, would be assessed on the basis of the rule-of-reason test as per the criteria under section 19(3) of CA02, as explained above. If the supplier is found to be a dominant player in the upstream market, it may be subject to inquiry for abusing dominance by imposing unfair or discriminatory conditions in the sale of goods under section 4 of CA02.

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

Quantity forcing or full-line forcing would be assessed on the basis of the rule-of-reason test as per the criteria under section 19(3) of CA02, as explained above.

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

The relationship between a buyer and supplier is of a vertical nature. This will be assessed under section 3(4)(b) as an 'exclusive supply' agreement or if the buyer is dominant under section 4 of CA02. As stated earlier, vertical agreements under CA02 are subject to a rule-of-reason analysis under section 3(4) of CA02. Such an agreement would be in contravention of CA02 only if it causes or is likely to cause AAECs in India. The factors that would determine such a finding are listed under section 19(3) of CA02 as mentioned in question 15. Therefore, whether a restriction on the supplier not to supply to other buyers is anti-competitive will depend largely on the market position of the buyer as well as the supplier. If the market share of the buyer is high enough to be regarded as dominant, the analysis would fall under section 4 of CA02, as stated earlier, that sets out the offence of abuse of dominance.

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

In the *Auto Parts* decision the CCI found that the conduct of the car companies was in violation of the provisions of section 3(4) of the Act with respect to its agreements with local original equipment suppliers (OESs), whereby it imposed absolute restrictive covenants and completely foreclosed the aftermarket for supply of spare parts and other diagnostic tools. Further, the CCI found that said companies, who were found to be dominant in the aftermarkets for their respective brands, abused their dominant positions under section 4 of the Act. The CCI held that the OEMs eliminated the competitive process by imposing restrictions on the supply of goods and on the sale of goods to independent suppliers .

Further, it is important to note that the CCI has held that an agreement between a supplier and an end-consumer is outside the purview of section 3(4) of CA02 and hence is not a vertical agreement for the purposes of CA02. This was observed by the CCI in *Mr Naresh Bansal & Ors v M/s Omaxe Limited* (Case No. 77/2013 dated 22 January 2014). A similar view was taken by the CCI earlier in the following cases:

- *South City Group Housing Apartment Owners Association v Larsen & Toubro Ltd* (Case No. 49 of 2011 dated 23 October 2013);
- *Sh Ram Niwas Gupta & Ors v Omaxe Ltd & Ors* (Case No. 74/2011 dated 18 October 2012); and
- *Shri Praveen Kumar Sodhi v Omaxe Ltd & Ors* (Case No. 83/2011 dated 21 February 2012).

45 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 authorities have made no decisions nor are there any guidelines to this effect.

Notifying agreements

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

CA02 does not have any provisions for notifying agreements to the CCI or the Compat. The CCI would look into an agreement only if it has information, either on its own or furnished by any person, that the agreement in question is causing or is likely to cause an AAEC. Hence, it is advisable that undertakings should get such agreements vetted by legal counsel for possible violation of competition law.

Authority guidance

47 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?

No. There is no formal procedure for notification or obtaining guidance from the authorities or from courts in relation to the assessment of a particular agreement in certain circumstances. It is the obligation of the undertakings to ensure that the agreements that they enter into do not violate the law. It is advisable that undertakings get their agreements vetted by their lawyers for possible inconsistencies with CA02.

Complaints procedure for private parties

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

CA02 does not restrict anybody from filing information (complaints) under section 19 of CA02 to the CCI. According to section 19(1) of CA02, the CCI can inquire into an alleged contravention of the law either on its own motion or on receipt of any information from any person, consumer or their association or trade association. It can also initiate an inquiry on a reference made to it by the central government, a state government or a statutory authority.

Enforcement

49 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?

CA02 came into effect in May 2009. There have been very few cases involving vertical restraint and the CCI has not delivered much guidance on vertical restraints that contravenes its provisions. However, the CCI recently, in the *Auto Parts* decision imposed a cumulative penalty of 25.45 billion rupees on 14 automobile manufacturers for abuse of dominant positions and anti-competitive vertical restraints in the markets for spare parts and aftersales services This could be indicative of the CCI's view on vertical agreements such as those between manufacturers and retailers.

In this case, the CCI examined arrangements and agreements between the OEMs and their OESs, and between OEMs and their authorised dealers of cars in India, whereby it held that the clauses in agreements requiring authorised dealers to source spare parts only from OEMs or their approved vendors and restrictions on OESs to sell parts directly to third parties was

Update and trends

On 25 August 2014, in a landmark ruling, the CCI imposed a fine of 2 per cent of turnover, totalling 25.44 billion rupees on 14 car manufacturers (OEMs) for restricting the sale and supply of genuine spare parts in open market, thereby violating section 3(4) and section 4 of the CA02. Apart from the penalty, CCI issued a range of structural directives on the OEMs.

The CCI has prescribed corrective measures to make the automobile market more competitive and to put an end to the present anti-competitive conduct of the car companies.

The car companies were also directed to adopt appropriate policies that would allow them to put in place an effective system to make the spare parts and diagnostic tools easily available in the open market to customers and independent repairers. Further, the CCI directed the car companies not to place any restrictions on the operations of independent repairers and garages. Other behavioural remedies to ensure competition in the market were also prescribed by the Act. After this decision, some OEMs have approached the High Court in a writ petition rather than avail themselves of the statutory appeal to appeal to the Compat. The nature of the challenge relates to the issue of jurisdiction of the CCI, constitutionality of certain provisions of the CA02, and the arbitrariness of the order. A few OEMs have also filed appeals with the Compat.

anti-competitive in nature. Further, by restricting access of independent repairers to spare parts and diagnostic tools and by denying the independent repairers access to repair manuals, the agreements were held to have violated section 3(4)(b), (c) and (d) of the Act. The CCI directed the OEMs to allow OESs to sell spares and diagnostic tools in the open market and refrain from putting in place any impediments in the supply of spares and diagnostic tools. The CCI directed that OEMs furnish affidavits of compliance within 60 days of the order.

While deciding the case, the CCI was guided by two prime motivations: enabling consumers to have access to spare parts and to have freedom of choice between independent repairers and authorised dealers; and enabling independent repairers to participate in the aftermarket and to provide services in a competitive manner. In terms of enforcement actions, the CCI does not set any priorities and is primarily driven by complaints or suo moto actions.

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

According to section 3(2) of CA02, an anti-competitive agreement is void. Under the Indian Contract Act 1872, an agreement not enforceable by law is 'void' (section 2(g) of the Indian Contract Act). Thus, no rights per se would flow from a void contract. The doctrine of severability has not been tested in such cases. However, to hold otherwise and enforce anti-competitive agreements would tantamount to enforcing a void agreement, which is impermissible under the Indian Contract Act 1872.

51 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?

As per section 27 of CA02, in case of a proven contravention of law, the CCI can pass any or all of the following orders:

- direct the concerned undertaking(s) to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- impose a penalty, which may be up to 10 per cent of the average turnover for the three preceding financial years of the concerned undertaking(s);
- direct that the agreement(s) shall stand modified to the extent and in the manner as may be specified by the CCI; and
- pass such other order or issue such directions as it may deem fit.

The CCI also has the power to issue interim orders, temporarily restraining a party from carrying on an anti-competitive act, where the CCI is satisfied that such an anti-competitive act has been committed or that it is about to be committed.

The CCI has the power to impose a penalty for:

- contravention of its order;
- failure to comply with its directions;
- making false statements;
- omitting to furnish material information; and
- altering, suppressing or destroying a document which is required to be furnished.

The Compat has the power to adjudicate on a claim for compensation that may arise from the findings of the CCI or the orders of the Compat itself or from a failure of a party to abide by the orders or directions of the CCI or the Compat.

Investigative powers of the authority

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

The CCI has the powers of a civil court for the purpose of discharging its functions under CA02, including the function of enforcing prohibition of vertical restraints, in respect of the following matters:

- summoning and enforcing the attendance of any person and examining them on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavit;
- issuing requests for examination of witnesses or documents; and
- requisitioning any public record or document or copy of such of record or document from any office.

The CCI also has the power to call upon such experts as it deems necessary to assist it in the conduct of any inquiry.

Once the CCI passes an order directing investigation into a case under section 26 (1) of CA02, it is mandatory for the investigative arm of the CCI, the DG, to carry out the investigation. The DG also has the same above-mentioned powers of a civil court as the CCI, besides the power to conduct dawn raids.

Section 32 of CA02 empowers the CCI to investigate and restrain anti-competitive acts or agreements taking place outside India but having 'appreciable adverse effect' on competition in India. Hence, the CCI has the power to demand information from enterprises situated outside its jurisdiction. The efficacy of this power and how it will be implemented with the reciprocal arrangements with foreign competition authorities has yet to be tested.

Private enforcement

53 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?

CA02 provides for private enforcement. Non-parties to an agreement, including consumers and consumer bodies, can approach the CCI and obtain declaratory orders and injunctions. However, compensation claims have to be brought before the Compat. There is no maximum time limit for the CCI to complete an inquiry. The Supreme Court in a judgment has laid down that the various provisions of CA02 and the General Regulations, particularly regulations 15 and 16, direct conclusion of the investigation, inquiry or proceeding within a 'reasonable time'. In this regard, the Supreme Court has issued the following directions:

- all proceedings, including investigation and inquiry, should be completed by the CCI/DG most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of CA02;
- wherever during the course of inquiry the CCI exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible as and in any case not later than 60 days. The regulations have been amended to permit the CCI to pass an order within 90 days in such cases; and

- the DG in terms of regulation 20 is expected to submit its report within a reasonable time, not later than 45 days from the date of passing of directions in terms of section 26(1) of CA02. The regulations have been amended to give the DG 60 days to submit its report, which is extendable on its request.

With time, it is hoped that the average time taken for inquiries will come down. In some of the matters, the DG has taken well over a year to conclude its investigation. Further, it has been seen that the CCI has, after receipt of the DG's report, taken up to eight to 10 months for its final decision.

It is believed that Compat has to date received two compensation claims, one in the case of *Belaire Owner's Association v DLF Limited, Huda & Ors* (Case No. 19 of 2010) and other in the case of *MCX Stock Exchange Ltd & Ors v National Stock Exchange of India Ltd and Ors* (Case No. 13 of 2011); however, there is no way of assessing the time that it might take in adjudication of such claims.

Other issues

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

Section 60 of CA02 provides that the provisions of CA02 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, in terms of section 61, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under CA02 to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under CA02.

In the early years of the CCI, the case law of other mature jurisdictions has had persuasive value. The CCI has referred in its orders to many cases decided in the United States and the European Union.

jsa
advocates & solicitors

Amit Kapur **amit@jsalaw.com**
Farhad Sorabjee **farhad@jsalaw.com**
Amitabh Kumar **amitabh.kumar@jsalaw.com**

B-303, 3rd Floor
Ansal Plaza, Hudco Place
August Kranti Marg
New Delhi – 110049
India

Tel: +91 11 49370630/49370648
+91 22 4341 8502
Fax: +91 11 4937 0617
www.jsalaw.com

Ireland

Helen Kelly and Darach Connolly
Matheson

Antitrust law

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

Section 4(1) of the Competition Act, 2002 (as amended) (the Act) (available at www.ccpc.ie) prohibits anti-competitive agreements between undertakings and is equivalent at national level to article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 4(3) of the Act allows the Competition and Consumer Protection Commission (CCPC) to make written declarations that, in its opinion, specified categories of agreement comply with the efficiency criteria in section 4(5) of the Act (equivalent to the power of the European Commission (the Commission) to grant block exemptions for categories of agreement that comply with the conditions in article 101(3) TFEU). In addition, section 10(1)(e) of the Competition and Consumer Protection Act 2014 (the 2014 Act) allows the CCPC to publish notices giving practical guidance as to the operation of provisions of the Act. The CCPC has published a notice and two declarations (each of which is available at www.ccpc.ie) applicable to vertical restraints, as follows:

- Declaration in respect of vertical agreements and concerted practices (Decision No. D/10/001) (the Declaration);
- Notice in respect of vertical agreements and concerted practices (Decision No. N/10/001) (the Notice); and
- Declaration in respect of exclusive purchasing agreements for cylinder liquefied petroleum gas (Decision No. D/05/001) (the Cylinder LPG Declaration).

The Notice and the Declaration were introduced by the CCPC following a review of the Irish competition rules applicable to vertical agreements further to the introduction by the Commission of Regulation No. 330/2010 (the Vertical Block Exemption Regulation (VBER)).

The Notice provides practical guidance as to the application of the Act and the Declaration. The Notice expressly provides that reference may be made to the Commission's Guidelines on Vertical Restraints (the Commission Guidelines) for guidance as to whether an agreement is likely to fall outside of section 4(1) of the Act. However, two exceptions are noted in this regard. First, the exemption provided for in the VBER in respect of vertical agreements entered into by retailer buyer pools where no individual member (together with its connected undertakings) has an annual turnover in excess of €50 million does not apply under the Declaration. In separate guidance (specifically, the CCPC's notice on activities of trade associations and compliance with competition law, N/09/002 dated 9 November 2009) the CCPC confirmed that it would follow the approach indicated by the Commission in its Guidelines on Horizontal Cooperation Agreements that group purchasing arrangements where the parties have a combined market share of less than 15 per cent in both the purchasing and selling markets are unlikely to raise competition concerns. Second, paragraphs 8 to 11 of the Commission Guidelines in respect of agreements of minor importance do not apply since there is no equivalent to the Commission's De Minimis Notice under Irish law.

The Declaration and Notice expire on 1 December 2020. The Cylinder LPG Declaration (see question 7) expires on 14 April 2015.

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 Declaration is closely modelled on the VBER and the alignment with EU law is a deliberate policy of the CCPC designed to facilitate self-assessment and to minimise compliance costs to businesses. 'Vertical agreements' are defined in article 1 of the Declaration as agreements or concerted practices between undertakings 'each of which operates, for the purposes of the agreement, 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'.

The types of vertical restraint covered by the Declaration include:

- non-compete obligations: any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year;
- exclusivity provisions: including exclusive purchasing agreements, exclusive supply obligations, and exclusive distribution agreements in respect of a given territory or customer group; and
- selective distribution systems: a distribution system whereby the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria, and where these distributors undertake not to sell such goods or services to unauthorised distributors.

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?

Irish competition law pursues purely economic objectives.

Responsible authorities

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

The CCPC (with the aid of the Irish courts) is responsible for enforcing prohibitions on anti-competitive vertical restraints. The Commission for Communications Regulations (ComReg) has competition powers in respect of vertical restraints in the area of electronic services, electronic communications networks or associated facilities.

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?

In order to be subject to antitrust law in Ireland, the object or effect of the restraint in question must be to prevent, restrict or distort competition in trade in any goods or services in Ireland (or any part of Ireland), irrespective of the location or domicile of the undertakings involved.

The Irish courts have not considered vertical restraints in an extraterritorial context.

Neither the CCPC, ComReg nor the Irish courts have as yet applied the rules on vertical restraints in a pure internet context.

Agreements concluded by public entities

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

Irish competition law applies to agreements concluded by public or state-owned entities insofar as they constitute 'undertakings' for the purposes of the Act.

An 'undertaking' is defined in section 3 of the Act as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings'.

An activity may be carried on 'for gain' irrespective of whether the undertaking is profit-making or not; the key criterion is that the undertaking charges for the product or service supplied.

Public bodies may not be considered to be undertakings when they exercise certain functions involving the exercise of official authority or where the functions in question operate on the basis of 'solidarity'. On this basis the CCPC determined that the Health Service Executive (HSE) was not acting as an undertaking where it administered certain public drug distribution schemes (Decision No. E/08/01).

That a public body may constitute an undertaking for certain purposes and not for others was upheld by the High Court in *Medicall Ambulance Ltd v HSE* (High Court, 8 March 2011). In this case, the High Court found that the HSE was an undertaking for the purposes of the Competition Act where, in certain cases, vehicles from the National Ambulance Service (part of the HSE) were used for the transfer of private patients. By contrast, in *Lifeline Ambulance Services v HSE* (High Court, 23 October 2012), the court found that the HSE did not operate as an undertaking when using its ambulance fleet for emergency services and the transport of public patients.

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.

The CCPC has issued a sector-specific declaration in respect of agreements for supply to independent retailers (or dealers) of liquefied petroleum gas (LPG) in cylinders. The Cylinder LPG Declaration limits exclusive purchasing obligations in such agreements to a duration of two years. This declaration entered into force on 1 April 2005 and expires on 14 April 2015.

The 2014 Act granted the Minister for Jobs the power to introduce secondary legislation for the regulation of certain 'unfair trading practices' by a defined group of grocery businesses. This secondary legislation (regulations), when issued, will mandate and/or prohibit certain 'unfair' supply chain practices by grocery retailers and suppliers that are part of a group of undertakings with an annual turnover of more than €50 million worldwide, known as 'relevant grocery good undertakings'. The proposed regulations will have the power to outlaw 'unfair' practices in the grocery supply chain. These practices can relate to the form of contracts between suppliers and retailers and how such contracts are varied, terminated, or reviewed. The proposed regulations may also require the relevant grocery undertaking to implement new compliance procedures, including staff training, preparation or annual compliance report, and maintenance of records. Further, the CCPC will have the power to undertake investigations, 'name and shame' offenders and issue 'contravention notices' directing a relevant grocery undertaking to remedy a contravention of the regulations. Breach of certain of the proposed regulations will amount to an offence, while failure to comply with a contravention notice is also an offence. Both breaches can result in a criminal prosecution (punishable by fines or imprisonment if prosecuted on indictment) or a claim by an aggrieved party. At the time of writing, the Minister for Jobs is consulting on the proposed regulations.

General exceptions

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

Where a restraint satisfies the efficiency conditions set out in section 4(5) of the Act, it will be exempt from the section 4(1) prohibition. These conditions effectively mirror article 101(3) TFEU. In particular, agreements containing vertical restraints that comply with terms and conditions of the CCPC's Declaration are exempt from the general prohibition in section 4(1). However, Irish competition law does not provide for a de minimis exception similar to that under EU law.

Agreements

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

The Act does not provide a definition of an 'agreement'. However, the CCPC and the Irish courts generally follow the approach of the Commission and the EU courts in applying a broad definition to this concept.

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?

Section 4 of the Act covers agreements between undertakings, decisions of associations of undertakings and concerted practices. The concept of an 'agreement' or 'concerted practice' between undertakings is interpreted broadly and is understood in functional rather than in formal or written contractual terms. The essential feature of the concept is that the 'agreement' or 'concerted practice' relates to conduct distinguishable from the unilateral conduct of an undertaking.

Parent and related-company agreements

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

Section 4 of the Act applies only to agreements between independent undertakings. In 1992 the CCPC found that two companies that were wholly-owned subsidiaries of the same holding company were not independent undertakings but were in fact separate arms of the same organisation and were therefore not in competition with each other (*AGF Life Holdings*, Decision dated 14 May 1992).

In *AGF-Irish Life/NEM Insurance* (Decision dated 9 June 1993), the CCPC found that the test to be applied is whether parties which are subsidiaries of a single parent form an economic unit within which they have no real freedom to determine their course of action on the market. Although the undertakings in this case were not wholly-owned subsidiaries, the CCPC found that they did not have sufficient commercial autonomy from their common majority shareholder to operate independently.

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?

Genuine agency agreements are outside the scope of section 4(1) of the Act. The CCPC follows the approach of the Commission in this regard. Accordingly, an agreement whereby a legal or physical person (the agent) is vested with the power to negotiate or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal,

or the sale of goods or services supplied by the principal, and where the agent does not bear any, or bears only insignificant, risk in relation to the contracts concluded or negotiated on behalf of the principal and in relation to market-specific investments for the field of activity will fall outside the scope of section 4(1) of the Act.

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?

Pursuant to the Notice, parties can refer to the relevant section of the Commission Guidelines (paragraphs 12 to 21) for guidance as to what constitutes an agent–principal relationship. There are no CCPC decisions to date dealing specifically with what constitutes an agent–principal relationship in the online sector.

Intellectual property rights

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

No, the Declaration applies to agreements containing provisions granting IPRs provided that the IPRs are merely ancillary to the primary purpose of the agreement.

Analytical framework for assessment

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

The first step is to ascertain whether section 4(1) of the Act applies to the restraint, namely whether the parties to the agreement are independent undertakings and whether the restraint has the object or effect of preventing, restricting or distorting competition in Ireland. Assuming the Act applies, it is then necessary to look at whether the restraint in question falls within the scope of the express exemptions in the declarations referred to above. This involves an analysis of (inter alia) the parties' market shares and the relevant provisions of the agreement. Hard-core restrictions such as vertical price-fixing and certain sales restrictions are treated like per se offences in the United States, and the object or effect of such agreements will automatically be presumed to restrict competition, irrespective of market share.

In the event that the parties are not able to avail themselves of one of the specific exemptions (declarations) from section 4(1) of the Act, the parties then need to consider whether the restraint otherwise satisfies the general efficiency conditions contained in section 4(5) of the Act. The Commission Guidelines may be of assistance in this regard. To the extent that this is not possible, the parties should consider whether they can disapply the restraint by severing it from the rest of the agreement in which it is contained, otherwise they risk the whole agreement being deemed anti-competitive.

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?

In order for a vertical restraint to benefit from the Declaration the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services must not exceed 30 per cent in each case. In line with the Commission Guidelines, the market positions of other suppliers may be relevant for an individual assessment about the 30 per cent threshold.

The CCPC has express power to disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market (article 8 of the Declaration).

The Cylinder LPG Declaration does not contain market share thresholds but does require that the restrictions be of a permitted type and that the agreement does not contain any hard-core restrictions.

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?

As noted in question 16, in order for a vertical restriction to benefit from the Declaration the market share of the buyer must not exceed 30 per cent of the market on which it purchases the contract goods or services. The relative market position or conduct of other buyers or willingness of buyers in the market to accept a particular type of restraint will not affect the compatibility of an individual restraint with the Declaration provided that the agreement complies with all of the other terms of the Declaration. Again, these factors may be relevant to an assessment of legality if the agreement falls outside the terms of the Declaration. As noted above, the CCPC can disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market.

Block exemption and safe harbour

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

As noted above, the CCPC has issued a number of declarations in respect of vertical restraints which are equivalent to a block exemption or safe harbour and, where relevant, are subject to the market share thresholds referred to in question 16.

Types of restraint

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

Any restriction on a buyer's ability to set its own resale prices is treated as a hard-core infringement of section 4(1) of the Act, irrespective of the parties' market shares. This is without prejudice, however, to the ability of suppliers within the scope of the Declaration to set recommended resale prices or maximum resale prices, provided that this does not amount to an indirect fixed or minimum resale price.

The CCPC has adopted a strict (per se) approach to resale price maintenance (RPM) to date, irrespective of the particular circumstances. For example, in its investigations of *The Irish Times Limited and Independent Newspapers (Ireland) Limited* (Decision No. E/03/004 and Decision No. E/03/003 respectively), the CCPC confirmed that the sending of circulars or mailshots informing retailers of revised cover prices, along with a reference to retailers' margins, was likely to amount to encouragement or instruction to apply the cover prices determined by the publishers. In *Statoil* (Decision No. E/03/002), the CCPC considered that a price-support mechanism, which provided for maximum resale prices, combined with a price-matching scheme and a price floor, below which retailers could not sell if they wished to take advantage of the price support offered by Statoil Ireland, constituted unlawful RPM.

The recent use of new enforcement tools available to the CCPC following the introduction of the Competition (Amendment) Act 2012 (2012 Act), confirms that the CCPC maintains a strict approach to RPM. The 2012 Act provides a formal basis for the practice of the CCPC, in certain cases, to accept commitments from a party under investigation for breach of the Act, in consideration for agreement by the CCPC not to bring civil enforcement proceedings. In addition, the 2012 Act gave the CCPC a new power to seek an order from the High Court compelling the party involved to comply with its commitments, such that failure to do so would constitute contempt of court. In *Competition Authority v Double Bay Enterprises Limited Trading as Brazil Body Sportswear* (High Court 18 December 2012), the CCPC sought an order under the 2012 Act for the first time, following an investigation into alleged RPM by Double Bay Enterprises, the exclusive Irish distributor of the Fitflop brand of footwear. The High Court granted an order in respect of commitments given by Double Bay Enterprises not to restrict retailers from deciding their own pricing and discount policies.

While paragraphs 223 to 229 of the Commission Guidelines acknowledge the possibility of RPM being justifiable under article 101(3) TFEU where it results in efficiencies, given the strict and active enforcement

approach traditionally adopted by the CCPC in respect of RPM, the CCPC is unlikely to take the view that RPM satisfies the section 4(5) criteria, save in very exceptional circumstances.

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'?

Neither the CCPC nor the Irish courts have given specific consideration to RPM in these circumstances. RPM is generally considered to be a per se breach of Irish competition law.

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

Yes. In its investigation of *Statoil* (Decision No. E/03/002), the CCPC gave consideration to the possible link between RPM and tacit price collusion between suppliers. Statoil Ireland had introduced a price-support scheme for its independent motor fuel resellers. Under the price-support scheme, Statoil Ireland provided financial support to retailers to compete with retailers of competing motor fuels. Retailers in receipt of such financial support were required by Statoil Ireland not to sell motor fuel above the recommended resale price or below the price of certain competing retailers. The CCPC took the view that this form of 'price-matching scheme' may facilitate tacit price collusion between suppliers. Following an investigation by the CCPC, Statoil Ireland undertook to withdraw the price-support scheme.

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

Since the Notice does not exclude the application of the section of the Commission's Guidelines relevant to RPM (as it does in the case of other areas discussed in question 1), the Commission's Guidelines in respect of RPM are applicable in interpreting the application of section 4 of the Act. Accordingly, while it is possible that the CCPC or the Irish courts may be prepared to analyse minimum RPM agreements under the efficiency criteria set out in article 4(5), as yet there is no example in practice of such an analysis.

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.

Neither the CCPC nor the Irish courts have given specific consideration to such 'pricing relativity' agreements. As indicated by its findings in the *Statoil* case, the CCPC is likely to carefully consider restrictions which affect the parties pricing incentives, depending on the specific circumstances of each case.

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.

We are not aware of any consideration of most-favoured-customer clauses under Irish competition law and so there is little definitive guidance available. These clauses may potentially give rise to competition issues where either party to the agreement has a market share above the 30 per cent threshold in the Declaration or, alternatively, if the parties are aware that a large number of competing suppliers use such clauses (in which case, there is a risk that they might facilitate price collusion among sellers).

In the case of a dominant supplier, the application by it of similar pricing to dissimilar customers could constitute an abuse of dominance, in breach of section 5 of the Act. Equally, in the case of a dominant customer, the application of a most-favoured-customer clause may reduce the scope for the supplier to reduce its prices to other customers and could also constitute an abuse of dominance in breach of section 5 of the Act. Most-favoured-customer clauses should be distinguished from 'English clauses' (ie, a clause whereby the buyer can purchase from alternative suppliers provided that it informs its supplier of the alternative supplier's terms and its supplier fails to match or better them), which may give rise to competition issues depending, inter alia, on the market share of the supplier or the structure of the market in question.

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.

The CCPC has not considered retail MFNs in the online environment and can be expected to be influenced by recent decisions of the European Commission and UK competition authorities in this regard.

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.

The CCPC has not considered restrictions such as minimum advertised price policies or internet minimum advertised price clauses. Where restrictions interfere with a buyer's discretion in pricing products for resale, such restrictions may amount to RPM. As noted above, RPM is generally considered to be a per se breach of Irish competition law. As indicated by its findings in the *Statoil* case, the CCPC is likely to carefully consider restrictions which affect the parties pricing incentives, depending on the specific circumstances of each case.

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.

Similar to the approach adopted in respect of most-favoured-customer clauses (discussed above), most-favoured-supplier clauses may potentially give rise to competition issues where either party to the agreement has a market share above the 30 per cent threshold in the Declaration.

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?

Any restriction on the territory into which the buyer may resell products is treated as falling within the prohibition in section 4(1) of the Act. However, as under the VBER, the Declaration permits the restriction of active sales into certain territories in the context of an exclusive distribution network that complies with the terms of the Declaration (article 4(2)(b) of the Declaration).

However, a supplier cannot prevent its buyer from making passive sales to customers in other territories, even where the supplier has appointed another exclusive distributor. In the recent *Fitflop* case (see question 19), Double Bay Enterprises also gave commitments, subsequently made a binding order of court, not to restrict its retailers' freedom to supply products to any customer, regardless of location, who sends unsolicited orders for products to such retailers.

In July 2013, the Irish High Court considered the distinction between active and passive sales in *SRI Apparel Limited v Revolution Workwear Limited and Others*. Laffoy J confirmed that, in the context of an exclusive distribution agreement, sales by an Irish company on a third-party sales website which facilitated sales (ie, www.amazon.co.uk) constituted active sales within the meaning of the Vertical Declaration and, as such, could lawfully be restricted under the terms of the agreement.

29 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?

A restriction on the buyer's freedom to sell contract products to certain customers falls within the scope of section 4(1) of the Act. However, as under the VBER, under the Declaration a supplier may restrict the customers to whom a buyer may resell contract products in certain circumstances (ie, in the context of an exclusive or a selective distribution network that complies with the terms of the Declaration; or a prohibition on the buyer selling products to end-users where the buyer operates at the wholesale level; or a restriction on the buyer's ability to sell components, supplied for

the purposes of incorporation, to customers for use in the manufacture of products that compete with the supplier's products (article 4(2)(b) of the Declaration)). However, as under the VBER in the case of exclusively allocated customer groups, a supplier cannot prevent its reseller from making passive sales.

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

A restriction on the uses to which a buyer (or subsequent buyer) may put the contract products is capable of breaching section 4(1) of the Act. However, the supplier may restrict the use of the contract products where the agreement falls within the Declaration safe harbour thresholds and the restriction prohibits the buyer from selling to customers who would incorporate the contract products into the same type of goods as those produced by the supplier (article 4(2)(b) of the Declaration).

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

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section 4 of the Act .The *FitFlop* case in 2012 was the first time that the CCPC took action against a supplier for an alleged internet selling restriction. In particular, the investigation involved an allegation that Double Bay Enterprises had infringed section 4 of the Act by requiring retailers not to make sales of products through mail order, internet or other electronic media without prior written consent. A subsequent 2013 Irish High Court case (*SRI Apparel Limited v Revolution Workwear Limited and Others*) considered the distinction between active and passive sales. In this case, sales made by an Irish company on a third-party sales website (ie, www.amazon.co.uk) were found to constitute active sales within the meaning of the Declaration and, as such, could be restricted in the context of an exclusive distribution agreement.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section 4 of the Act. In *SRI Apparel Limited v Revolution Workwear Limited and Others* (considered above), the Irish High Court appeared to distinguish between use of a retailer's own website and third-party internet sales channel.

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

Selective distribution systems where the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent benefit from the Declaration. Permissible restrictions include a restriction on supplying unauthorised distributors outside the network. The supplier may not however, prohibit its distributors from making cross-supplies to one another, including distributors operating at different trade levels within the network (for example, to avoid parallel imports or to maintain differential pricing or RPM) (article 5 of the Declaration).

As for establishing a selective distribution network, Irish competition law generally follows EU competition law regarding permissible qualitative and quantitative criteria. In addition, the Cylinder LPG Declaration specifically prohibits a supplier from limiting the number of resellers for reasons other than objective grounds of safety, and in particular from selecting resellers on the basis of quantitative, subjective or discriminatory criteria.

34 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?

Neither the Declaration nor the Notice is limited in respect of the types of products to which they apply. However, the CCPC is likely to take account of the Commission's view (expressed in the Commission Guidelines) that in order to fall outside the prohibition in section 4(1), the nature of the product in question should necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use.

35 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?

Under the Notice, the sections of the Commission Guidelines relevant to internet sales are applicable to the interpretation of section 4 of the Act.

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

The Irish courts have not yet taken any decision relating to the enforcement of selective distribution agreements. However, provided that any restrictions in such agreements fall within the scope of the Declaration, it is likely that an Irish court would enforce them against an authorised reseller.

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

The CCPC can disapply the Declaration where in its opinion access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant market (article 8). However, the CCPC has as yet never disapplied the Declaration. The CCPC is likely to follow paragraph 179 of the Commission's Guidelines in relation to the cumulative effect of multiple selective distribution systems.

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

We are not aware of specific decisions of the CCPC regarding selective distribution agreements combined with restrictions on the territory into which approved buyers may resell the contract products. However, pursuant to the Notice, the CCPC would be expected to follow paragraph 152 of the Commission Guidelines which prohibits the combination of selective distribution systems with restrictions on active sales into other territories.

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

Exclusive purchasing obligations are covered by the Declaration provided that the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent, the duration of the obligation does not exceed five years and the other conditions of the Declaration are met. In this regard, the CCPC is likely to follow the provisions of the Commission Guidelines, which prohibit the use of exclusive purchase obligations in selective distribution systems.

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

Neither the CCPC nor the Irish courts have taken any specific decision in respect of restrictions on a buyer's ability to sell such products. However, they would be likely to consider whether the restriction in question was objectively justifiable taking account of the nature of both the contract products and the products deemed by the supplier to be 'inappropriate'.

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

Any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of the buyer's total purchases of the contract products and their substitutes on the relevant market is covered by the Declaration, provided that

the duration of the obligation does not exceed five years and the market share and other conditions of the Declaration are met. In the event that the duration of the non-compete obligation is for a period in excess of five years, the obligation will not automatically breach section 4, but may need to be justified by the parties. In addition, while a non-compete obligation in excess of five years falls outside the Declaration, it does not affect the validity of the remainder of the agreement.

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

According to the Declaration, a buyer may be required to purchase 80 per cent or more of its needs from the supplier where the market share of the supplier on the relevant market on which it sells the contract goods or services and the market share of the buyer on the relevant market on which it purchases the contract goods or services do not exceed 30 per cent and the duration of the obligation is for a maximum period of five years.

When looking at cases in this area, the CCPC pays particular attention to the level of commitment required under the obligation in terms of the buyer's percentage needs as well as the duration of the obligation itself. Examples include Decisions No. 553 and 554, *Dynochem Ireland Limited/Irish Fertiliser Industries Limited* (IFI) (*Urea Supply Agreement* and *Urea Formaldehyde Concentrate Agreement* respectively) (27 May 1999); and Decision No. 472, *Bewleys Coffee Machines 1* and Decision No. 473, *Bewleys Coffee Machines 2* (12 December 1996).

Neither the CCPC nor the Irish courts have to date taken any decision in respect of an obligation to carry a full range of a supplier's products. However, in the absence of dominance, such a requirement is unlikely to give rise to competition concerns.

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

As under the VBER, exclusive supply obligations are not listed under the Declaration as either hard-core or excluded restrictions and, as such, are generally permitted where the market share of both the supplier and the buyer does not exceed 30 per cent. Outside the terms of the Declaration, the CCPC can be expected to follow the approach of the Commission as outlined in the Commission Guidelines.

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

As with the VBER, the Declaration deals primarily with restrictions that are imposed by the supplier on the buyer and is more permissive in respect of restrictions imposed on the supplier. Accordingly, at or below the 30 per cent market share threshold, the supplier may be restricted from selling to end-users, for example as part of an exclusive distribution agreement. By way of exception, the Declaration lists as a hard-core prohibited restriction a restriction imposed on a supplier of components and a buyer who incorporates those components, on the supplier's ability to sell the components as spare parts to end-users (or to third-party repairers or other service providers).

45 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?

There are no decisions of the CCPC or Irish courts dealing with restrictions on suppliers other than those already considered above.

Notifying agreements

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

In line with the EU regime, it is not possible to notify individual agreements to the CCPC for clearance. Instead, it is up to the individual parties (and their advisers) to determine whether section 4(1) applies and, if so, whether the efficiency conditions in section 4(5) of the Act apply.

Authority guidance

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

The primary principle is one of self-assessment. To assist parties in this respect, the CCPC has issued the Declarations and Notice discussed in question 1. Although the CCPC may be prepared to discuss novel or difficult cases in limited circumstances, the CCPC emphasises that it is no longer the function or policy of the CCPC to comment on individual agreements, decisions or concerted practices notified to it and that it will not be able to give comfort to undertakings in relation to their agreements.

Complaints procedure for private parties

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

Complainants may alert the CCPC to alleged anti-competitive behaviour through a variety of means, including the CCPC's online complaints form. The CCPC will consider the matter and, should it decide that there is sufficient evidence, may carry out a formal investigation. There is no formal timetable; investigations may last only a few months or many months depending upon the complexity of the issues concerned. Complaints may be submitted anonymously.

Enforcement

49 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?

Average figures are not available. Since the commencement of the Act, there have been only a small number of published cases in which vertical restraints were at issue. The majority of these cases involved alleged RPM.

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

An agreement that breaches section 4(1) of the Act will be void and unenforceable. In certain instances, however, it may be possible to sever the offending provisions while leaving the remainder of the agreement intact. This exercise is carried out in accordance with Irish legal principles of severance.

51 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 CCPC is not empowered to impose any penalties under the Act. Fines may only be imposed by the Irish courts. The CCPC may, however, issue non-binding enforcement decisions declaring whether, in its view, a particular restraint breaches section 4 of the Act. Further, under a new commitment order procedure introduced by the 2012 Act (see question 19 above), the CCPC may accept commitments provided by an undertaking not to engage in anti-competitive behaviour and may apply to the High Court for such commitments to be made binding. Breach of such commitments would amount to contempt of court.

Civil or criminal sanctions may be imposed by the courts depending upon the severity of the infringement. The civil sanctions that may be imposed by the courts are a declaration that the conduct in question amounts to a breach of the Act and an injunction to bring such conduct to an end. Criminal sanctions will generally only be pursued in the case of hard-core infringements (eg, price fixing).

The maximum criminal sanctions for breach of the Act were increased in 2012 by the commencement of the 2012 Act. Any undertaking or individual guilty of breaching section 4 of the Act will be liable on summary

conviction to a fine of up to €5,000. On indictment, an undertaking may be liable to a fine of the greater of €5 million or 10 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or in the case of an individual, to a fine of up to €5 million or 10 per cent of the turnover of the individual in the financial year ending in the 12 months prior to the conviction. Additional fines of €300 on summary conviction, and €50,000 on indictment, may be imposed for each day that the contravention continues.

While the Act now makes provision for imprisonment for up to 10 years for competition offences, such penalties only apply in respect of hard-core cartel offences (ie, agreements or concerted practices between competitors such as price fixing, output limitation or market sharing).

In October 2000, Estuary Fuels Limited was convicted of two breaches of section 4(1) of the Competition Act 1991 (the predecessor to the Act) for entering into and implementing an agreement imposing minimum resale prices for diesel and unleaded petrol in a filling station. The court imposed a fine of IR£500 in respect of each charge.

More recently, the CCPC has issued reasoned enforcement decisions in a number of cases in which it investigated allegations of RPM and obtained undertakings from the parties involved that they would cease or amend their conduct to comply with the Act. Such undertakings can now be made a binding order of court (see above).

Investigative powers of the authority

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

The CCPC has statutory powers to carry out investigations, either on its own initiative or in response to a complaint made to it by any person, into any breach of the Act that may be occurring or has occurred. These powers are set out in sections 18 and 37 of the 2014 Act and include the power to collect evidence by means of information requests (voluntary), interviews (including by means of a formal witness summons procedure under which witnesses are compelled to attend before the CCPC and to give evidence under oath) and the ability to carry out dawn raids. Original books, documents or records (including electronic records) may be seized and copies may be taken.

Before the CCPC exercises its dawn raid powers to search premises (including private dwellings and vehicles), the CCPC must first obtain a warrant from the district court.

A warrant will only be issued where the court is satisfied that:

- it is appropriate to grant the warrant;
- there is no other reasonable way of obtaining the information in question;
- there is a reasonable suspicion that a criminal offence (and not just a civil wrong) has been committed or that there is evidence relating to a criminal offence; and
- the constitutional rights of the persons involved will be protected.

The 2014 Act provides a wide and undefined ability for the CCPC to enter and search 'any place at which any activity in connection with [a] business... is being carried on'. While the 2014 Act does not explicitly provide for the ability of the CCPC to search the private dwelling or vehicles of directors, managers or staff of companies subject to investigation (as was previously the case under the Act), the 2014 Act provides the CCPC with the power to enter and search 'any place occupied by a director, manager, or member of staff'. This power may only be exercised where there are 'reasonable grounds' to believe that records relating to the business are being kept there. The 2014 Act does not define the term 'occupied' and, as such, it would fall to be understood according to its plain meaning.

Failure to attend before the CCPC in response to a witness summons or obstructing or impeding the CCPC from exercising its dawn raid powers under warrant is an offence, punishable on summary conviction, with a fine of up to €3,000 or imprisonment for a term not exceeding six months, or both.

Private enforcement

53 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?

Section 14(1) of the Act provides a right for any person (including the parties themselves) who is aggrieved in consequence of any agreement, decision, concerted practice or abuse, prohibited under sections 4 or 5 to bring a civil law action seeking relief against the relevant undertaking or individual concerned. An action for relief may be brought in either the Circuit Court or the High Court. The reliefs available include:

- an injunction;
- a declaration;
- damages; or
- exemplary damages.

The successful party is normally able to recover its legal costs, subject to standard litigation rules regarding maximum costs recoverable.

Other issues

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

No.

Matheson

Helen Kelly **helen.kelly@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

Israel

Boaz Golan and Nimrod Prawer

B Golan Law Firm

Antitrust law

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

Restraints of trade (more commonly referred to in Israel as: 'restrictive arrangements'), whether horizontal or vertical, are supervised pursuant to the Restrictive Trade Practices Law, 5748-1988 (the Law) and regulations promulgated pursuant to it, including block exemptions which will be discussed below.

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?

Article 2(a) of the Law establishes a restrictive arrangement as:

> *an arrangement entered into by persons conducting business, according to which at least one of the parties restricts itself in a manner liable to eliminate or reduce the business competition between it and the other parties to the arrangement, or any of them, or between it and a person not party to the arrangement.*

This definition applies to both vertical and non-vertical restraints. Thus any arrangement entered into by persons conducting business in which one of the parties restricts itself in a manner liable to eliminate or reduce the business competition is a restrictive arrangement.

Article 2(b) sets a number of non-rebuttable presumptions for the existence of a restrictive arrangement. The non-rebuttable presumptions all deal with accepted patterns of restrictive arrangements. The article establishes non-rebuttable presumptions regarding price fixing, coordination of the profit margin, market allocation, allocation of customers, and coordination of the production of supply, the quality or the kind provided. Article 2(b) applies not only to restraints between competitors but also to vertical restraints.

Article 4 establishes that any restrictive arrangement is unlawful unless it received clearance from the Antitrust Tribunal (the Tribunal), it has been exempted by the Israeli antitrust authority's General Director (General Director), or it falls within a block exemption. Article 47(a)(1) establishes that violation of article 4 is a criminal offence.

In practice, agreements such as most favoured client/nation (MFC/MFN), exclusivity and retail price maintenance (RPM) would all be deemed as restrictive arrangements.

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?

The sole objective of the Law is the protection of competition. Other objectives such as employment and the promotion of small business, important as they may be, are not part of the Law's objective.

Nevertheless, as mentioned above, one of the paths to clear a restrictive arrangement is to file a request with the Tribunal. While this path is rarely used as the first option, the Tribunal, unlike the General Director, can take into consideration interests that are not purely competitive, if they are in the public interest. Thus the Tribunal may promote or protect interests such as employment and choose to clear a restrictive arrangement that might harm competition if it believes that such clearance is in the public interest.

Responsible authorities

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

The relevant authority is the Israeli Antitrust Authority (IAA), headed by its General Director. The IAA is an independent governmental agency.

Prior to exempting a restrictive arrangement, the General Director is obliged to consult with the Committee for Exemptions and Mergers, composed of representatives from the government and the public. Although there is no legal duty to consult with the committee prior to blocking a restrictive arrangement, in practice its advice is also sought when a negative decision is considered.

The Tribunal is an administrative court. According to the Law any person wishing to enter into a restrictive arrangement can file a motion with the Tribunal for approval of the restrictive arrangement.

The procedure before the Tribunal is very similar to a full trial on the merits as it includes a full hearing on the evidence and it ends with the Tribunal's judgment. In the procedure before the court the General Director states his position regarding the restrictive arrangement.

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?

The IAA applies the 'effect doctrine' in order to acquire extraterritorial jurisdiction over restrictive arrangements performed outside Israel that may limit the competition in Israel. The IAA has used this doctrine consistently since 1998 when it was used with regard to vertical restraints between suppliers of branded perfumes and a local retailer, and as recently as 2013 with regard to the gas insulated switchgears cartel in which all percipients were foreign companies. Thus the effect doctrine is used in relation to both vertical and non-vertical restraints.

Agreements concluded by public entities

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

The Law does not apply differently to public entities and public entities are bound by the limitations of the Law.

As mentioned, the Law applies to agreements entered into by 'persons conducting business'. It is questionable whether public entities such as the state should be regarded as a 'person conducting business'. Case law in Israel has established that when the state operates as the responsible authority for ensuring the regular course of the vital systems (a governmental action) it is not a person conducting business.

In addition, article 3 of the Law establishes that notwithstanding the provisions of section 2, an arrangement involving restraints, all of which are established by law, shall not be deemed restrictive arrangements.

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.

In general there are no different laws for the assessment of vertical restraints in specific industries. Nevertheless, there are important exceptions as article 3 of the Law specifies a sector-specific arrangement which shall not be deemed restrictive and includes the following:

> *An arrangement involving restraints, all of which relate to the growing or marketing of domestic agricultural produce of the following kinds: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry or fish, provided that all parties are growers or wholesale marketers of such products.*

General exceptions

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

There are no general exceptions, however the block exemptions regime includes the Block Exemption for Agreements of Minor Importance, whose main condition (regarding vertical restraint) is that the aggregate market share of each of the parties to the restraint, in the product market, does not exceed 15 per cent.

Agreements

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

While the term 'agreement' is not defined in the Law, the term 'arrangement' is defined as 'whether express or implied, whether written, oral or by behaviour, whether or not legally binding'.

Case law has given a very broad interpretation to this definition to include any agreement regardless of its form, thus even silence or a wink could amount to an agreement as long as it expresses consent.

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?

As mentioned, the Law defines 'arrangement' very broadly in the first place; case law has given an even more broad interpretation to this term to include almost any behaviour. For instance, in the insurance companies cartel case it was ruled that even a wink of the eye or a nod of the head could be sufficient to establish a mutual understanding. Thus, in practice the fact that there is no written agreement is irrelevant in cases in which it has been established that there is a different kind of mutual understanding.

Parent and related-company agreements

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

Section 3 of the Law stipulates situations that will not be considered as restrictive arrangements. Section 3(5) establishes that an agreement between a parent company and its subsidiary will not be considered as a restrictive arrangement.

In addition, the Block Exemption for Agreements Between Related Companies stipulates that an agreement between two subsidiaries (controlled by the same parent company) is exempted if the arrangement does not include an additional third party. This Block Exemption will be in force only until 16 March 2016, and any agreement made after this date will not enjoy this exemption.

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?

Article 2(a) stipulates that a restrictive arrangement is an arrangement entered into by 'persons conducting business'. An agent is clearly a 'person conducting business' and thus might be a party to an unlawful restraint.

It follows that the antitrust laws apply regularly to an agent–principal agreement. For instance, if the principal agrees to grant the agent exclusivity then this exclusivity would fall under the non-rebuttable presumptions of section 2(b) as a restrictive arrangement.

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?

There are neither guidelines nor direct case law relating to agent–principal relations in antitrust cases. It is our understanding that the fact that the agent is not a party to the agreement between the principle and the customer would be considered.

Intellectual property rights

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

Article 3(2) of the Law stipulates that arrangements that relate to right to use patents, designs, trademarks, copyrights, performers' rights or developers' rights would not be considered as restrictive arrangements provided that the arrangement is entered into by the proprietor of the asset and the party receiving the right to use the asset (and that if the said asset is subject to registration by law, it is registered).

The General Director expressed his opinion that article 3(2) would apply only to vertical restraints and only to agreements in which all restraints thereof relate to the right of use for such intellectual property assets.

Analytical framework for assessment

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

According to article 14, the General Director may grant clearance to a restrictive arrangement if:

- the restraints in the restrictive arrangement do not limit the competition in a considerable share of a market affected by the arrangement, or they are liable to limit the competition in a considerable share of such market but are not sufficient to substantially harm the competition in that market; and
- the objective of the arrangement is not to reduce or eliminate competition, and the arrangement does not include any restraints that are not necessary to fulfil its objective.

Thus the required standard has two elements: the first has to do with the arrangement's likely effect on competition – in this regard the required standard is that the arrangement would not lead to reasonable concern of significant harm to the competition. The second element is that the arrangement would have a legitimate businesses justification.

The recently legislated Block Exemption for Agreements that are not Horizontal and have no Price Restrictions (the Vertical Block Exemption) has a major role, as it establishes a comprehensive reform to the permit regime for vertical restrictive arrangements. The main importance of the Vertical Block Exemption lies in the shift from formal tests such as market shares and the number of competitors in the relevant market, which are being used by other block exemptions, to substantive tests: whether there is a commercial justification for the restraint (the restraint is ancillary), and its probable effect on the competition.

To illustrate this shift, the application of the Block Exemption for Exclusive Distribution Agreements depends (among others) on the fact that the distributor does not hold a market share exceeding 30 per cent.

The Vertical Block Exemption replaces the need for market share examinations with examinations integrally related to the very purpose of the antitrust laws: the necessity of the restriction and the impact it has on competition.

The Vertical Block Exemption puts the parties in the General Director's shoes and requires them to complete a self-assessment procedure in which they make the same analytical framework that the General Director would if the restraint were filed for his exemption.

Therefore the parties have full discretion to design the restraint as they see fit, as long as it satisfies the two substantive tests mentioned above: the necessity of the restriction and the impact it may have on competition.

In addition, the Vertical Block Exemption permits some pricing restraints and introduces a more liberal approach than ever before. It allows the supplier to dictate the maximum price that a distributor or a retailer will charge the client (RPM maximum), and allows a most favoured customer condition (MFC or MFN) as long as the substantive tests are met.

With regard to the analytical stages in examining the restrictive arrangement, while there is no published guideline, any examination would begin with these following steps: defining the relevant market in which the restraint takes place, and then examining the parties' market shares and the barriers to entry or expansion.

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 share could be extremely relevant when assessing the applicability of any block exemption. First, the supplier's market share would be crucial in determining whether a specific block exemption such as the Block Exemption for Exclusive Distributions Agreement applies. In addition, since the main issue in assessing the restraint (whether by the General Director or by self-assessment according to the Vertical Block Exemption) is the likely effect on competition in the market, the market share of the parties to the agreement will probably play a key role.

For instance, in order to determine the likely effect on competition of an agreement containing a most favourite customer clause (MFN), the supplier's market share is important. The General Director concluded as much in its decision regarding the *Pelephone/Mirs* restrictive arrangement. The General Director has rejected an MFN provision agreed upon between Pelephone (one of the three largest mobile providers in Israel) and Mirs, a new entrant into the cellular providers market. The agreement granted Mirs MFN with regard to Pelephone's charges for national roaming prices. In his decision the General Director rendered that market shares played a prominent role and stated:

> *It should be noted that the market share of the customer can be of great importance during the operation of an MFN provision such as the one before us: as the share of purchases of the customer from the total sales in the relevant market is higher – the fear of harm to competition is found to be more significant since the benefit that the supplier will be required to provide to the party enjoying the MFN if a different customer would be given better terms, will be greater.*

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?

As is in the answer above, the buyer's market shares can be, in the relevant cases, just as important as the supplier's market shares, to continue the previous example – in an MFN agreement, the buyer's market share is very relevant since a very large buyer receiving an MFN could affect competition considerably more than a small unimportant buyer receiving the same agreement. The issue of whether such restrictions are widely used could play a major role too.

The General Director considered the buyer's market share in its decision regarding the *Tnuva/Corporations for transporting milk* case. In that case the General Director rejected a request for an exemption from a restrictive arrangement while reasoning that:

> *The competitive harm was established mainly due to a vertical exclusivity by a firm possessing a dominant position (in this case – Tnuva, a buyer of transporting milk services) which blocks a very significant share of the market, so that the existence of exclusivity may result in the exit of competitors from the market.*

The market share is also relevant for determining whether specific block exemptions such as the Block Exemption for Exclusive Purchase Agreements apply.

Block exemption and safe harbour

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

As mentioned there are several block exemptions that can apply to vertical restraints. Before elaborating with regard to these block exemptions it is important to understand the relationship between the Vertical Block Exemption and all other block exemptions that apply to vertical situations. In that regard, it has been rendered by the IAA that all block exemptions other than the Vertical Block Exemption would function as safe harbours.

Therefore, if the restraint falls within any one of the block exemptions (such as the Block Exemption for Franchising Agreements or the Block Exemption for Restraints of Minor Importance) it would also be exempted according to the Vertical Block Exemption as it satisfies the required standard of having a justification and its likely effect on the competition.

The IAA further stated that restraints that could be exempted in accordance with the Vertical Block Exemption would simply not be examined by the IAA. This makes sense as the parties are required to apply the same standard as the General Director applies when exempting the agreement under article 14. Thus, the fact that the parties approached the General Director for a vertical restraint (a restraint which is not among competitors as defined in the Vertical Block Exemption) means that they either see a concern of limiting the competition in a considerable share of a market or they do not have a legitimate business justification for the agreement.

The result is that filing a request for an exemption for a vertical restraint in accordance with article 14 could occur in only two cases. The first is in a case that the restraint itself is vertical but the parties have some other competing products or services, which means they will be regarded as competitors for the purpose of the Vertical Block Exemption. The second is in cases in which the restraint includes a price restraint that is not RPM maximum or MFN. In such cases the Vertical Block Exemption would not be applied and a request for an exemption would have to be filed to the General Director.

Types of restraint

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

As mentioned, the most important block exemption is the Vertical Block Exemption. This block exemption stipulates that any RPM, other than RPM maximum, cannot enjoy the block exemption and would need to be filed with the IAA in order to receive an exemption from the General Director or alternatively be approved by the Tribunal.

Thus if a vertical agreement includes any price restraint other than RPM maximum it could only be cleared in these channels. In practice, fixed or minimum price maintenance would in all likelihood not be cleared.

Recommended price depends largely on the recommendation being in fact a mere recommendation. According to several court decisions, a mere recommendation is not a restrictive arrangement. In such cases the IAA would view any action taken by the supplier other than recommending a price, such as supervision of whether the recommendation is being implanted, as going beyond mere recommendation and thus as a restrictive arrangement.

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'?

Although the duration of the arrangement is a relevant factor in assessing the restraint's probable effect on competition, fixed RPM or RPM minimum are not likely to be cleared regardless of the time they would be in place. We are not aware of any case in which the IAA allowed RPM minimum even if it was for a limited time.

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

Generally, it is possible that an agreement containing several different restraints would not be exempted while any restraint by itself could be exempted. Nevertheless, there is no specific decision dealing with the link between RPM and other restraints such as MFN. In assessing such link it would be necessary to analyse each restraint separately while bearing in mind that the combination could by itself have an adverse effect.

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

There are several IAA decisions that view RPM maximum as having many advantages due to the efficiencies it brings.

Nevertheless, the IAA's long-standing position is that fixed and minimum RPM would not be cleared.

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.

The Vertical Block Exemption would not apply to such an agreement and such an understanding would not be cleared by the IAA. Regarding the commercial practices of dominant suppliers and large retailers in the food sector the IAA has taken the position that such practices raise competitive concerns.

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.

MFN provisions could be exempted in accordance with the Vertical Block Exemption. The main question in assessing MFN's provisions is the effect such a restraint would have on the suppliers' incentives to offer better terms to other buyers. The parties' market share would, of course, play a key role. In addition, the parties needs to have sufficient business justification for the MFN, such as the buyer's bearing substantial sunk costs for adjusting its business to the suppliers' products.

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.

Generally, such a restraint is very similar to, and will be examined as an RPM restraint, which would examined under the same analytical framework mentioned above.

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.

There are no specific IAA decisions regarding minimum advertised price policy (MAAP) clauses. It is very likely that in such a case the IAA would not give any weight to the fact that the buyer could in practice allow discounts from such prices and examine this restraint as RPM minimum, which would not be cleared.

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.

A buyer warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most favoured supplier is an MFN provision for all intents and purposes and would be assessed in the same manner any MFN provision is assessed as discussed in question 24.

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?

Article 2(b)(3) of the Law stipulates that any arrangement involving a restraint relating to the division of all or part of the market according to type of persons with whom business is to be conducted will be deemed as a restrictive arrangement. Nevertheless, the Law is a territorial law and applies solely to Israel; thus an agreement relating to limitations on sales outside Israel is not subject to the Law.

Other divisions of the Israeli territory are, as mentioned, a restrictive arrangement. Nevertheless, when they are agreed upon by parties that have a vertical relationship they could be exempted under the Vertical Block Exemption. Thus such restraints could be exempted if they have legitimate commercial justifications and satisfy the above-mentioned test with respect to the likely effect on competition.

29 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?

Such agreements would be deemed as restrictive arrangements. Nevertheless when such agreements are agreed upon by parties that have only a vertical relationship they could be exempted under the Vertical Block Exemption if there is a legitimate justification for such a restriction and satisfy the above-mentioned test with respect to the likely effect on competition.

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

Article 3 of the Law establishes that an arrangement entered into by a person assigning a right to real property and a person acquiring such right, involving restraints, all of which relate to the types of assets or services that the acquirer of the right is to engage in on such property will not be deemed a restrictive arrangement.

With regard to other assets, although this is clearly a restrictive arrangement it can possibly be exempted under the Vertical Block Exemption. The key issue would be whether there is a legitimate justification for the buyer's limitation. If such a justification exists and the above-mentioned test with respect to the likely effect on competition is satisfied, such a restriction could be exempted.

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

The IAA has not, to date, regarded sales via the internet any differently from any other distribution channel. Thus restricting the buyer's ability to generate sales through the use of the internet is similar to preventing the buyer from generating sales in any other channel. While such provisions are clearly restrictive arrangements, they could be exempted depending on a substantive examination of their effect on competition if there is a business justification for their existence.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

We are not aware of any such decisions or guidelines.

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

A supplier is free to choose its distributors. Thus, an agreement in which a supplier selects approved members and then restricts these members from selling to entities outside the network could be exempted. Such an exemption would be examined on a case-by-case basis and the outcome of any examination largely depends on how essential the product or service in question is and on the competitive level that exists in the actual circumstances of the case.

34 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?

It is more likely that a selective distribution system would be exempted when regarding products that require special technological expertise or products that are premium branded and there is a special investment in promoting such brand (including by personal sales technique).

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

There are no authority cases or guidelines regarding such cases.

36 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?

We are not aware of any such cases.

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

The IAA can take into account possible cumulative effects of multiple selective distribution systems in the same market and restrict such agreements even in cases in which a competitive harm would not be caused if only one player used such a system.

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

No such authority decisions or guidelines exist.

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

The IAA's view of such a restriction can be found in the Block Exemption for Franchising Agreements. There, it is stated that the block exemption would not apply to agreements restricting the franchisee ability to purchase its products unless such a restriction could be justified on grounds of the product's quality. It is likely that this represents the IAA view also with regard to such restrictions which are not a part of a franchising agreement.

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

Protecting the supplier's reputation and goodwill are valid grounds for such a restriction and the IAA is likely to take a liberal standpoint in such cases.

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

Such a restraint would be examined in a similar manner to an exclusivity clause. It could be exempted in accordance with the Vertical Block Exemption but a valid justification must be demonstrated.

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

Requiring a buyer to buy the supplier's full range could be problematic only if the supplier enjoys a dominant position, since in this case concerns of tying and rebates might be raised.

Otherwise the main question would be how similar is such a requirement to an exclusivity. If, for instance, the agreement requires the buyer to buy a thousand products from the supplier while the supplier only makes a thousand products, this would be for all intents and purposes a de facto exclusivity which would be examined as detailed above. Partial exclusivity will exist in cases in which there is no full compatibility between the buyer's commitment to purchase and the seller's output. In these cases the outcome depends on how partial the exclusivity is, but this should viewed in quite a liberal manner.

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

Such a restriction is examined in this manner as exclusivity clauses – as discussed above.

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

While such a restriction could raise anti-competitive concerns, it could be justified. Not allowing such a restriction would allow the supplier to free ride on the distributor's efforts (ie, the distributor will make all the effort but the supplier will enjoy the benefits). What would be the exact balance between these two concerns would be decided on a case-by-case basis depending on the specific circumstances at hand.

45 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?

No.

Notifying agreements

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

As mentioned, restrictive arrangements, including vertical agreements, can be notified either to the General Director or to the Tribunal. Both paths require notification to the authorities. An agreement may be exempted by the General Director according to article 14 of the Law. In order to obtain such an exemption, a filing must be made to the IAA in which the parties submit all relevant information. The General Director has 90 days to render his decision whether to exempt such an arrangement and can decide (with no need for any approval) to extend the time period by an additional 60 days. Since the time between the General Director's request to receive information (either from the parties to the agreement, or from third parties) and the time it receives such information does not count in the limited time frame it has, in practice the General Director's scrutiny could take quite a long time.

The third path is to file the agreement with the Tribunal in order to receive clearance. In most cases it would be preferable to try to obtain the General Director's exemption rather than the Tribunal's clearance since the assessment by the Tribunal may be a lengthy procedure and, in any case, the General Director shall be summoned to present his position and arguments regarding the motion before the Tribunal.

It should be noted, however, that the Tribunal can take into account considerations that the General Director cannot since the Tribunal needs to examine the public interest, which has a broader scope than assessing the effect of the restriction on competition. For instance, the Tribunal can clear an arrangement that would likely harm competition because of other redeeming virtues such as employment or foreign policy.

Update and trends

The IAA's approach to vertical restraints has changed dramatically due to the legislation of the Vertical Block Exemption.

To date there have been no IAA decisions relating to cases in which the parties assessed that the restraint was lawful while the IAA took the opposite view, but it is only a matter of time until such cases will be brought by the IAA.

The Vertical Block Exemption has heavily affected the industry as it allows the parties to craft their agreements as they wish as long as they meet the required standard of not harming competition.

Authority guidance

47 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?

Following the enactment of the Vertical Block Exemption, the IAA stated that it would not ordinarily allow declaratory judgments in agreements that could be exempted according to the Vertical Block Exemption (as the parties should self-assess these agreements according to the Vertical Block Exemption). Other agreements may be filed with the IAA for pre-ruling. In that sense it is important to note that on one occasion in the past the IAA reversed its initial opinion in the pre-ruling once it conducted an in-depth analysis of the agreement and the relevant market.

Complaints procedure for private parties

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

Private parties can either complain to the IAA and report an agreement that is harmful to them or alternatively sue the parties to the agreement in a private suit.

If a private party files a complaint with the IAA, the IAA can examine the case or alternatively decide that it has no interest in investigating the case. The IAA is not bound to a specific time frame in such cases so there is no guarantee regarding the duration of the process.

Enforcement

49 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?

Since the Vertical Block Exemption is very new legislation, all past statistics relating to the number of decisions relating to vertical agreements is of limited relevance. Nevertheless, the IAA takes enforcement measures regarding vertical restraints a few times annually.

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

The courts in Israel would not enforce an unlawful agreement. Nevertheless, this does not mean that if an agreement contains an illegal vertical restraint it will be completely unenforceable as the rest of the agreement can remain valid and enforceable even where certain restraints are deemed unlawful. In addition, in motions for intermediate relief the courts would enforce the contract as it is, and will not consider allegations that it constitutes a restrictive arrangement. For example, the court in a motion for intermediate relief has enforced an exclusivity clause and did not allow for a competing pharmaceutical store to operate in a certain shopping centre. The court stated that the restrictive arrangement question would be dealt with only at the full trial on the merits.

51 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 IAA has very broad enforcement tools and has the power to impose administrative fines. In addition, the IAA could also enforce using criminal sanctions, but the IAA's guidelines clearly state that the criminal enforcement would not be considered in vertical restraints.

In addition, if the agreement has been filed with the General Director in accordance with article 14, the General Director can exempt the agreement after imposing remedies, which can be behavioural and structural.

Investigative powers of the authority

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

Any person is obligated upon the demand of an IAA authorised staff member to provide all information and documents that would ensure or facilitate the implementation of the Law.

B.Golan law firm

Boaz Golan **boaz@bgolanlaw.com**
Nimrod Prawer **nimrod@bgolanlaw.com**

76 Rothschild Blvd
Tel Aviv 857 8513
Israel

Tel: +972 77 8868999
Fax: +972 77 8868222
www.bgolanlaw.com

The IAA has recently taken enforcement measures against violations of article 46(b) of the Law, which allows the General Director to demand such information. In those cases the IAA has issued consent decrees which required payment of fines in lieu of criminal indictments.

Nevertheless it is apparent that the IAA does not possess a real 'hammer' to drop on foreign entities not cooperating with such requests.

Private enforcement

53 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 enforcement is indeed possible for any person suffering damage from an agreement if it is found to be unlawful. Such suits could be brought by a party to the agreement, by a competitor or by any other person suffering damage. It should be noted that such suits could also be in the form of a class action and in these cases consumer bodies play a role. As mentioned above it is almost impossible to obtain a temporary injunction and the plaintiffs would have to wait for a full trial on the merits. Private enforcement could be a lengthy procedure amounting to several years. The successful party would be able to recover its legal costs, although in practice the costs the court would order would not be sufficient to cover all legal costs.

Other issues

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

No.

Japan

Nobuaki Mukai

Momo-o, Matsuo & Namba

Antitrust law

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

The Japanese Antimonopoly Act, Act No. 54 of 14 April 1947, as amended (JAMA), prohibits private monopolisation under the first half of article 3 thereof. Under the latter half of article 3, it prohibits 'unreasonable restraint of trade', which has been narrowly interpreted as horizontal restraint, including cartel or bid rigging, and so on, based on the historical developments of the law. The coverage provided in article 19 of the JAMA is related and in addition to those provisions above. It prohibits various 'unfair trade practices', including some conduct recognised as vertical restraints, and as a matter of coverage sharing, it is settled that article 19, as opposed to article 3, is the primary provision to applicable to such practices.

'Private monopolisation' is defined under article 2, paragraph 5, of the JAMA, and is classified into two categories: 'exclusionary private monopolisation' (ie, private monopolisation by excluding the business activities of other entrepreneurs); and 'private monopolisation by control' (ie, private monopolisation by controlling the business activities of other entrepreneurs) (see the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act, the Japan Fair Trade Commission, 28 October 2009 (EPM Guidelines), page 1).

Under the JAMA prior to the amendments in 2009, 'unfair trade practices' was defined as any act falling under the six basic categories statutorily provided, which tends to impede fair competition and which is 'designated by the Fair Trade Commission' (see question 2) under the then article 2, paragraph 9, thereof. Although from a theoretical perspective, the scope has not been expanded, from an enforcement perspective, the amendments in 2009 divided them into two categories: those subject to a monetary sanction (surcharge order) under items 1 to 5 of paragraph 9 of article 2; and the remainder under item 6 thereof (see question 51).

In addition to the statutory provisions above and the relevant guidelines issued by the authority referred to in the respective questions below, here is the list of the precedents constituting the legal sources about vertical restraints:

Court precedents

- *Wakodo v JFTC*, 22 Shinketsushu 237 (Sup Ct, 10 July 1975) (questions 20 and 22);
- *Meiji Shoji v JFTC*, 22 Shinketsushu 201 (Sup Ct, 11 July 1975) (questions 20 and 22);
- *Toyo Seimaiki v JFTC*, 30 Shinketsushu 136 (Tokyo High Ct, 17 February 1984) (question 41);
- *Shiseido v Fujiki*, 45 Shinketsushu 455 (Sup Ct, 18 December 1998) (questions 36 and 37); and
- *Kao v Egawa Kikaku*, 45 Shinketsushu 461 (Sup Ct, 18 December 1998) (question 29 and 39).

Japan Fair Trade Commission (JFTC) precedents

- JFTC recommendation decision against Auto Glass East-Japan, 46 Shinketsushu 394 (2 February 2000) (question 47);
- JFTC recommendation decision against Matsushita Electric Industrial, 48 Shinketsushu 187 (27 July 2001) (questions 29 and 39);
- JFTC hearing decision re Sony Computer Entertainment, 48 Shinketsushu 3 (1 August 2001) (question 39);
- JFTC Keikoku (warning) against Johnson & Johnson (12 December 2002) (question 31);
- JFTC recommendation decision against Intel, 52 Shinketsushu 341 (13 April 2005) (question 42);
- JFTC order against Oita Oyama-machi Agricultural Accociation, 56-2 Shinketsushu 79 (10 December 2009) (question 43);
- JFTC hearing decision re Hamanaka, 57 Shinketsushu 28 (9 June 2010) (question 22);
- JFTC order against Johnson & Johnson, 57-2 Shinketsushu 50 (1 December 2010) (question 30);
- JFTC order against DeNA, (9 June 2011), 58-1 Shinketsushu 189 (question 43); and
- JFTC order against Adidas (2 March 2012), 58-1 Shinketsushu 284 (question 19).

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?

For the purpose of exclusive private monopolisation, the EPM Guidelines state that, while there is a wide variety of conduct deemed as exclusionary conduct, it lists four typical ones: below-cost pricing, exclusive dealing, tying and refusal to supply and discriminatory treatment (page 5).

For the purpose of unfair trade practices, in terms of describing the types of vertical restraints, the then Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of 18 June 1982) (UTP Designation), which was in effect prior to, but is now amended by, the amendments in 2009, may still be appropriate. Under the authorisation pursuant to the then article 2, paragraph 9 of the JAMA, the then UTP Designation detailed and reorganised the six categories and reclassified them into the 16 categories. The following describes the major categories among them.

Discriminatory consideration or treatment on trade terms, etc

Unjustly supplying or accepting goods or services for a consideration which discriminates between regions or between parties, or unjustly affording favourable or unfavourable treatment to a certain party in regard to the terms or execution of a trade.

Tie-in sales, etc

Unjustly causing another party to purchase goods or services from oneself by tying the purchase to the supply of other goods or services, or otherwise coercing the said party to trade with oneself.

Trading on exclusive terms

Unjustly trading with another party on condition that the said party shall not trade with a competitor, thereby tending to reduce trading opportunities for the said competitor.

Resale price restriction

Supplying goods to another party while imposing, without justifiable grounds, such restrictive terms as to cause the said party or subsequent repurchaser to maintain the selling price of the goods that one has determined, or otherwise restricting the said party's free decision on the selling price of the goods.

Trading on restrictive terms
Other than any act falling under the trading on exclusive terms or the resale price restriction above, trading with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party.

Interference with a competitor's transaction
Unjustly interfering with a transaction between another party who is in a competitive relationship with oneself and its transacting party, by preventing the execution of a contract, or by inducing the breach of a contract, or by any other means whatsoever.

Abuse of dominant bargaining position
Unjustly, in light of normal business practices, making use of one's dominant bargaining position over the other party, by engaging in such acts as: causing the said party in continuous transactions to purchase goods or services other than the one pertaining to the said transaction; imposing a disadvantage on the said party regarding terms or execution of transaction, and so on. See question 54.

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?

The basic objective of the law is to protect and promote competition.

In this regard, the case law states that the direct purpose of the law is to protect and promote competition, while the ultimate purpose thereof is 'to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers' (*Idemitsu Kosan et al v Japan*, 30 Shinketsushu 237 (Sup Ct, 24 February 1984). While the Supreme Court issued this ruling in the context of horizontal restraints, it is also applicable to vertical restraints.

In addition, it has been commonly understood that the objective of the abuse of dominant bargaining position may be found to be different from that of the others. See question 54.

Responsible authorities

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

The Japan Fair Trade Commission (JFTC) is responsible for the enforcement of the JAMA.

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?

Although article 6 of the JAMA deals especially with international matters separately from regular prohibitions, due to the recent developments regarding the international service of process, and so on, there seems to be a tendency toward dealing with both domestic and international cases under the same provisions. According to the broadly accepted interpretation, in order to find that the JAMA is applicable to a certain case, it is necessary that the case has a substantial effect on the Japanese market. For the extraterritorial application, there is another issue of how to reach the prospective respondent for service and other procedural purposes. While the JFTC may attempt to reach a foreign entity via informal measures to request voluntary cooperation, or to ask it to retain Japanese legal counsel on its behalf, extraterritorial service of process via the Japanese consulate may apply for a vertical restraint case.

At this stage, there is no authoritative precedent which establishes a rule or criteria regarding the jurisdictional issue in a pure internet context.

Agreements concluded by public entities

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

The JAMA regulates 'business activities' by 'entrepreneurs'. This concept of 'entrepreneur' is defined as 'a person who operates a commercial, industrial, financial or any other business' under article 2, paragraph 1 of the JAMA, and the case law shows that even a public entity may be found to fall under the definition of 'entrepreneur' if and as far as it deals with business activities, whether or not it generates profit (*Nippon Shokuhin KK v Tokyo Metropolitan Government*, 36 Shinketsushu 570 (Sup Ct, 14 December 1988) (commonly known as the *Tokyo Slaughterhouse* case).

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.

There are three particular regulations applicable to specific sectors of industry such as the newspaper business, the specific shipping or transport business and the large-scale retailers, which mainly cover abuse of dominant bargaining position only (see question 54).

In addition, there are regulated industries, such as public transport, communications, and so on. Even if a certain matter in the industry is regulated by a certain competent regulatory agency, it would not necessarily exempt it from the application of the JAMA. However, depending on the nature or purpose of such regulation, it may be found to supersede the application of the JAMA.

General exceptions

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

There are some provisions regarding the exemptions from the JAMA. Among others, article 21 provides for the matters regarding intellectual property (see question 14). Article 23 provides for the general exemption from the resale price restriction regarding, among others, copyrighted products. It is narrowly construed to include newspapers, books, magazines, records (which includes audio tapes and audio compact discs) only, and does not include other items such as videotapes, digital video discs, and so on.

Agreements

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

At least for the purpose of the vertical restraints, there is no definition of 'agreement'. Rather, under Japanese law, the subject matter of the prohibition of the vertical restraints is 'restriction' itself and an 'agreement' may be found to be a measure by which a party binds the other party to a certain obligation. However, an 'agreement' is not an indispensable factor and, for example, in the case of resale price restriction, it would suffice if it is found that a party successfully compelled the other party to comply with its instruction regarding pricing by using the 'carrot and stick' approach.

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?

Under Japanese law, in order to engage the JAMA in relation to vertical restraints, it is not necessary for there to be a formal written agreement (see question 9). Even an informal or unwritten understanding, or a certain mechanism for a party to motivate the other party to comply with its instruction, may suffice, depending on the situation.

Parent and related-company agreements

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

In theory, the vertical restraint rules would apply unless the agreement is between a parent and its wholly owned subsidiary (Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (DSBP Guidelines), JFTC, 11 July 1991). Under the DSBP Guidelines, it is also stated that, even if a parent owns less than 100 per cent of the shares of its subsidiary, if it is recognised that transactions between them are equivalent to intra-company transactions (in substance), the agreement would not be subject to the regulation of unfair trade practices. Whether or not transactions between a parent and its subsidiary are equivalent to intra-company transactions is to be determined on a case-by-case basis by means of comprehensive examination of various factors, for example, the ratio of shares of the subsidiary held by the parent, the business relationship between the parent and subsidiary, and so on.

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?

Basically, the JAMA on vertical restraints does not apply to such agreements. In this regard, the DSBP Guidelines state that, if a dealer who purchases products from a manufacturer only functions as a commission agent, and if in its essence the sale is actually occurring between the manufacturer and the real purchasers through said dealer or agent, even if the manufacturer instructs the resale price to said dealer or agent, it is usually not illegal.

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?

There are no specific rules or recent authority decisions on what constitutes an agent–principal relationship, and it is basically determined on a case-by-case basis by means of comprehensive examination of various factors. For example, for the purpose of the resale price restriction, the DSBP Guidelines state that, if it is a consignment sales transaction, and if the transaction is made with a consignor at its own risk and account so that a consignee bares no risk beyond that associated with its obligation to exercise the care of a good manager in shortage and handling of goods, collection of payments, and so on, and therefore is not liable for loss of goods, damages to them, or for unsold goods, even if the manufacturer or consignor instructs resale price to the real purchaser (from the consignee), it is usually not illegal.

Intellectual property rights

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

Article 21 of the JAMA provides, as an exemption, that the provisions thereof shall not apply to such acts recognisable as the exercise of IPRs. The Guidelines for the Use of Intellectual Property under the Antimonopoly Act, JFTC, 28 September 2007 (IP Guidelines) state that the JAMA is applicable to restrictions pertaining to the use of technology that is essentially not considered to be the exercise of rights. In addition, while an act by the rights-holder to block other parties from using its technology or to limit the scope of use may seem, on its face, to be an exercise of rights, if it cannot be recognised substantially as an exercise of a right, then it may be subject to the JAMA enforcement if it is found to deviate from, or run counter to, the intent and objectives of the intellectual property systems (ie, to promote creative efforts and use of technology in view of the intent and manner of the act and its degree of impact on competition).

Analytical framework for assessment

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

The 'substantial restraint of competition' is required for private monopolisation and the 'impediment of fair competition' is required for unfair trade practices. According to court precedent, the criteria for the former could be found more severe than that for the latter. However, some recent academic analysis pointed out that these two should be consolidated into one single standard as an appropriate and sufficient anti-competitive effect. In practice, vertical restraint cases have been mainly dealt with by the unfair trade practices enforcement.

The analytical framework for the 'impediment of fair competition' depends on the type of vertical restraint at issue. In this regard, the DSBP Guidelines state that, for the restriction on distributors' handling of competing products, it should be assessed based on whether or not a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels (see question 41), while for the restrictions on distributors' sales territory or the restrictions on distributors' customers, it should be assessed based on whether or not the price level of the product covered by the restriction is likely to be maintained (see questions 28, 29 and 44). Especially in furtherance of the latter, it is exceptional that the resale price restriction can be justified (see question 19).

In addition, analysis on whether the conduct at issue impairs transactions based on free and independent judgment by firms is required regarding an abuse of dominant bargaining position (see question 54).

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?

In assessing either the 'substantial restraint of competition' or the 'impediment of fair competition' referred to in question 15, the JFTC considers whether the infringement is done by a firm that is influential in a market, which requires a consideration of market shares, market structures and other economic factors. The DSBP Guidelines state that, for the 'impediment of fair competition', depending on the type of the vertical restraint, it would be considered whether a firm is 'influential in a market', which is first assessed by ascertaining the market share of the firm, that is, whether it has more than 10 per cent or its position is within the top three in the market. However, even if a firm matches said criterion, the firm's conduct is not always illegal.

With respect to the consideration on the restriction widely used in the market, it is relevant from the perspective of the possible cumulative restrictive effects of such restriction. See also question 37 regarding multiple selective distribution systems operating in the same market.

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?

In assessing a buyer's conduct, the rule basically conforms with what is discussed in question 16, in that the JFTC considers whether the infringement is done by a firm that is influential in a market, which requires a consideration of market shares, market structures and other economic factors, and whether a firm is 'influential in a market' is first assessed by ascertaining the market share of the firm, that is, whether it has more than 10 per cent or its position is within the top three in the market.

Notwithstanding the above, as far as the abuse of dominant bargaining position is concerned, it is rather typical that such a 'power buyer' abuses its dominant bargaining position against its suppliers (although from the theoretical perspective, such a violation may not necessarily be classified as a typical vertical restraint).

On the other hand, in assessing a seller's conduct, usually the anti-competitiveness of the conduct is to be evaluated by considering the factors listed in question 16, regardless of how the buyer may be found to be influential in a market. That is, sometimes certain factors, for example, the

fact that a 'power buyer', or many buyers widely, agreed to certain types of restriction, may lead a fact-finder to find that the restriction at issue should be permissible. On the other hand, depending on the situation, similar facts may lead a fact-finder to find that the restriction at issue effectively works to an anti-competitive effect.

There is no such guidance or authoritative precedents that deal specifically with this issue in the online sector.

Block exemption and safe harbour

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

There are no block or safe harbour exemptions regarding vertical restraints which are statutorily provided. In this regard, however, the reverse aspect of the criteria referred to in question 16 ('more than 10 per cent or its position is within the top three in the market') may work as a safe harbour for the vertical restraints such as the restriction on distributors' handling of competing products, and so on.

Types of restraint

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

As stated in question 2, the JAMA prohibits resale price restriction. There are two formal administrative orders issued by the JFTC within the past six or seven years, including *Adidas* (JFTC order, 2 March 2012). It covers not only price-fixing and minimum resale price, but also any measures with equivalent effect, such as limiting the buyer's ability to give rebates or discounts.

With respect to maximum resale price, it may be a strong argument that it may be beneficial for consumers or end-users. However, at least on its face, the statutory provision for this prohibition does not differentiate the restriction on maximum price from that on minimum price, and it is also argued that in practice, restriction on the maximum resale price may (intentionally or inadvertently) function similarly to the minimum resale price. In addition, even such restriction on the maximum resale price would restrict the purchaser or reseller's free decision on its pricing. At this stage, there is no precedent where maximum resale price maintenance is differentiated from minimum resale price maintenance and should be found to be legal.

With regard to suggested resale price, the DSBP Guidelines state that, if a manufacturer's suggested retail price or quotation is indicated to distributors solely as a reference price, such conduct itself is not a problem. Whether or not it is referred to as a 'suggested price', however, if the manufacturer tries to have its distributors follow the reference price, such conduct would constitute resale price restriction.

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'?

It has been commonly understood that the assessment regarding the resale price restriction violation would not require the calculation and analysis of the respondent's market share. In *Wakodo* (Sup Ct, 10 July 1975), the court declined Wakodo's argument that it only had a minor presence in the market (approximately 6 per cent or 10 per cent of the market share) and could strengthen its competitiveness by adopting the resale price restriction. From such viewpoint, it is unlikely that the former factor listed in this question could justify the resale price restriction. However, some recent academic analysis pointed out that court precedent can be found to be fact-specific and can be differentiated. If so, it may still be possible to argue the 'impediment of fair competition' based on the facts specific to the case at issue.

Moreover, the Supreme Court of Japan has stated that the resale price restriction cannot be justified if its purpose is to prevent a retailer using a brand as a loss leader (*Meiji Shoji* (Sup Ct, 11 July 1975)). However, in this regard, recent academic analysis pointed out that court precedent can be found to be silent or neutral regarding whether the resale price restriction can be justified if it is specifically introduced only for the retailers that use the brand as a loss leader.

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

Resale price maintenance is to be found not solely based on the existence of an 'agreement', but possibly based on the existence of a certain measure by which a party binds the other party to a certain obligation. Therefore, if such other forms of restraint work as an incentive to compel the other party to comply with the resale price restriction, such other forms of restraint may be found to be linked with the resale price maintenance (see question 9).

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

With regard to the possible benefits that may be rendered by the resale price restriction, such as the prevention of free-riding or the promotion of new entry, see question 20.

It has also been commonly understood that resale price restriction cannot be justified solely because it is necessary and reasonable from a business management perspective, for example, that stable supply is required (see *Wakodo*, *Meiji Shoji*), or that it is necessary to conserve a traditional industry (*Hamanaka* (JFTC hearing decision, 9 June 2010)). However, some recent academic analysis suggested that certain justification should still be available for the resale price restriction, for example, from the perspective of the necessity to assure product safety.

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.

While there is no precedent regarding this issue at this stage, if a buyer is an exclusive retailer of such supplier's products, or if a buyer has a substantial market share, this could be tantamount to substantially fixing retail market prices of such equivalent (or competing) products. Therefore, this could rather be found problematic from the perspective of such horizontal restraints.

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.

While there is no precedent regarding this issue at this stage, it would probably be assessed as a possible violation of the prohibition of trading on restrictive terms. Unless the promise practically works as a cartel or other horizontal restraint (eg, multiple suppliers widely warranting in the market) it is most likely to be found not to have the aspects of excluding competitors or avoiding competition, and be assessed by less strict scrutiny.

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.

As far as this works as a supplier's warranting the most favoured price to some certain specific platform (eg, platform A in this question), the same rule applies as in question 24.

On the other hand, if it is found that a supplier and such a certain platform are in the agent–principal relationship that is authentic in its nature, then the pricing in such various distribution channels is to be left to the supplier's choice, and therefore it should be found permissible.

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 *Johnson & Johnson* (JFTC order, 1 December 2010), the JFTC found that, regardless of the price range, Johnson & Johnson's forcing of its retailers not to refer to their retail prices of its products on their advertisements constituted a violation. It can be construed that, although it was not a restraint on pricing, but rather on sales methods, due to such pricing aspects of the restraint at issue it was subject to the level of higher scrutiny. That is, as far as such a restraint has any pricing aspects, it may be subject to higher

scrutiny, namely, whether or not the price level of the product covered by the restriction is likely to be maintained (see question 15).

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 analysed in question 24, it is likely to be assessed as a possible violation of the prohibition of trading on restrictive terms. So, unless it in fact practically works as a cartel or other horizontal restraint, similarly it is most likely to be found not to have the aspects of excluding competitors or avoiding competition, and be assessed by less strict scrutiny.

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?

Although there has been no precedent specifically analysing this matter in the past 10 years, as described in question 15, the DSBP Guidelines state that a restriction of this type is assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of unfair trade practices. Whether or not the price level of the product covered by the restriction is likely to be maintained is to be determined, comprehensively taking into account the following factors: actual conditions of inter-brand competition, actual conditions of intra-brand competition for the product, and so on.

The Guidelines also state that, if the agreement assigns a specific area to each distributor but does not restrict the distributor from selling to customers outside each area upon request, ie, if it does not restrict 'passive' sales but 'active' sales only, whether the restriction is imposed by an influential supplier in the market may also be taken into account (see question 16).

29 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?

This restriction is to be assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of unfair trade practices. It is adopted by the DSBP Guidelines. In *Matsushita Electric Industrial* (JFTC recommendation decision, 27 July 2001), a violation was found after a supplier had its contract dealers refuse to deal with non-contract price-cutting dealers (although the applicable type of conduct was indirect refusal to deal, another type of unfair trade practice, as opposed to trading on restrictive terms). If it could be found that said supplier traded on such exclusive terms, *Matsushita Electric Industrial* could be regarded as the case where said assessment criteria applied. On the other hand, as stated in question 37, even though vertical restraints may have a price maintenance effect to some extent, if it is rather to achieve something reasonable, eg, to improve brand image, and the restriction on the customers is found to be necessary for that purpose, then it could be allowed to that extent. That is, in *Kao v Egawa Kikaku* (Sup Ct, 18 December 1998), it was also found that as far as it is tailored to achieve a reasonable business purpose, in that buyers were just prohibited from selling the suppliers' products to only unauthorised or non-contract dealers, and it is applied non-discriminatorily, restricting the customers to whom a buyer may resell contract products could be found permissible. See question 36.

With respect to the prevention of the customer's ability to obtain the supplier's products from alternative sources, see also question 39.

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

While restraints other than trading on exclusive terms and resale price restriction are classified as trading on restrictive terms, it is the basic understanding that less strict scrutiny applies. Although there is no authoritative precedent showing what kind of scrutiny is applicable to this issue, considering the analogy with the restriction on the buyer or distributor's sales methods, the same analytical framework of whether it is reasonable and non-discriminatory to the other distributors may be found to be applicable. See question 36.

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

This restriction is to be assessed as a possible violation of trading on restrictive terms. That is, the basic analytical framework is similar to the restriction on territory or customer (ie, whether the price level of the product covered by the restriction is likely to be maintained (see questions 28 and 29)).

At this stage, there is no court judgment regarding this issue and the only available material is *Johnson & Johnson* (JFTC's warning, 12 December 2002) for restricting the buyer's ability to sell its contact lenses via the internet. In this case, it was found that the restriction at issue practically hindered low pricing, in spite of the fact that the transactions were appropriately approved by an ophthalmologist. It was also found that Johnson & Johnson voluntarily ceased such practice more than one year prior to the issuance of the said warning, and the JFTC did not issue its formal cease-and-desist order in this case.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

At this stage, there is no court decision or guidelines from the JFTC about this issue.

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

Depending on the nature of the applicable restrictions, basically, unless it works as resale price maintenance, it is to be assessed in the light of the restrictions on trading on restrictive terms. So, the aspects of restricting territory, customer, etc, are subject to the analysis of the framework described in question 15, while the aspect of the restriction on retailer's sales method is basically subject to a different, likely less strict, scrutiny. See question 36.

The criteria for selection do not necessarily need to be published. Please also see 'Update and trends'.

34 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?

At this stage, there is no authoritative precedent showing that such selective distribution system may be more likely to be lawful where they relate to certain types of product.

35 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?

As above, this aspect of the selective distribution systems is to be analysed in the light of the restrictions on trading on restrictive terms, and therefore, with respect to the restrictions on internet sales, question 31 is also applicable here. At this stage, there is no recent decision that deals with internet sales restrictions imposed on approved buyers in connection with selective distribution systems.

36 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?

As far as the aspect of the restrictions on retailer's sales methods is concerned, in *Shiseido v Fujiki* (Sup Ct, 18 December 1998), one of the most famous cases regarding this matter in Japan, the Supreme Court of Japan issued its judgment that Shiseido, a manufacturer of cosmetics, could enforce its contractual terms regarding the distributorship if the terms themselves were reasonable and non-discriminatory towards the other distributors. The restriction at issue was to have the sales staff of its retailers provide appropriate support and explanation to end-user customers so that they could use the products appropriately; such conduct could be helpful to improve the supplier's (products') brand image, and was found reasonable and non-discriminatory.

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

As far as such cumulative restrictive effects of the trading on exclusive terms are concerned, in connection with the issue of whether or not a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, the DSBP Guidelines state that, if two or more manufacturers, individually and in parallel, restrict the handling of competing products, it is more likely to result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, compared to cases with only one manufacture, and therefore it may be more likely to be found illegal.

In addition, in connection with the restriction on trading on restrictive terms, if inter-brand competition does not work well due to the oligopolistic structure of the market and product differentiation, price competition for the product of the manufacturer's brand may be suppressed, and the price level of the product is likely to be maintained, the exclusivity given to distributors may lead the authority to find the likelihood of price maintenance.

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

As analysed in questions 28 and 33, although there is no precedent from the last ten years specifically analysing the matter of restriction on the territory, under the DSBP Guidelines, the aspect of restricting territory is subject to the analysis of the framework described in question 15 (whether or not the price level of the product covered by the restriction is likely to be maintained).

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

With regard to the prevention of distributors' buying or selling the supplier's products among themselves, the DSBP Guidelines apply the same analytical framework that is used for the restriction of selling to certain customers (see question 29). Therefore, this is to be assessed from the perspective of whether the price level of the product covered by the restriction is likely to be maintained in connection with the prohibition of the unfair trade practices restriction. In *Sony Computer Entertainment* (JFTC hearing decision, 1 August 2001), the JFTC differentiated the case from what was found in *Kao* above, and basically applied the same rule to the restriction at issue.

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

As analysed in question 30, the restraints other than trading on exclusive terms and the resale price restriction are classified as trading on restrictive terms, and it is the basic understanding that less strict scrutiny applies. That is, although there is no authoritative precedent showing what kind of scrutiny is applicable to this issue, considering the analogy with the restriction on buyers' or distributors' sales methods, the same analytical framework of whether it is reasonable and non-discriminatory to the other distributors may be found to be applicable. See question 36.

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

With respect to the restrictions on distributors' handling of competing products, *Toyo Seimaiki v JFTC* (Tokyo High Ct, 17 February 1984) stated that this is to be assessed from the perspective of how the restriction would make the distribution channel foreclosed or exclusive. Subsequently, the same rule was adopted by the DSBP Guidelines stating that this type of restriction is to be assessed from the perspective of whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. It also points out that, if the restriction is carried out by an influential supplier in the market, it may lead to a finding that the restriction causes the 'impediment of fair competition' (see question 16).

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

This is to be assessed from the same perspective as stated in question 41, especially if in practice, the requirement restricts the buyer from dealing with competing products. The DSBP Guidelines address the situation of requiring distributors to deal with such a large volume of their products (which is close to their capacity) in the same manner as the restriction on distributors' handling competing products.

In *Intel* (JFTC recommendation decision, 13 April 2005), while it was not expressly required, Intel's licensing terms and conditions, especially in connection with the applicable rebate settings, incentivised the licensees/PC OEM manufacturers to purchase all or almost all of the CPUs to be installed in their PCs from Intel, and it was found that this constituted exclusionary private monopolisation. In this regard, Intel's market share was found to be approximately 89 per cent of the Japanese market.

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

The DSBP Guidelines apply the same analytical framework as described in question 41 to this issue – that is, whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. It also points out that if the restriction is carried out by an influential reseller or customer in the market, it may lead to a finding that the restriction causes the 'impediment of fair competition' (see question 16). The restriction may still be found to be legal if:

- a finished product manufacturer supplies materials to parts manufacturers, commissions them to make parts and requires them to sell all parts exclusively to itself; or
- a finished product manufacturer provides know-how to parts manufacturers, commissions them to make parts and requires them to sell all parts exclusively to itself, and if such restriction is deemed necessary for keeping the know-how confidential or preventing the unauthorised diversion of it.

In *Oita Oyamacho Agriculture Association* (JFTC order, 10 December 2009), the JFTC concluded that the restraint at issue made it difficult for a certain specific competitor to secure an alternative supply source. In this regard, in *DeNA* (JFTC order, 9 June 2011), although it was similarly intended to restrain the suppliers' abilities to supply to a certain specific competitor, the category of the applied violation was not the trading on restrictive terms, but the interference with a competitor's transactions. Although the reason why those two cases were differentiated has not been made clear, considering that the interference with a competitor's transaction does not necessarily require the level of the anti-competitiveness for the purpose of trading on restrictive terms in this context, ie, whether the restriction may result in making it difficult for new entrants or competitors to easily secure alternative sources of supply, close attention needs to be paid about whether, practically, making the restraint of this kind illegal by such less strict scrutiny may be the case in the future.

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

While there is no guidance or authoritative precedents regarding this issue at this stage, the potential anti-competitive effect caused hereby could be found equivalent to the restriction on the distribution channel, although it is made by the distributor, as opposed to the supplier. So, it should be assessed, in the context of trading on restrictive terms, based on whether or not the price level of the product covered by the restriction is likely to be maintained. See question 15.

45 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?

For other than those covered above, with respect to whether a supplier may apply different prices or conditions to similarly placed buyers, it is commonly understood that there are two aspects to be considered: analogous with the unjust low price sales, one of the unfair trade practices not listed in question 2; and analogous with the trading on restrictive terms.

Update and trends

From the perspective of regulatory reform, via the Cabinet Decision as of 24 June 2014, the Japanese government decided to consider improving the judging criteria on the illegality of vertical restraints by reviewing the Guidelines concerning Distribution Systems and Business Practices (DSBP Guidelines; see question 11). It is therein noted that, among others, the criteria 'whether or not the price level of the product covered by the restriction is likely to be maintained' (see question 15) is not clear enough and therefore should be amended or clarified, and it must be completed by March 2015. Items to be clarified beyond their current status by March 2015 also include (i) the requirements whereby the selective distribution systems could be legally implemented, and (ii) the requirements whereby the resale price maintenance could be justified. In addition, it is required that analysis of the safe harbour to be introduced in connection with vertical restraints be commenced by March 2015.

The former is not exactly the same but could be something similar to predatory pricing. It is basically assessed from the perspective of whether the pricing is below cost (*Sekino Shoji v Nippon Gas*, 52 Shinketsushu 818 (Tokyo High Ct, 31 May 2005).

The latter is basically assessed from the perspective of whether it may result in making it difficult for new entrants or competitors to easily secure alternative business channels (see question 15). In *Auto Glass East-Japan* (JFTC recommendation decision, 2 February 2000), it was found that the application of different conditions to dealers who simultaneously dealt with import products had an exclusive anti-competitive effect against such competing import products. In addition, if the application of different conditions is connected with the resale price maintenance or some other restraints, it is to be analysed all together as such. See question 21.

Notifying agreements

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

There is no formal procedure for notification.

Authority guidance

47 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?

It is possible to obtain guidance from the JFTC through the consultation procedure.

Complaints procedure for private parties

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

Article 45, paragraph 1 of the JAMA provides that any person may, when he or she considers that a fact involving violation of the provisions of the JAMA exists, report the said fact to the JFTC and ask for appropriate measures to be taken. Paragraph 2 thereof provides that the JFTC, upon receipt of such report as prescribed in the preceding paragraph, shall make necessary investigations with respect to the case.

Enforcement

49 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?

According to the JFTC's annual report for the year 2013 (April 2013 to March 2014) issued on October 2014, the JFTC issued 12 formal orders regarding unfair trade practices within the past five years. Of these 12 cases, seven concern abuse of a dominant bargaining position, three concern trading on restrictive terms, one concerns interference with a competitor's transaction, and one deals with resale price restriction. The report shows these are the four major enforcement priorities regarding vertical restraints.

As explained in questions 1 and 2, depending on the nature of the conduct at issue, private monopolisation may be applicable to vertical restraints. According to the annual report, the JFTC has issued one formal order regarding private monopolisation within the past five years, addressing certain exclusionary conduct by the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) against its competitors (namely, other organisations offering similar blanket licence services) where it was alleged that the JASRAC adopted a contractual royalty-calculation method which had such anti-competitive effect. Subsequently, however, the case was subject to examination by the JFTC's hearing examiner, and the said order against JASRAC was reversed on 12 June 2012. E-License, one of the competitors, filed an appeal against it and, on 1 November 2013, the Tokyo High Court reversed it. The JFTC appealed, and the case is currently under review by the Supreme Court of Japan.

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

Basically, it is commonly understood that if it is found that a certain contract provision violates the law, it would not necessarily be found void or unenforceable. In addition, while the contractual provision that is found to violate antitrust law may be determined to be unenforceable, the other contractual provisions contained in the same agreement may still be found to be enforceable, even without such severability clause.

51 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 JFTC has the power to directly impose a monetary sanction (surcharge order), in addition to a cease-and-desist order, in connection with certain categories of the vertical restraints under the JAMA amendment in effect as of January 2010. While those constituting private monopolisation or abuse of a dominant bargaining position would be subject to a monetary sanction for the violation in question, for the four other categories subject thereto (ie, joint refusal to deal, discriminatory consideration, below-cost pricing and resale price restriction), it is applicable only when the same violation is repeated within 10 years.

After the said amendment, there have been four cases where a monetary sanction was levied on target companies in connection with unfair trade practices (abuse of dominant bargaining position), where it was alleged that the target companies forced their suppliers and so on to unduly bear additional costs for the benefit of those target companies, for instance by forcing such suppliers to accept the return of unsold goods, etc. The JFTC orders re *Sanyo Marunaka*, 58-1 Shinketsushu 312 (22 June 2011); *Toys 'R' Us Japan*, 58-1 Shinketsushu 352 (13 December 2011); *Edion*, 58-1 Shinketsushu 384 (16 February 2012); *Ralse* (www.jftc.go.jp/en/pressreleases/yearly-2013/july/130703.html) (3 July 2013); and *Direx* (www.jftc.go.jp/houdou/pressrelease/h26/jun/14060501.html) (5 June 2014) are all subject to the examination procedure with the JFTC's hearing examiner.

See also question 54.

Investigative powers of the authority

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

Under article 47 of the JAMA, the JFTC may:

- order persons concerned with a case or witnesses to appear to be interrogated, or collect their opinions or reports;
- order expert witnesses to appear to give expert opinions;
- order persons holding books and documents and other materials to submit such materials, or keep such submitted materials in its custody; and
- enter any business office of the persons concerned with a case or other necessary sites, and inspect conditions of business operation and property, books and documents, and other materials.

Although these powers are available only within its jurisdiction in Japan, the JFTC has demanded information from a supplier domiciled outside

Japan (through its representative in Japan), based on the power in the first bullet point above.

Private enforcement

53 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?

Non-parties do not have standing in private enforcement unless it is found that the agreement at issue causes an anti-competitive effect on such non-party. Parties to agreements can bring damage claims as well as injunction claims at the competent district court. The length of time that a company should expect for such a private enforcement action would depend on the facts and situation. Japanese courts do not usually conduct consecutive day concentrated hearings or trials, so if witness examination is required, it would likely take at least one year. Although there are court precedents where damage claims have, or a preliminary injunction claim has been awarded, a perpetual injunction claim has yet to be recognised in a final judgment.

Other issues

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

As stated in question 2, the unfair trade practices include the abuse of dominant bargaining position. It has been commonly understood that the requirement of 'impediment of fair competition' for ascertaining the abuse of dominant bargaining position is different for the other types of restraint. For example, the Guidelines concerning Abuse of Dominant Bargaining Position, JFTC, 30 November 2010 (ADBP Guidelines) state that this aims at eliminating these types of conduct if they are likely to impede fair competition among retailers or among suppliers, and also state that such conduct impairs transactions based on free and independent judgement by firms (as opposed to whether a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels or whether the price level of the product covered by the restriction is likely to be maintained (see question 15)).

According the ADBP Guidelines, a party shall be found to be 'in a dominant bargaining position' over the other party to the transaction, based on comprehensive consideration that is to be given to such factors as degree of dependence on the party, position of the party in the market, changeability of the transactional partner from the other party's perspective, and so on. For the possible sanction applicable hereto, see question 51.

MOMO-O, MATSUO & NAMBA

Nobuaki Mukai **mukai@mmn-law.gr.jp**

Kojimachi Diamond Building
4-1 Kojimachi
Chiyoda-ku
Tokyo 102-0083
Japan

Tel: +81 3 3288 2080
Fax: +81 3 3288 2081
www.mmn-law.gr.jp

Latvia

Ivo Maskalāns and Andris Dimants
Attorneys at Law Borenius

Antitrust law

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

The Competition Law of 2001, which entered into force on 1 January 2002, is the principal legislation on competition in Latvia. The Competition Law only establishes the general rules concerning agreements and practices that may restrict competition; more detailed procedures for the application of various provisions of the Competition Law are provided by supplemental regulations issued by the Cabinet of Ministers. With regard to block exemptions, the Cabinet of Ministers has adopted two regulations, the first regarding the exemption of vertical agreements from the prohibitions imposed by the Competition Law (Regulation No. 797, dated 29 September 2008, on the Exemption of Certain Vertical Agreements from the Prohibitions Specified in article 11, paragraph 1 of the Competition Law, and the second concerns exemption of particular horizontal agreements from the prohibitions imposed by the Competition Law.

The Competition Council of Latvia and the Latvian courts also make the reference to EU-level legislation (regulations, guidelines, case law) in their decisions.

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?

In general, vertical agreements in Latvia are regulated by Regulation No. 797, which, similarly to EC Block Exemption Regulation, provides for the exemption of vertical agreements that meet certain requirements from the general prohibition.

Agency agreements
Agency agreements as such are regulated under the Commercial Law, but none of the relevant provisions on agency agreements touch upon competition law issues (except for non-mandatory provisions regulating non-compete issues). Furthermore, no case law is available at the time of writing on the application of the prohibition under article 11 of the Competition Law to agency agreements.

Exclusive distribution
Currently, the Competition Law does not contain any provisions regarding exclusive dealing. Regulation No. 797 anticipates that exclusive dealing agreements (the seller sells goods to only one buyer for resale in a specific territory) are exempt from this prohibition in the Competition Law where the market share of the seller in the relevant retail market is less than 30 per cent. In addition, exclusive supply agreements (the seller sells goods to only one buyer for use in production) are exempt from this prohibition where the market share of the buyer in the relevant purchasing market does not exceed 30 per cent.

Resale price maintenance
The Competition Law states that agreements regarding the direct or indirect fixing of prices and tariffs in any manner, or provisions for the formation of prices and tariffs, are prohibited. Regulation No. 797 anticipates that agreements that would otherwise be prohibited because of resale price maintenance issues are exempt from this prohibition where there is established maximum resale price or where the resale price is recommended. In practice, the Competition Council has sanctioned companies that have attempted to fix minimum sales prices or regulate resale prices in vertical agreements.

Territorial and customer restrictions
As mentioned above, the Competition Law also explicitly provides that agreements regarding the division of markets, taking into account territory, customers, suppliers, or other conditions, are prohibited. Regulation No. 797 specifically states that agreements on the division of territory or customers are in fact prohibited; they do, however, provide for contractual restrictions that are exempt from this prohibition:

- performing active sales in exclusive territories or to exclusive groups of customers that the supplier has reserved for itself or has assigned to another purchaser if such a restriction is not applied to the sales carried out by the customers of the purchaser;
- purchasers operating at the level of wholesale trade selling contract goods to end-users;
- participants of the selective distribution network selling contract goods to unauthorised distributors; or
- selling components that are supplied for the assembly of finished goods to such customers as might use them to make the same type of goods as those produced by the supplier.

Restrictions on parallel imports
There are no specific provisions of law or case law on the issue of restrictions on parallel imports. Given the tendency of the Competition Council to follow EU practice, the Competition Council will likely follow the principles developed in EU law in this area.

As restrictions on parallel imports restrict cross-border trade, restrictions on parallel imports between EU Member States will in most cases fall within the scope of application of EU law. Therefore, such restrictions must be examined under article 101 of the Treaty on the Functioning of the EU (TFEU). Please note, however, that the provisions of Regulation No. 797concerning restrictions of the territory into which the buyer may sell the contract goods and services (see 'Territorial and customer restrictions', above) also have to be observed.

Selective distribution
Regulation No. 797 defines a selective distribution agreement as a vertical agreement under which the seller, directly or indirectly, sells goods only to a limited number of distributors who are selected on the basis of specific criteria and under which these distributors are obliged not to sell the contracted goods to unauthorised distributors.

According to Latvian competition law, participants of a selective distribution system could be subject to a direct or indirect obligation not to sell any goods in competition with the goods of the seller. Also, participants in a selective distribution system could be subject to restrictions with respect to sales from locations in which they have not been authorised to sell by other participants of the system. Similarly, as under the relevant EU law, it is also prohibited under Latvian law to apply restrictions to mutual sales among the participants of selective distribution system that operate at the same or different distribution levels.

Unfortunately, no case law is available in Latvia on these issues and therefore it is rather difficult to predict the exact approach of the Competition Council to qualitative and quantitative selective distribution

systems. As in other cases, the Competition Council can be expected to follow EU practice.

Requirements contracts

The Competition Law does not contain any special provisions regarding requirements contracts, ie, contracts containing obligations for buyers to purchase certain goods from suppliers for a certain period of time. No case law on requirements contracts can be found. Therefore, the Competition Council will most likely examine each specific case to determine whether the inclusion of these requirements in the agreement could be regarded as distorting or restricting competition and, accordingly, whether to permit or prohibit the agreement.

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?

According to article 2 of the Competition Law the goal of the law is to protect, maintain and develop free, fair and equal competition in the interests of the public in all economic sectors. The Competition Council and the courts, in various decisions, have also stated that the main priority of the Competition Law (including vertical regulation) is the welfare of consumers.

Responsible authorities

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

The Latvian competition authority is the Competition Council. This authority adopts decisions regarding vertical restraints cases, which can be challenged in the administrative courts. The Competition Council is an independent authority and the government has no direct influence with respect to its activities.

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?

The legal test is the ability of the practice (vertical restraint) to influence competition in Latvia. Therefore, antitrust law applies to all companies (including foreign) who perform, or are preparing to perform, an economic activity that are in position to influence competition in the territory of Latvia. In practice, the Competition Council evaluates whether the particular company performs an economic activity in Latvia that may be a subject to antitrust regulations.

Agreements concluded by public entities

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

The Competition Law is applicable to public entries, and the Competition Council has issued several decisions concerning public entities.

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.

There are no laws or regulations that apply to specific sectors of industry, but there are specific rules for chains having a 'dominant position in the retail sector' (this concept is different from the 'classic' concept of dominant position). These rules regulate terms and conditions that can be used in relationships between retailers with dominant position in retail (grocery stores) and their suppliers (such as farmers). The Competition Law lists explicit conditions that cannot be inserted into such agreements (eg, return of unsold goods to the supplier without fair reason).

General exceptions

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

Such exceptions are listed in Regulation No. 797. The idea behind them is to forbid only those vertical agreements that, by their nature, have a negative impact on competition in a particular market. The main criterion for evaluating whether an agreement has an impact on competition is by reference to the market share: if the participants to a vertical agreement hold a market share that does not exceed those specified in Regulation No. 797, the agreement will not be subject to antitrust law on vertical restraints. The market share percentage under which a vertical agreement is not subject to antitrust law depends on the particular type of vertical restraint (see question 2). For example, in the case of exclusive dealing agreements, this market share percentage is 30 per cent.

If a vertical restraint is not exempt from prohibition in accordance with Regulation No. 797, another possible exception applies if there is a legitimate interest for such restraint to take place. Agreements that promote development of the production or distribution of products, or economic development generally bringing benefits to consumers, can also be exempt from the antitrust law on vertical restraints. These agreements must not set out restrictions on the involved parties that are not necessary to achieve the aforementioned purposes of the agreement and they must not eliminate competition in a significant part of the particular market.

Companies may submit a notification about an agreement to the Competition Council to ask whether a particular agreement is subject to general prohibition of vertical restraints and whether any exceptions would apply (see question 46).

Agreements

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

Similarly to article 101(1) of TFEU, article 11 of the Competition Law prohibits 'agreements between market participants which have as their purpose or consequence the hindrance, restriction or distortion of competition in the territory of Latvia'; such agreements between competitors are referred to as horizontal agreements. The Competition Law states that the agreement is a contract between two or more market participants or a concerted practice in which market participants participate, as well as a decision taken by registered or unregistered grouping of market participants (association, union, etc), or by an officer of such grouping.

The Competition Law does not prescribe the form of agreement that is subject to the prohibition imposed by the Competition Law. Therefore, the meaning of the term 'agreement' in essence is very broad and is interpreted according to the general provisions of the Latvian Civil Law. The most basic of the relevant Civil Law provisions states that the essential features of an agreement are the consensus of the parties and its intended enforceability. Under the Civil Law, the agreement does not generally have to be in writing unless the Civil Law itself or other laws specifically provide otherwise. The Competition Council has, on various occasions, stated that in order to reach an agreement between parties there is no need to establish that a written agreement exists between the parties.

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?

In almost all antitrust law violation cases, illegal vertical agreements are concluded in written contracts; however, the antitrust law on both vertical and horizontal restraints can be engaged even if there is no written agreement between the parties. The burden of proof is considerably lower in the case law of the Competition Council and courts. The Competition Council and the Latvian courts have made reference to EU case law and established that an 'agreement' between the parties can be proven with both direct and indirect evidence. There have been cases where the Competition Council has looked into a possible breach of antitrust law on the basis of an announcment by a spokesperson of a company in a press conference.

In decision No. E02-25 of 29 March 2006, the Competition Council ruled that the bakery Hanza Maiznīcas violated antitrust law in relation to vertical restraints by putting price labels on its products for resale. In the court proceedings, the company stressed that its agreements with the

supermarkets did not include setting specific prices for the products, but the court confirmed the finding of the Competition Council that by putting price labels on the packaging of the product the prices were fixed by the factual circumstances (buyers have expectations products will be sold according to the prices on the package, therefore the retailer was not able to charge different prices for the products).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company?

The general restrictions established by the Competition Law (including vertical restraints) do not apply between companies belonging to the same economic group. Whether companies belong to the same economic group depends on whether one company holds a decisive influence (de facto or de jure) over another. The Competition Law defines a single undertaking (economic group) as when: 'an undertaking or several undertakings jointly have a decisive influence over one undertaking or several other undertakings, then all undertakings may be considered as one undertaking'.

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?

The law does not deal with the agency relationships. Nevertheless, the Competition Council in some decisions (which are not dealing with this issue on the merits) has recognised that it will follow the principle of genuine and non-genuine agency when it deals with agency relationships under the Competition Law.

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?

No, there are no decisions that deal with this issue.

Intellectual property rights

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

No, but in some cases the rights to use IPRs (such as trade marks) might be interpreted as the element that means that both parties can be viewed as a single economic unit, and the right to use IPRs can result in a merger.

Analytical framework for assessment

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

There are certain restraints that are prohibited per se – hard-core restrictions:

- resale price maintenance (fixing of resale price or minimum resale price);
- restriction of passive sales;
- restrictions imposed on members of selective systems to sell goods to each other or end-users; and
- restriction to sell spare parts to the end customers or unauthorised repairers.

All other types of vertical restriction (such as exclusivity and non-compete provisions) may only be recognised as unlawful on case-by-case basis. In addition, the law sets some safe harbour thresholds according to which certain types of agreement will enjoy group exemptions from the prohibitions based on the market share (and length of the agreement) held by the parties to the respective agreement.

Regulation No. 797 sets the following safe harbour thresholds:

- de minimis: 10 per cent (not applicable to hard core restrictions listed above);
- exclusivity and non-compete provision (no longer that five years): 30 per cent;
- vertical agreement between competitors: 10 per cent.

In the event that the parties to the agreement hold market share greater that the thresholds, the agreement is not deemed illegal as such. In turn, the Competition Council must prove that the effects of the agreement have restricted the competition.

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?

The market share of the supplier is the main criteria by which the effects of a restraint are analysed, but the conduct of other suppliers can also have an effect on the analysis as the significance of the cumulative effects of the conduct has been recognised by the Competition Council in several decisions (eg, decision of 23 March 2012 in Case No. p/11/03.01/16).

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?

The market share of the buyer is a very relevant factor, especially in a case of exclusive distribution. Market positions and conduct of other buyers are also relevant to the analysis of a case.

Block exemption and safe harbour

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

The aforementioned Regulation No. 797 provides certain exceptions to the general prohibition of vertical restraints (see question 8).

This regulation defines the permitted market share of the companies concluding a vertical restraint that the antitrust law does not restrict. In addition to certain market share thresholds, the regulation also specifies certain situations in which vertical restraints are subject to the general prohibition of vertical restraints. For example, an agreement on fixing retail prices can only be subject to an exception from the general prohibition if it is an agreement fixing the maximum or recommended retail price; agreements fixing the minimum retail price are prohibited. Stricter rules apply if the parties to the vertical restraint agreement are competitors; in addition to the buyer's 10 per cent market share threshold, parties must not be competitors at the same level of production. Regulation also specifies at which cases these exceptions for competing companies do not apply.

Types of restraint

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

Setting of a fixed and minimum prices has been recognised unlawful in several cases (in the *Hanzas Maiznīcas* case and Decision No. E02-40 of 30 October 2009, the *Samsung* case, etc). In those decisions the Competition Council found violations based on both statutory agreements and the behaviour of the parties. During the past three years the Competition Council has ruled on a case of resale price infringement only once.

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'?

In the *Hanzas Maiznīcas* decision the Competition Council gave some general guidance on how it looks on particular types of the resale price maintenance. In particular, it acknowledged that exceptions to the general rules are possible if the new product is coming to market or the sales campaign is very short (associated with the validity term of the product in question).

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

No.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions? (Please briefly describe. What are the efficiencies and were they recognised in the decision in question?)

Yes, the decision in aforementioned the *Hanzas Maiznīcas* case addresses the efficiencies that can be reached by the fixation of the resale price.

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.

The Competition Council has stressed that pricing relativity agreements or 'English clause' agreements generally need to be considered as infringements of the Competition Law.

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.

Most favourable terms might cause competition problems if a supplier holds the dominant position in the market of supplied goods. The existence of most favourable terms in an agreement alone will not normally be recognised as an infringement of the 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.

There is no case law on this subject, but it is likely that this might raise competition concerns only in the event that the supplier is dominant in the market of the supplied goods or if the supplier is used as the mediator for platforms A and B to reach the agreement on the prices.

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.

There is no case law with this regard, but it is likely that such behaviour would be deemed the fixing of the minimum sales price, which is prohibited. It is, however, possible that such behaviour might be allowed due to the efficiencies if this can be proved by the supplier.

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.

This behaviour might be assessed as an exclusive purchase obligation, which is not an infringement per se. Whether it would be recognised as an infringement would depend on the other factors, most importantly the market shares of the parties involved.

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?

Restriction of passive sales will always be recognised as an infringement of the Competition Law. Restriction of the active sales is allowed if such territories (where the active sales are prohibited) are reserved to the other party, the term of such prohibition does not exceed five years and the market share threshold requirement (30 per cent) is satisfied (but it is also possible that such conduct will be allowed if the market share threshold is exceeded).

29 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?

Restriction of passive sales will always be recognised as an infringement of the Competition Law. Restriction of active sales to a customer's group might be allowed if such restriction is justified for objective reasons (quality standards, etc).

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

It will be assessed on case-by-case basis.

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

There is no case law in this respect. Most likely, such restrictions will be recognised as an infringement of the Competition Law.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There is no case law in this respect. Most likely, such restrictions will not be recognised as an infringement of the Competition Law if an objective justification for such practice can be proven by the seller.

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

Generally, selective systems are allowed. There might be some competition concerns were the system to be based on quantity criteria. The criteria must be made available to parties wishing to join the network.

34 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?

Yes, if the product sold requires special knowledge (eg, medicines or complicated technology), or is treated as a 'luxury' brand, selective distribution systems are more likely to be lawful.

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

There is no case law with this regard, but it is likely that a complete ban on internet sales would be treated as disproportionate and therefore restrictive.

36 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?

No, there is no relevant case law.

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

There are no decisions regarding selective distribution systems in which the cumulative restrictive effects are analysed, but the Competition Council has analysed the cumulative restrictive effects in several merger cases.

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

No, there is no relevant case law.

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

Such restriction is assessed as an exclusivity purchase obligation, which is not illegal, per se. Such restriction, however, can be assessed as an infringement if the negative effect of the restriction can be proven by the authority.

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

No, there is no relevant case law, but we believe that if such restrictions can be justified (eg, the luxury brand does not allow the selling of 'cheap' products in the same shop) no infringement will be found in such case.

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

Such restriction will be assessed as a non-compete obligation, which is not illegal, per se. Such restriction can, however, be assessed as an infringement if the negative effect of the restriction can be proven by the authority.

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

Normally, such restrictions would be allowed, but if by effect a 'minimum quantity' requirement results in a non-compete provision (ie, the minimum quantity corresponds to the entire amount purchased by the buyer), it will be assessed accordingly.

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

Such restriction will be assessed as a non-compete obligation, which is not illegal, per se. Such restriction can, however, be assessed as an infringement if the negative effect of the restriction can be proven by the authority.

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

Normally, such restriction would be allowed if the non-compete obligation does not, by effect, restrict competition in the market.

45 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?

Not applicable.

Notifying agreements

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

The formal procedure for notifying the Competition Council is specified in Cabinet Regulation No. 799 'Procedure for submitting and examining notifications of agreements between market participants'. Most importantly, this notification applies to vertical restraints that are not exempt from the general prohibition on vertical restraints in accordance with Regulation No. 797, but could be exempt on the basis of a legitimate interest (see question 8). It is not necessary to notify the Competition Council about agreements that are exempt from a general prohibition of vertical restraints in accordance to the Regulation No. 797.

In the notification the applicant must provide information, inter alia, about the agreement, the parties, the particular market and the market shares of the parties, and the Competition Council may request additional information. Notification is published on the website of the Competition Council to enable other market participants to express their opinions. The Competition Council provides a decision within one month of submission of the notification, but this period may be extended to four months.

In its decision the Competition Council may allow or disallow such vertical agreement. If it plans to disallow the agreement, it informs the applicant, who is then entitled to submit its proposals for conditions under which this agreement could be exempt from the general prohibition of vertical restraints. All decisions are published on the website of the Competition Council.

Authority guidance

47 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?

It is possible to submit a request for guidance to the Competition Council in accordance with the Law on Submissions. As the Competition Council is the competent authority as regards antitrust enforcement it is obliged to respond to such submission.

Complaints procedure for private parties

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

Procedure on such submissions is specified in article 23 of the Competition Law. Submission can only be submitted by a person who has a legitimate interest in making such. This may be a person who is or may be the victim of an unlawful vertical restraint or a person who is involved. The applicant must substantiate that it has a legitimate interest.

In such submission, the applicant must provide substantiated information concerning persons who are involved in the unlawful activity, as well as proof of the infringement. It could be copies of contracts, postal or e-mail messages, propositions on prices and provisions of contracts, or other documentation that could prove that a particular person has infringed antitrust rules. The Competition Council may request further information.

The Competition Council makes a decision on the initiation of the proceedings or refuses to do so within a month of the submission; if necessary, it can extend this period to two months. Possible reasons behind a decision to refuse initiation of proceedings include insufficiency of information in the submission, lack of infringement, or failure to establish the impact of the infringement.

Enforcement

49 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?

There have only been two Competition Council decisions finding vertical restraints in the past two years (both appealed) out of the 21 decisions finding an infringement. There were significantly more decisions finding vertical restraints in 2011 and 2012 – eight (six in force, two still appealed) of the total of 48 decisions finding an infringement. There have been significantly more cases regarding retail price maintenance than other infringements.

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

Under Latvian law illegal vertical restraints are invalid from the moment such agreement was taken by the parties; however, some of the provisions of a contract being deemed invalid does not terminate the contract as a whole, unless the provisions that were deemed invalid contained essential elements of the contract.

51 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 Competition Council can impose penalties in form of a legal obligation (such as a duty to put an end to the infringement) and a fine of up to 5 per cent of the offender's net turnover for the previous financial year. If the vertical restraint was concluded between competitors, the fine can be up to 10 per cent of the offender's net turnover for the previous financial year. If the legal obligation is not fulfilled within the time period specified, The Competition Council may increase the fine up to the maximum amount (5 or 10 per cent), a decision that can be contested with the court. Fined parties do not have to pay the fine before the final judgment finding an infringement enters into the force. The courts may annul a decision of the

Competition Council in whole or in part and also reduce the fine imposed, but it may not impose greater sanctions than those imposed by a decision of the Competition Council

The highest fine to date was imposed on a group of Samsung TV producers and distributors for retail price maintenance and territorial restraints. Five companies were fined €9,404,142 in total.

Investigative powers of the authority

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

The Competition Council has very broad powers to investigate possible antitrust infringements. There are some investigative powers that the Competition Council has that do not require any approval, but for certain powers that are a greater violation of a person's fundamental rights the Competition Council requires judicial approval.

Without the need for a judge's approval the Competition Council may, inter alia, request information that is necessary for the investigation in any form from any person. It may ask any person to give explanations. It may also visit any market participant without prior notice, demand any documentation and confiscate property that may have an impact on the case.

With a judge's approval, the Competition Council without notice and in the presence of police, inter alia, has the right to enter any property owned or used by the employees of a market participant, to conduct a search and to inspect any files and documentation (including those stored on computers). It has 72 hours to secure the evidence. Employees of the particular market participant are obliged to comply with the authorities.

The Competition Law also applies to foreign companies that perform economic activities in Latvian territory. Therefore, they may demand information from suppliers domiciled outside the Competition Council's jurisdiction.

Private enforcement

53 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?

A violation of antitrust law may also be found by the courts. It is possible to file a damages claim against a person who has potentially violated antitrust law. In this case, the court would inform the Competition Council of such a claim, which may then conduct an investigation of its own.

Update and trends

During the past 12 months the Competition Council has adopted only one decision (No. E02-40, *Kia*, adopted on 7 August 2014) where a vertical infringement was found. This decision dealt with restrictions imposed by the importer of Kia vehicles in Latvia on repairs or maintenance being performed at unauthorised repairers, and unauthorised spare parts being used during the period of the warranty. This decision is being appealed to the courts.

Any entity that has suffered a loss as a result of unlawful conduct may bring a claim to court. Therefore, competitors who have suffered losses from an antitrust violation may bring claims for damages against the offender. In the aforementioned *Samsung* case the Competition Council specifically stated that consumers had the right to bring damage claims against the offenders. The Consumer Rights Protection Centre may also bring actions against offenders on behalf of consumers, but such claims have been very limited in practice.

The time a claim for damages could take depends highly on the complexity of the case. The claimant must prove that there has been unlawful conduct by the defendant (this is presumed if there is a Competition Council decision finding an infringement in force), the existence of losses, and a causal link between the unlawful conduct and the losses suffered. The average time taken for damages and debt claims in first instance proceedings in 2013 was seven months, and at second instance it was four months (no individual data on damage claims is available).

Other issues

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

The Competition Council often terminates initiated proceedings on the basis of insufficient evidence; however, when a decision finding an infringement is taken, court proceedings regarding any kind of antitrust infringement (including vertical restraints) in Latvia have tended to be absolutely clear-cut. Since 2010 there has not been a single case in which Competition Council's decision was annulled, neither have here have been many cases where imposed fines were reduced.

BORENIUS
ATTORNEYS AT LAW

Ivo Maskalāns **ivo.maskalans@borenius.lv**
Andris Dimants **andris.dimants@borenius.lv**

Lacplesa Street 20a
1011 Riga
Latvia

Tel: +371 67 201 800
Fax: +371 67 201 801
www.borenius.lv

Malaysia

Sharon Tan
Zaid Ibrahim & Co

Antitrust law

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

The Competition Act 2010 (the Act), which came into effect on 1 January 2012, introduced general competition law for all markets in Malaysia except those carved out for sector regulators under the Communications and Multimedia Act 1998 in relation to the network communications and broadcasting sectors, and the Energy Commission Act 2001 in relation to the energy sector. Activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974, in relation to upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia, are also excluded from the application of the Act.

Following a public consultation, the Malaysia Competition Commission (MyCC) issued the following guidelines:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anti-Competitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Compliance Guidelines (published on 28 September 2013);
- Guidelines on Leniency Regime (published on 14 October 2014); and
- Guidelines on Financial Penalties (published on 14 October 2014).

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?

Section 4 of the Act expressly prohibits restraints in both horizontal and vertical agreements between enterprises insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

'Vertical agreement' is defined as an agreement between enterprises each of which operates at a different level in the production or distribution chain. Where an enterprise is dominant in a market, it will also be necessary to consider whether restraints in its vertical agreements constitute an abuse of dominance.

Beyond this, the Act does not define vertical restraints, but the Guidelines on Anti-Competitive Agreements and Guidelines on Abuse of Dominant Position give a non-exhaustive list of anti-competitive vertical restraints, including:

- resale price maintenance;
- agreements that require a buyer to buy all or most supplies from a supplier;
- exclusive distribution agreements covering a geographic territory;
- exclusive customer allocation agreements;
- upfront access payments;
- price discrimination;
- loyalty rebates and discounts; and
- bundling and tying.

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?

The Act has several related objectives. It aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers. The rationale is that the process of competition encourages efficiency, innovation and entrepreneurship that promote competitive prices, improvement in the quality of products and services and wider choices for consumers. In order to achieve these benefits, the Act prohibits anti-competitive conduct.

While the Act does not expressly promote other interests, agreements which may on the face of them be anti-competitive under section 4 (see question 2), may nevertheless be relieved of liability where there are significant identifiable technological, efficiency or social benefits directly arising from the agreement, and such restraints are necessary and proportional to the benefits, and do not eliminate competition. As the benefits are widely described, these may well include other interests.

Responsible authorities

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

MyCC, a body corporate established under the Competition Commission Act 2010 and comprising representatives from both the public and private sectors, enforces the Act, which applies across all sectors except the communications and energy sectors. The Malaysian Communications and Multimedia Commission enforces competition law in the communications sector, while the Energy Commission oversees competition in the energy sector.

In order to coordinate the enforcement of competition law between the above regulators, MyCC has established a special committee and interworking arrangements between them. The committee comprises representatives from MyCC, the sector regulators, the Central Bank of Malaysia and the Securities Commission, who together discuss competition issues at the regulatory level.

MyCC advises the minister of domestic trade, cooperatives and consumerism on all matters concerning competition. While MyCC may initiate investigations as it thinks fit, the Act empowers the minister to direct MyCC to investigate any suspected infringement of the Act.

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?

The Act applies to any commercial activity both within Malaysia, and outside Malaysia where it has an impact on any market in Malaysia. There is no requirement that any of the parties to the agreement be domiciled in Malaysia.

Extra-territorial enforcement may be more difficult in practice, unless the enterprise has, within its group, a presence in Malaysia. The definition of enterprise incorporates the concept of single economic unit (described further in question 6).

As the Act only came into force in 2012, there has been no extraterritorial application of the Act to vertical restraints or in the context of pure internet commerce.

Agreements concluded by public entities

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

The Act applies to the commercial activities of enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This would include, for instance, companies, partnerships, businesses, trade associations, individuals operating as sole traders, state-owned corporations and non-profit making bodies. The definition expressly recognises the concept of a single economic unit, and thus includes subsidiaries that do not enjoy real autonomy in determining their actions on the market and parent companies.

The application of the Act is determined by the nature of the activity, whether commercial or not, rather than the kind of entity. Commercial activity has been defined to exclude any activity directly or indirectly in the exercise of government authority or activity conducted on the basis of solidarity. Thus, where a public body or government-linked company engages in commercial activity, it will be subject to the Act.

Anticipating issues arising out of the European Court of Justice judgment in *Fenin* (11 July 2006), the Act excludes from commercial activity, any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity. Thus, public sector procurement for the provision of goods and services on the basis of solidarity (such as public health services) or services of general economic interests will be excluded.

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.

MyCC issued the Guidelines on Anti-Competitive Agreements and Guidelines on Abuse of Dominant Position, which apply generally to all vertical restraints; however, MyCC has indicated in its Guidelines on Anti-Competitive Agreements that in the future it intends to issue a separate guideline to address specific issues arising from transfers of intellectual property rights and franchising arrangements.

Sector-specific competition law applies to licensees under the following statutes: the Communications and Multimedia Act 1998 and the Postal Services Act 2012, which are regulated by the Malaysian Communications and Multimedia Commission. The Energy Commission also has powers under the Energy Commission Act 2001 to promote and safeguard competition and fair and efficient market conduct or, in the absence of a competitive market, to prevent the misuse of monopoly or market power in respect of the generation, production, transmission, distribution and supply of electricity and the supply of gas through pipelines.

General exceptions

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

MyCC indicates in its Guidelines on Anti-Competitive Agreements that in general, certain agreements are not likely to be considered to have significant anti-competitive effect. In relation to vertical agreements, these are where the parties to the agreement are not competitors and none of the parties individually has a share exceeding 25 per cent in the relevant market. However, this may not apply to price-fixing agreements.

While the guidelines explicitly indicate safe harbours for non-price restraints for enterprises that are below 25 per cent of their relevant market, this is not similarly provided for in the section of the guidelines relating to price restraints. In the guidelines, MyCC has also emphasised that it will take a strong stance against minimum resale price maintenance and finds it anti-competitive, and as such the safe harbour may not apply to price restraints. For more details on resale price maintenance, see question 19.

Agreements

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

'Agreement' is widely defined in the Act as any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.

'Concerted practice' means any form of coordination between enterprises that knowingly substitutes practical cooperation between them for the risks of competition and includes any practice that involves direct or indirect contact or communication between enterprises, the object or effect of which is either to:

- influence the conduct of one or more enterprises in a market; or
- disclose the course of conduct that an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.

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?

No. The definition of agreement encompasses all forms of arrangements, understanding and concerted practices. There has yet to be a local decision on whether unilateral instructions from one party will be construed as part of the vertical agreement or whether acquiescence is required.

Parent and related-company agreements

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

As the prohibition on anti-competitive agreements applies to agreements between two or more enterprises, the prohibition does not apply to agreements within a single economic unit. A parent and its subsidiary companies are regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.

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?

MyCC has not given guidance on this issue. It is likely to be persuaded by jurisprudence in other countries which consider that genuine agents perform auxiliary functions in the market on behalf of the principal and fall outside the equivalent of section 4. In determining whether the agency is a genuine one, MyCC is likely to consider whether the agent bears any financial or commercial risk. It is likely to consider that risks related to the provision of the agency services in general, such as the dependence of the agent's income on his success as an agent and sales commission will not be relevant to the assessment.

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?

There have thus far been no cases or guidance on this issue.

Intellectual property rights

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

MyCC intends to issue a separate guideline for provisions relating to IPRs. Meanwhile the general provisions apply. Where the grant of IPR is used to restrict competition or enforce exclusivity, they would need to be analysed under section 4 in the same way as other vertical restraints.

Analytical framework for assessment

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

Once it is established that there is an agreement between two or more enterprises, one must consider whether the agreement has a significant impact on the market. MyCC generally considers that agreements below the safe harbour threshold (described in question 8) to be insignificant.

In examining restrictions in vertical agreements, MyCC broadly divides these into price restrictions and non-price restrictions. MyCC generally considers price restrictions to be anti-competitive by object, and the safe harbour may not apply (see question 8). If the object of an agreement is highly likely to have a significant anti-competitive effect, then MyCC may find the agreement to have an anti-competitive object. Where an agreement is not anti-competitive by object, MyCC will examine the effects of the restrictions to see if they are significant on the market by comparing the actual effect of the restriction to the 'counterfactual', namely, the levels of competition in the relevant market without the restriction. In relation to non-price restrictions, MyCC generally considers that the anti-competitive impact is not likely to be significant where all the parties to the agreement are within the safe harbour.

Agreements between parties outside the safe harbour threshold will be examined to ascertain whether they have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia (section 4).

No vertical agreements are per se unlawful. Any agreement that is prohibited under section 4 may be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments (section 5). The parties claiming relief must prove that:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

The Guidelines on Anti-Competitive Agreements also indicate that such parties must also prove that these benefits are passed on to consumers.

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?

Market shares are relevant but they are not the only consideration. MyCC will have regard to the market power of the enterprise imposing the vertical restriction, the justification claimed for the restriction, and the extent to which a market in the vertical relationship will be foreclosed. Where certain types of restrictions are widely used by suppliers in the market, the cumulative effect will be taken into account. MyCC will also consider barriers to entry and countervailing buyer power.

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?

In addition to the factors in question 16 above, MyCC will take into account countervailing buyer power, and cumulative effects of widely used buyer restraints. MyCC has indicated that where small and medium-sized enterprises collaborate to gain economies of scale in procurement, this is unlikely to be problematic.

Block exemption and safe harbour

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

MyCC has not issued any block exemptions in relation to vertical restraints.

Types of restraint

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

As indicated in question 8, the safe harbour thresholds may not apply to price restraints. Generally, MyCC will take a strong stance against vertical price restraints, in particular, resale price maintenance and minimum price restraints, which it considers anti-competitive by object.

Other forms of resale price maintenance, including maximum pricing and recommended retail pricing which serve as a focal point for downstream collusion will also be considered anti-competitive. The concern is that the downstream resellers or retailers do not compete on price.

MyCC will consider the price restrictions in the context of the market. For example, where retailers ask a manufacturer to set a certain price as a way of enforcing a cartel between retailers, MyCC considers that this would have the same effect as a horizontal price-fixing agreement between the retailers and will find such agreement to be anti-competitive.

Although there have been no cases thus far, in our view the prohibition on price restraints is likely to include any restriction on components of pricing (for example, margins, bonuses, rebates and discounts), even though these are not explicitly mentioned in the context of vertical price restraints.

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'?

No. The Guidelines on Anti-Competitive Agreements have not considered these, and there have been no cases thus far.

Where an agreement infringes section 4, the parties may justify their conduct by proving the pro-competitive benefits in section 5 (see question 15). Where resale price maintenance is for a limited period for a new product launch, MyCC is likely to take into account the softening of the approach towards this kind of conduct in the European Union and United States. For example, short-term resale price maintenance may be helpful in the introductory period to induce distributors to promote the product or provide pre-sales services for experience or complex products, which benefit consumers.

Resale price maintenance restrictions in franchise agreements will be dealt with in a guideline to be issued by MyCC.

In relation to price restrictions to prevent loss leading, there is no guidance or case. MyCC has indicated that it will take a strong stance against fixed or minimum resale price maintenance. Nestlé attempted to apply for an exemption for its pricing policy known as the Brand Equity Protection Policy. This application for exemption was withdrawn when MyCC indicated that the policy had elements of resale price maintenance that prevented resellers from setting their prices independently, potentially leading to increased prices for consumers. MyCC required the dismantling of the policy. It should be noted that the application for exemption was filed very soon after the Act came into effect in January 2012, and MyCC's efforts were then focused on advocacy. Such conduct two years later is unlikely to escape without financial penalty.

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

Horizontal collusion is described in question 19 above. Apart from this, the guidelines do not make the link.

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

No, there have been no decisions or guidelines on this point. This is fact-specific and is open to the parties to the agreement to prove efficiencies, and satisfy the criteria in section 5 (see question 15).

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.

There are no guidelines or cases on 'price relativity' agreements. Typically the buyer should be free to determine its retail price for products from both suppliers. MyCC considers price restraints to have greater anti-competitive effects than non-price restraints, and considers resale price maintenance to be anti-competitive. While price relativity agreements have not been discussed by MyCC, this is likely to be compared with the harm of resale price maintenance. MyCC has expressly indicated that it will take a strong stance against RPM. MyCC has not indicated whether it will characterise price relativity agreements as anti-competitive by object – it should be noted that it is not precluded from doing so. In any event, where there are anti-competitive effects, this will be of interest to MyCC.

Price relativity agreements potentially soften inter-brand competition between suppliers who may take less aggressive pricing strategies and are likely to be scrutinised by the MyCC. Intra-brand competition may also reduce in circumstances where a price reduction would be profitable for one product but unprofitable for another. Such agreements limit the retailers' ability to use one product as a loss leader. Further, MyCC is likely to query if this arrangement is used to facilitate collusion at the supplier's level by improving price transparency, or whether there is resulting market foreclosure if the price relativity applies to new entrants.

However, where it is possible to show pro-competitive benefits, especially where cost savings are passed on to consumers, the parties may consider whether section 5 is satisfied (see question 15).

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.

The issue on MFN clauses has yet to be examined by MyCC. It is thus unclear whether MyCC will adopt the approach in other jurisdictions where MFN is considered akin to RPM and anti-competitive by object.

Although at first glance an MFN clause appears to give the buyer a most favoured price, as a whole, this discourages discounting as the supplier may not be able to profitably offer such deep discounts across the board. As a supplier enters into more MFN arrangements with its customers, it will be more reluctant to compete on price.

MFN clauses can also be instruments of tacit or explicit collusion where they involve information-sharing about the price that competing suppliers are offering, particularly where the MFN clause is coupled with rights to ensure compliance with the MFN obligation, thus enabling visibility into competitor pricing. Any departure from agreed prices is easier to detect and more costly where a discount to one buyer needs to be offered to other buyers. Where similar MFN clauses are adopted by several players in the market, MyCC will consider the cumulative effect. Sellers entering into MFNs may signal to others its intention not to compete aggressively on price.

MFN clauses are a particular cause for concern where they are used by dominant buyers (firms with a significant market share), as this can have a foreclosure effect shutting out new entrants who have greater difficult achieving lower input prices and having to offer deeper discounts. However, where it is possible to show pro-competitive benefits which outweigh detriments to competition (eg, assurance of lower prices), especially where cost savings are passed on to consumers, the parties should consider whether section 5 is satisfied (see question 15). Other possible pro-competitive benefits include reducing uncertainty when market prices are in flux or a new product is difficult to price. MFNs can also be used as a means to reduce the risk of opportunism where a buyer or seller has made significant investments related to that transaction then exploits these by selling to others at a lower price. Enterprises intending to use MFN clauses should clearly document the business justification and solid pro-competitive benefits in contemporaneous documentation. This is especially crucial where it is expected that the result of the MFN is higher prices for consumers.

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.

There is at present no guidance or precedent in Malaysia. MyCC is likely to examine the effects on competition and consider the concerns discussed in question 24: softening on price competition, tacit or explicit collusion and foreclosure. Two separate markets will be relevant: the market for internet platforms and the product market.

On the internet platform market, MyCC will consider whether the arrangement has significantly softened competition between platforms that have less incentive to reduce transaction fees, resulting in increased costs that are passed on to consumers. MyCC will also be keen to determine whether such MFN arrangements facilitate collusion between platforms and improve ability to monitor prices under the guise of auditing compliance. It is possible that such arrangement forecloses effective entry of new platform operators, as suppliers are prevented from reducing prices on competing platforms.

In the product market, retail MFNs reduce intra-brand competition and limit the ability of sellers to have price discrimination across platforms and may be used to facilitate collusion and ease monitoring of horizontal price agreements.

As with wholesale MFNs, where it is possible to show pro-competitive benefits, especially where cost savings are passed on to consumers, the parties may consider whether section 5 is satisfied (see question 15). MyCC is likely to be persuaded by decisions of European competition authorities in cases typically involving online travel services and market platforms such as Amazon, Expedia and Booking.com, where MFN clauses are considered to have the effect of reducing competition and favouring existing market participants with significant market power.

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.

There is no Malaysian guidance or precedent, but, as minimum advertised price policy (MAPP) and internet minimum advertised price (IMAP) clauses are similar to resale price maintenance in that they are minimum price restrictions, MyCC may well consider MAPP and IMAP clauses to be anti-competitive by object. Parties may, however, be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments (section 5).

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.

There is no Malaysian guidance or case. Similar to the above, MyCC has yet to characterise this as anti-competitive by object but is not precluded from doing so. If the arrangement is not considered to have the object (purpose) of restricting competition, MyCC would need to assess the effects on competition.

As described in questions 24 and 25, parties to the agreement may argue that there are pro-competitive benefits outweighing the adverse effects of the restraint, under section 5 (see question 15).

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?

Such non-price restraints are not considered anti-competitive by object and MyCC will need to assess the effects on competition. Competition issues may arise if there is no effective competition from other brands (ie, inter-brand competition).

Potentially, an exclusive distribution agreement between an overseas supplier and a Malaysian company could impact competition if a sole distributor is appointed in a market where there is no inter-brand competition. An exclusive distribution agreement between the sole Malaysian distributor and its downstream resellers will need to be examined to assess whether restrictions have a significant anti-competitive effect. In our view, where the territory is the whole of the Malaysian market, this is lower risk than carving up smaller territories within Malaysia.

MyCC considers that generally, non-price restrictions in agreements that fall within the safe harbour are unlikely to be anti-competitive.

29 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?

A vertical restraint on customer allocation is generally not treated to have the object of infringing section 4 and MyCC will need to assess the effects of such restraint. This is more likely to raise concerns where there is low inter-brand competition. Parties to the agreement may argue that there are pro-competitive benefits outweighing the adverse effects of the restraint, under section 5 (see question 15).

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

MyCC does not address this type of restraint specifically in its Guidelines on Anti-Competitive Agreements. As this is a non-price restraint, MyCC will assess the effects of this restraint on competition, and parties can argue that pro-competitive benefits outweigh any anti-competitive effects (see question 15).

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

Same as question 30. There is at present no guidance on internet sales.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

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

Similar to question 30, the guidelines do not address selective distribution systems other than to indicate that MyCC will consider the effects on competition. Cases in other jurisdictions will be persuasive but are not binding. MyCC is likely to take a favourable view of such systems that have objective qualitative criteria relating to the reseller and its staff.

34 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?

There are no guidelines or cases on this issue. MyCC is likely to take into account the need for complex products and branded products to be limited to retailers which meet certain objective qualitative criteria.

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

There are no guidelines on internet sales.

36 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?

No.

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

MyCC may assess the possible cumulative restrictive effects of multiple selective distribution systems within the same market if it is a significant feature of the relevant market.

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

No.

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

It is not considered to be anti-competitive by object, and MyCC will consider the effects of such restraint on the market. The guidelines indicate that where the seller has a significant part of the downstream market, an exclusive (or close to exclusive) vertical agreement with the buyer can foreclose a substantial part of the downstream market to other sellers. MyCC will also consider the duration of the agreement, but has not indicated any thresholds.

Anti-competitive non-price vertical agreements may not be considered to have a 'significant' anti-competitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

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

There are no guidelines or cases on this issue, and the effects will need to be assessed in each case taking into account inter-brand competition. Precedents in other jurisdictions will be persuasive but are not binding. There are added concerns if the seller is dominant in a market, and the seller should also assess if the restraint constitutes abuse of dominance. Anti-competitive non-price vertical agreements may not be considered to have a 'significant' anti-competitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

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

The guidelines do not address this point. MyCC will need to assess whether this restriction forecloses the market to competitors of the supplier.

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

It is assessed similarly to the approach in question 39.

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

There is no guideline or precedent, other than the indication that non-price restraints are generally less detrimental than price restraints.

MyCC would need to assess the effects on competition, including foreclosure of competing buyers. Parties to the agreement may argue that there are pro-competitive benefits outweighing the adverse effects of the restraint, under section 5 (see question 15). Anti-competitive non-price vertical agreements may not be considered to have a 'significant' anti-competitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

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

It is assessed similarly to the approach in question 43.

45 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?

No. There have been no cases or guidance on this issue thus far.

Notifying agreements

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

There is no requirement to notify agreements that contain vertical restraints, and enterprises are encouraged to conduct their own assessment of whether they will be able to claim relief from liability under section 5 (described in question 15).

Where an enterprise desires certainty in respect of a particular agreement, it may apply to the MyCC for an individual exemption. MyCC can only grant such an exemption where all the criteria in section 5 have been satisfied. The individual exemption will be published in the Gazette, and may be subject to conditions and for a limited duration only.

Authority guidance

47 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?

MyCC has indicated that it expects businesses to conduct their own assessment of the conduct to determine whether there is an infringement, based on the guidelines and to seek legal advice if necessary.

Complaints procedure for private parties

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

Yes. MyCC encourages complaints and has issued Guidelines on Complaint Procedures to assist complainants. Complaints must be made in the prescribed form, providing information about the complainant, the parties complained of, a description of the alleged infringing activity and include other relevant information or supporting documents. Anonymous complaints are possible but discouraged, as MyCC will not be able to seek clarification or further information from the complainant. A number of MyCC investigations have been commenced following complaints.

Enforcement

49 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?

There has only been one case thus far. MyCC completed its first vertical restraints case in October 2014 relating to exclusivity agreements entered into by two major providers of logistical and shipment services by sea – Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd – with their vehicle manufacturers, distributors and retailers. MyCC raised concerns that these agreements may have the effect of foreclosing customers to competitors of the enterprises, which, if established, would have the effect of significantly preventing, restricting or distorting competition in the provision of such services. To address these concerns, both parties had to undertake to stop inserting exclusivity clauses in their agreements that may distort, restrict or prevent the provision of services to their customers or potential customers.

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

Typically, parties to an agreement include a severability clause, which can work to sever the anti-competitive restraint, leaving the remainder of the agreement intact. Even in the absence of a severability clause, parties may argue that they have reciprocally promised to perform obligations which are legal (eg, a distribution contract), and under special circumstances, to do certain things which are anti-competitive, thus illegal. The second set of illegal promises will be void, but the first set will remain enforceable.

51 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?

MyCC may impose financial penalties once it makes a finding of infringement without reference to any other entity. Once MyCC makes a finding of infringement of the Act, MyCC:

- must require that the infringement be ceased immediately;
- may specify steps required from the infringing enterprise, which appear to MyCC to be appropriate for bringing the infringement to an end;
- may impose a financial penalty of up to 10 per cent of the worldwide turnover of the infringing enterprise or enterprises over the period during which an infringement occurred; and
- may give any other directions as it deems appropriate.

To date, the financial penalties that have been proposed or imposed by MyCC have ranged from 283,600 ringgit to 20 million ringgit, all cases involving horizontal anti-competitive agreements. In relation to non-financial remedies, MyCC also issued directions to cartelists (namely, the floriculturist association and lorry transport enterprises) to refrain from anti-competitive practices. Although not all infringing enterprises have been fined with financial penalties, it appears from recent trends that MyCC is taking a stricter stance in terms of deterrence. The following is a summary of the decisions or proposed decisions issued by MyCC to date and the total financial penalties imposed:

Infringing enterprise(s)	Anti-competitive conduct	Financial penalty
Megasteel Steel Sdn Bhd	Abuse of dominance	4.5 million ringgit
Malaysia Airlines and AirAsia	Market-sharing	20 million ringgit in total
Ice manufacturers (26 enterprises)	Price-fixing	283,600 ringgit in total
Sibu Confectionery and Bakery Association (24 enterprises)	Price-fixing	439,000 ringgit in total

The financial penalty is potentially higher in Malaysia than that in other jurisdictions where the penalty is limited to a specified number of years because the penalty imposed may be for the entire duration of an infringement. Even though the magnitude of this may not be felt for a while as the Act does not have retrospective effect and hence relates back only to 1 January 2012 (the date on which the Act came into force), parties to agreements that infringe the Act remain at risk for the continued anti-competitive conduct.

MyCC has, on 14 October 2014, issued its Guidelines on Financial Penalties, which explain how MyCC determines the appropriate fine and the factors that it may take into account in doing so. In imposing financial penalties, MyCC aims to reflect the seriousness of the infringement and deter future anti-competitive practices. In determining the amount of any financial penalty in a specific case, MyCC may take into account aggravating factors (eg, the seriousness of the infringement, its duration, and recidivism) and mitigating factors (eg, existence of an appropriate corporate compliance programme, cooperation by the enterprise during the investigation and low degree of fault).

Financial penalties imposed by MyCC may be higher post-issuance of the recent financial penalties guidelines, as the guidelines indicate that MyCC may round up the infringement duration, whereby a period of infringement shorter than six months will be counted as half a year and a period between six months and a year will be counted as a full year. In the event that the duration of the infringement is longer than a year, MyCC may take into account a maximum of 10 per cent of the enterprise's worldwide turnover and multiply that by the number of years of infringement. In the market-sharing case involving Malaysia Airlines and AirAsia, MyCC imposed a financial penalty of 10 million ringgit each on MAS and AirAsia, for the four months commencing immediately when the Act came into effect up to the time that the two airlines terminated the collaboration agreement. In future, MyCC may round the infringement period up to six months, resulting in higher financial penalties. Similarly, the 26 ice manufacturers on which financial penalties totalling 283,600 ringgit were imposed for price-fixing may have faced higher penalties had the case been decided today as their worldwide turnover for six months may have been taken into account despite them infringing the Act for approximately one week only.

Investigative powers of the authority

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

MyCC has wide discretion on how it collects evidence and may direct a person (including persons outside of Malaysia) to give MyCC access to his books, records, accounts and computerised data. However, these powers are subject to lawyer–client privilege and may, at the request of the person disclosing, be protected by confidentiality. As anti-competitive conduct is not a crime, there is no privilege against self-incrimination.

Update and trends

In October 2014, MyCC completed its first vertical restraints investigation on exclusivity agreements entered into by two major providers of logistical and shipment services by sea, Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd, and their vehicle manufacturers, distributors and retailers. MyCC had indicated that it is currently carrying out investigations on 15 cases (mainly involving cartels) out of the 47 complaints it had received since the Act came into force. Moving forward, MyCC is likely to continue its enforcement actions against hard-core cartelists whose actions have a significant impact on competition in Malaysia, regardless of whether these infringing parties are large corporations or SMEs. MyCC has also indicated that it will investigate and take appropriate enforcement action against enterprises taking advantage of the introduction of the Goods and Services Tax (which is set to be implemented from 1 April 2015 onwards) to fix prices.

Information requests

MyCC may, by written notice, require any person (including third parties to the agreement) whom MyCC believes to be acquainted with the facts and circumstances of the case to produce relevant information or documents. MyCC may also require the person to provide a written explanation of such information or document. Where the person is not in custody of the document, he or she must, to the best of his or her knowledge and belief, identify the last person who had custody of the document and state where the document may be found. A person required to provide information has the responsibility to ensure that the information is true, accurate and complete, and must provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading.

Dawn raids

MyCC may search premises with a warrant issued by a magistrate, where there is reasonable cause to believe that any premises have been used for infringing the Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named on the warrant to enter the premises at any time by day or night and by force if necessary. During such searches, MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in the powers for business or residential premises. Where it is impractical to seize the evidence, the Commission may seal the evidence to safeguard it. Attempts to break or tamper with the seal constitute an offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Act, MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

Private enforcement

53 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?

Yes, any person who suffers loss or damage directly as a result of an infringement of the Act may bring a private action against the infringing parties in the civil courts. MyCC cannot award damages, and any follow-on action is intended to enable aggrieved persons to obtain compensation.

Such civil action may be initiated even if MyCC has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

Class actions are not possible in Malaysia. The only form of group litigation possible is representative actions. However, it would be necessary for parties to establish that they have suffered direct loss and a commonality of interest in bringing the claim.

Civil cases can be as quick as 12 months, but this depends on the complexity of the issues, and the successful party can recover costs.

Other issues

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

No.

ZaidIbrahim&co
a member of ZICOlaw

Sharon Tan **sharon.suyin.tan@zicolaw.com**

Level 19, Menara Milenium
Jalan Damanlela
Pusat Bandar Damansara
50490 Kuala Lumpur
Malaysia

Tel: +60 3 2087 9999
Fax: +60 3 2094 4666 / 4888
www.zicolaw.com

Mexico

León Ricardo Elizondo

Legal and Economic Avantgarde SC

Antitrust law

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

The legal basis for competition law is national, exclusively at federal level, having its fundamental basis in the Political Constitution of the United Mexican States, the Federal Law of Economic Competition (the Competition Law) and its Regulations (the Regulations), the Federal Civil Code and the Federal Code of Civil Procedures. There are no local competition laws.

At the international level the Mexican government is also a party to international conventions supporting the enforcement of competition law, such as the North America Free Trade Agreement, among others.

No criminal action can be brought for vertical restraints, unlike in the case of collusive conduct. Therefore criminal codes are not applicable.

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?

Conduct that diminishes, impairs or prevents competition and free market access in the production, processing, distribution and marketing of goods or services is prohibited (Competition Law). The Federal Economic Competition Commission (COFECE) enforces this prohibition.

Vertical restraints are known under the Competition Law as relative monopolistic practices (RMPs). This type of behaviour is judged under a balancing analysis or the rule of reason. The analysis requires market definition, market power assessment and an assessment of the impact of the conduct on the competition process.

RMPs are acts, contracts, agreements or combinations of these, which have as their aim or effect:

- the improper exclusion of other agents from the market;
- substantial hindrance of agent access to the market; or
- the establishment of exclusive advantages in favour of one or several entities or individuals.

This can be achieved through:

- Vertical market allocation: this is where non-competing economic agents agree to the exclusive distribution of goods or services according to subject or geographical location, or for specific periods of time, including the division, distribution or assignment of customers and suppliers, and where there is an obligation not to manufacture or distribute goods or services for a specific period of time.
- Vertical price-fixing: this is where prices or other conditions are set, which a distributor or supplier must follow when marketing or distributing goods or providing services.
- Tying arrangements: this is where the conclusion of contracts is made subject to acceptance, by the other parties, of supplementary obligations that have no connection with the subject of those contracts.
- Exclusive arrangements: this is where a sale or transaction is made subject to the condition that one party does not use, acquire, market or provide the goods or services supplied by a third party.
- Refusal to deal: this is refusing to sell or provide to specific individuals goods or services that are available and normally offered to third parties.
- Boycott: this is where an agreement is reached among several economic agents, or an invitation is extended to them, to exert pressure on customers or suppliers to discourage them from specific behaviour or to force them to act in a specific way.
- Predatory pricing: the systematic sale of goods or services at prices under average total cost or the occasional sale of the same below average variable cost.
- Discounts conditional on exclusivity: the granting of discounts by producers or suppliers to purchasers with the requirement of exclusivity in the distribution or marketing of products or services when the same is not justified by efficiency reasons.
- Cross-subsidisation: the persistent use of profits that an economic agent obtains from the sale of a good or service to finance losses of another good or service.
- Price discrimination: the establishment of different prices or sales conditions for different purchasers located in equal conditions.
- Raising rival's costs: the action by one or several economic agents with the direct or indirect purpose or effect on competitors of any of the following:
  - increasing cost;
  - impinging upon the production process; or
  - reducing demand.

All types of RMPs are caught, provided the firms involved have a significant market power equivalent to dominance.

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?

The main objective of competition law, even when applied to vertical restraints, is the protection of competition, understanding that consumer benefits will ensue from a healthy competition culture. There is no other economic policy underlying competition law objectives.

Responsible authorities

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

The Competition Law used to be enforced by the Federal Competition Commission, which until 2103 was an independent administrative body within the Ministry of Economy. However, as a consequence of a constitutional amendment, from 12 June 2013 it was recreated as an autonomous constitutional agency, which means that now it is completely independent from the federal government, without having to report to any other authority. It is now called the Federal Economic Competition Commission (COFECE) (the Commission). The Commission will enforce absolutely all vertical agreements or restraints except those related to telecommunications. The constitutional amendment also created the Federal Telecommunications Institute (IFT), a new independent agency empowered to regulate and enforce competition matters relating to broadcasting or telecommunications activities or infringements.

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?

Considering that consumer welfare is the ultimate purpose underlying competition regulation and policy, any RMP or vertical restraint having or intending to have an impact thereon will be subject to the Commission's scrutiny, regardless of where it is taking place or the nationality of the parties involved, as long as it has an impact on Mexican customers.

Agreements concluded by public entities

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

Public entities at any level – federal, state, or municipal – are expressly subject to the Competition Law, precisely in order to avoid any misconception as to its scope. However, the public entity must be acting in the capacity of private law entity, meaning by doing commerce or trade acts with private parties, and not acting as an authority enforcing any law or regulation it is empowered to apply.

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.

No particular laws or regulations apply to the assessment of vertical restraints in specific sectors. With the recent creation of IFT, it is reasonable to expect that some laws or regulations in this regard will be issued, applicable to broadcasting and telecommunications activities, including of course any prohibited 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.

There are no general exclusions or exemptions under the Competition Law.

There are exceptions for some specific activities that are undertaken by federal government entities and considered to be strategic, legal monopolies under the Competition Law. However, this does not mean that federal entities carrying out these activities are completely exempt from the scope of the Competition Law. For example, Petroleos Mexicanos, the state oil company solely in charge of upstream activities, is still subject to the Competition Law should it attempt to restrict supply sources, impose tying arrangements or refuse to deal or carry out other similar practices in downstream markets.

Agreements

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

There is no such definition in the Competition Law. However, this is where the Federal Civil Code provides a definition of such general terms. So an agreement is the concurrence of wills by two or more parties in order to create, transfer, modify or to extinguish obligations. An RMP may take place not only by an agreement or contract but also by a unilateral act, or combination of different firms with a purpose or effect of engaging in anti-competitive conduct.

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?

Competition law in Mexico applies both to formal and informal agreements. An objective or intention to engage in illegal conduct is enough to constitute a violation of the Competition Law and its regulations, even if it does not produce any actual negative effect. Therefore, non-written or tacit agreements relating to illegal conduct are also caught by the rules.

Parent and related-company agreements

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

In order for a vertical restraint to apply and be deemed illegal, no economic interest shall be shared among the parties involved, otherwise they may be considered to be a single economic agent or an economic interest group, for instance when a parent company dictates the resale price to a subsidiary or an affiliate company. Even under a franchise model the Commission has ruled that the identity of economic interest pursued by the franchisor and the franchisee will exclude them from engaging in illegal conduct for a market allocation or resale price maintenance. An economic interest group, which is a more relevant definition than related company for competition purposes in Mexico, exists when a group of individuals or legal persons with commercial and financial consonant economic interests coordinate their activities to achieve a common objective. Other elements may occur such as control, autonomy and unity in their market behaviour. Such control may be actual from a controlling firm over its subsidiaries, or latent when its exertion is potential through persuasive measures, even when there is no centralised or legal link. Therefore there must be analysis as to whether any person may directly or indirectly coordinate the activities of others to operate in the market and to exert decisive influence or control over the others.

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?

Criteria for agent–principal agreements are much the same as for related companies (see question 11). However, an agent following a principal's instructions derives its relationship from an independent economic interest, whereas the agent bears the very same interest as the principal, acting as its representative.

However, should the principal be a dominant firm using its agent in order to engage in illegal conduct, then both may be held liable. In other words, the agent may not have market power, which is a requirement for engaging in infringing conduct, but still may refuse to deal with a third party or discriminate against it. Therefore, since it is acting on behalf of a principal who may be abusing its market dominance, a vertical restriction may take place through the vertical agreement entered into between the agent and a third party downstream.

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?

There is no guidance provided in the Competition Law on what constitutes an agent–principal relationship.

Intellectual property rights

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

Whereas it is quite common to have several restrictions in agreements involving IPRs, the question is whether such restrictions are in place in order to legitimately protect such rights. In other words, the IPR-holder may not abuse the exclusiveness granted thereby by requesting, for instance, a licensee to do certain things beyond the rightful protection of his rights. Thus exclusivity in order to maintain quality, or definition of the specific territory where the product or service may be offered, in order to maintain service levels, may call for a different analysis from the competition point of view. Therefore, as long as there is a valid business reason behind restrictions involving IPRs, and efficiencies resulting from the restriction are demonstrated, a different analysis and application of the Competition Law will be given.

Analytical framework for assessment

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

There are no vertical restraints that may be considered per se unlawful, not even resale price maintenance.

Conduct may be illegal if its purpose or effect is to diminish, damage or deter competition and free access to equal, similar or substantially related goods or services. In determining whether this is the case, the Commission analyses whether the firm involved has substantial market power.

The Commission evaluates the goods or services that make up the relevant market and identifies:

- those that are, or may be, substituted for them (whether domestic or foreign);
- the time required for the substitution;
- the geographic area in which the goods or services are supplied or are in demand;
- where suppliers and customers can be changed without incurring appreciably different costs;
- the cost of distributing the goods or services;
- the cost and probability of access to alternative markets; and
- the federal, local or international statutory restrictions that limit the access of users or consumers to alternative supply sources or suppliers to alternative consumers.

To determine the existence of substantial market power, the Commission examines the following issues:

- the entities' market share and whether they can unilaterally set prices or restrict supply in the relevant market without competitors being able, or potentially able, to counteract these measures;
- the entry barriers and the elements that may alter those barriers;
- the existence and market power of any competitors;
- the entities involved and their competitors' possible access to sources of raw materials or other inputs needed to manufacture products or provide a service; and
- the recent performance and behaviour of the entities involved.

The Competition Law also provides a list of examples of efficiency gains that the Commission may take into account to assess the competitive effect of the restraint.

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?

Market share is only one of the different factors to be analysed in order to evaluate market power and the likely impact of the restriction, and of course the existence and market power of any competitors may be relevant in this assessment, along with the elements mentioned in question 15.

To determine market share, the Commission can consider:

- sales indicators;
- the number of customers;
- output capacity; and
- any other appropriate factors.

The method for calculating ratios and the degree of concentration in the relevant market is the Concentration Index, which is a Mexican adaptation of equivalent indices used abroad (such as the Herfindahl-Hirschman Index).

The fact that other suppliers or competitors may use a particular restriction is something that has been evaluated by the Commission as a counterbalancing factor. In an investigation where Pepsi-Cola was challenging the fact that Coca-Cola was foreclosing the market by imposing restrictions such as exclusivity on retailers, the Commission found that Coca-Cola had exclusivity in 45 per cent of the retail market, while Pepsi-Cola had exclusivity in 40 per cent. Therefore, the Commission deemed that the playing field was indeed level.

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?

Whereas the vertical restrictions may also take place upstream, in order to evaluate whether the buyer has market power the same analysis shall be made, considering the buyer's market share as only one of the elements for the evaluation, along with the position and conduct of the buyer's competitors. The fact that buyers' restrictions are widely used does not diminish any likely liability, nor constitutes a justification or a valid defence. However, there is a particular precedent in the soft drinks market, where the defendant was accused of having almost 45 per cent of the retail sales points covered by exclusive agreements, forbidding the marketing of competitors' products. At that time the Commission realised and ruled that even though such exclusive agreements might be illegal, the claimant had covered the remaining 40 per cent of retail sales points with exclusive agreements, leaving only the remaining 15 per cent available for the rest of the competitors. From then on further investigations took place to correct the market.

Block exemption and safe harbour

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

There are no block exemptions or safe harbours provided by the Competition Law, or guidelines. However, as mentioned previously, in any vertical agreement the more efficiency gains are demonstrated by the parties involved the more likely that it would be cleared by the Commission.

Types of restraint

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

It has been proven that resale price maintenance may have some benefits or efficiencies, regardless of the existence of the market power that the firm imposing it may have. According to the Competition Law vertical price-fixing may occur by setting a minimum, a maximum or a fixed price. Each one of these cases deserves a particular analysis. Minimum and fixed prices may be more sensitive when they might prevent inter-brand versus intra-brand competition, whereas the latter may fall under the concept of related company or economic interest group, as mentioned in question 11.

On the one hand, setting a maximum price may only affect the profit of the reseller, avoiding loss of sales for the supplier, if the buyer decides to get extra profit from the well-positioned product of the supplier, regardless of the fact that this maximum price does not affect the consumer.

On the other hand, setting a minimum price may apparently affect competition by preventing the buyer from increasing sales by offering a lower price. However, behind the product may be a brand-name reputation created by the supplier, which may be seriously affected if the buyer unilaterally decides to drop the price in order to increase sales.

Consequently, the result of the Commission's analysis will very much depend on the ability of the supplier to produce those business arguments to justify the resale price maintenance. Otherwise, an RMP may take place and be considered illegal according to the Competition Law.

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'?

There are no guidelines for vertical agreements, restrictions or resale price maintenance.

However, a limited time period for resale price maintenance set in advance for the launch of a new product or brand, or avoiding predation of the brand, could be further supported by providing legitimate business reasons, aside from any market power that the supplier may have.

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

There are no guidelines for vertical agreements, restrictions or resale price maintenance.

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

There are no guidelines issued by the Commission; however, the Competition Law provides a list of efficiencies that can be assessed when analysing a vertical restriction, including resale price maintenance. Among such efficiencies are the following:

- the introduction of new products;
- the profitable use of remnant, defective or perishable products;
- cost reductions from the creation of new production techniques and methods, from the integration of assets, from increases in production scale or the production of different goods or services with the same production factors;
- the introduction of technological advances producing new or improved goods or services;
- the combination of productive assets or investments and their recovery, improving the quality or expanding the features of the goods or services; and
- the improvements in the quality, investments and their recovery, timeliness and service that have a favourable impact on the chain of distribution, which do not cause significant price increases, or a significant reduction in the level of innovation in the relevant market;

Any other efficiency producing net contribution to the welfare of consumers, overcoming any anti-competitive effects resulting from the vertical restriction, can be proposed and demonstrated.

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.

Most of the RMP defined in the Competition Law refers to a vertical downstream relationship, except for market allocation, boycott, refusal to deal or discrimination, which may take place upstream. So the unilateral decision of the buyer of setting the prices by reference may not entail a violation. However, imposition of the price for supplier A's products and not allowing the buyer to independently move the price of the competing supplier B's products, avoiding competition for itself by using the buyer as an instrument to achieve it, may be considered as an infringement. Of course, it will be illegal as long as the rest of the required elements are met, holding market power and having an illegal purpose or effect.

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.

Most-favoured-customer scenarios normally respond more to bargaining power than to market power itself. At the end of the day the particular customer bargaining for such condition will be the beneficiary thereof. Fortunately competition takes place not only for prices, but for the rest of the deals the buyer may be able or willing to offer to its customers, such as discounts, financial terms, promotions and rebates, among others. Therefore, should the buyer have market power he may be able to force the supplier to discriminate against another buyer's competitor; however, if a supplier does not have similar market power illegal discrimination will not occur. In any case, the conduct it will be assessed as an RMP, subject to a balancing analysis.

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.

There are no precedents regarding this scenario. However, if it were to occur, the analysis should be the same as if the market were not via the internet.

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.

This scenario should be assessed in the same way as the minimum resale price maintenances (see question 19). The fact that the supplier prevents the buyer from advertising its products for sale below a certain price but allows the buyer to offer subsequent discounts entails a real possibility of competing through the price factor, making the alleged minimum price innocuous. The discount may be a turning point for making the buying decision as a result of competition regardless of the original price advertised. In conclusion, setting a minimum price for advertising may not be illegal but it is ineffective anyway due to the subsequent discount.

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.

The scenario in question 24 should apply, but switching the roles and considering that the supplier is now the one who has the market power. However it seems unlikely that the buyer would accept such a condition even when the supplier has market power. In any case, the conduct it will be assessed as an RMP, subject to a balancing analysis.

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?

Vertical market allocation may be a legitimate business practice, provided the rest of the required elements for engaging in an RMP are not met. Having a well-structured distribution system may entail efficiencies and benefits resulting from the order or discipline observed by its members, making them focus and concentrate on the service level for the clients located in the assigned territory, and avoiding wearing off themselves by disputing the clients.

When it comes to the issue as to whether there is a difference in making the restriction applicable to active sales or passive sales, if the analysis leads to the assumption that the restriction could be illegal, it would seem reasonable for the Commission not to extend the restriction to the passive sales.

Finally, if the distribution chain downstream for a particular market or product/service has more than two levels (manufacturer, wholesaler, retailer, end-client/customer), the legality of extending the restriction to the customer for not making onward sales outside the territory will depend on how well grounded are the business reasons supporting the territory allocation at the first level. In addition, of course, the rest of the factors required to make the conduct illegal must not be met, namely market power and an infringing purpose or effect. However, in any case the conduct will be assessed as an RMP, subject to a balancing analysis.

29 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?

Following the rationale in question 28, market allocation may take place for territories, clients and customers, products and specifications, time periods, etc, among others. Therefore in this particular case referring to customers instead of territories should make no difference to the analysis, as long as the business reason is sound.

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

This scenario may be the case when the specific product has different uses, but the whole marketing, image, brand name and trademark have been promoted for some specific use. Therefore it seems very reasonable for the supplier to restrict downwards the use of the product consistent with the investment behind it. It is important to keep in mind that in order for an RMP to take place, in addition to market power, the purpose or effect must be the improper exclusion of other agents from the market; substantial hindrance of agent access to the market; or the establishment of exclusive advantages in favour of one or several entities or individuals.

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

There has been no precedent regarding this particular issue. But again, it is always a matter of a supplier's ability to justify a restriction according to its business model. If the supplier has market power, it is more likely to be found liable for engaging in illegal or restrictive conduct.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No precedents have been produced by the Commission to date. However, with the recent creation of IFT, it is reasonable to expect that some decisions or guidelines will be issued applicable to broadcasting and telecommunications activities, including vertical restraints relating to the internet.

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

A very well-grounded explanation must be given to support the legality of a 'selective' distribution system, such as keeping strict quality levels, highly sensitive confidentiality levels, economic or financial soundness, high-tech or specialisation, among others. Otherwise it would be very easy to find members liable for having the aim or effect of improperly excluding other agents from the market; substantially preventing others from accessing to the market; or establishing exclusive advantages in favour of one or several entities or individuals. Irrespective of the fact that the system may be deemed an entry barrier, when it comes to demonstration of market power, it will not be a problem since, according to a Competition Law amendment dated 10 May 2011, a new concept was included to evaluate RMP. Specifically, it allows in articles 13 and 13-bis the consideration of whether a group of independent economic agents, competitors to each other, if acting in a coordinated way ('tacit collusion') might have joint or collective substantial market power, so that their commercial practices could infringe the Competition Law. Regulations and criteria for the application of this concept are still pending.

The more that transparency and publicity are given as to the requirements for becoming a member or excluding current or potential members may mitigate the risk of considering the system illegal.

34 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?

Consistent with question 33, if the products or services do not involve strict quality levels, highly sensitive confidentiality levels, economic or financial soundness, high-tech or specialisation, among others, the system is more likely to be found illegal.

35 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?

No precedents concerning this issue have yet been produced by the Commission; however, with the recent creation of IFT, it is reasonable to expect that some decisions or guidelines will be issued applicable to broadcasting and telecommunications activities, including vertical restraints relating to the internet.

36 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?

No precedents concerning this issue have yet been produced by the Commission.

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

As mentioned before, irrespective of the fact that the system may be deemed by itself an entry barrier, when it comes to demonstration of market power, it will not be a problem since, according to the Competition Law amendment of 10 May 2011, a new concept was included to evaluate RMP. Specifically, it allows in articles 13 and 13-bis the consideration of whether a group of independent economic agents, competitors to each other, if by acting in a coordinated way ('tacit collusion') might have joint or collective substantial market power, so that their commercial practices could infringe the Competition Law. Regulations and criteria for the application of this concept are still pending.

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

No precedents concerning this issue have yet been produced by the Commission; however, see question 33.

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

If all the elements required for engaging in an RMP are met, then it may be assessed as exclusive dealing conduct, provided that it is demonstrated that the aim or effect of the restriction is the improper exclusion of other agents from the market; substantial hindrance of agent access to the market; or the establishment of exclusive advantages in favour of one or several entities or individuals.

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

Such a restriction would require a large amount of justification, as it would be very unlikely that a non-competing product could affect the supplier's product. Therefore, 'inappropriate' should be very well grounded in arguments demonstrating a real conflict in image, reputation or similar. Otherwise, if the supplier has market power the restriction could be considered as illegal exclusivity aimed at improperly excluding other agents from the market; substantially preventing others access to the market; or establishing exclusive advantages in favour of one or several entities or individuals.

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

Again, if the supplier has market power the restriction could be considered as illegal exclusivity aimed at improperly excluding other agents from the market; substantially preventing others access to the market; or establishing exclusive advantages in favour of one or several entities or individuals. If it is clearly demonstrated, for instance, that a 'free ride' is occurring where the buyer is using the supplier's equipment, systems, software, facilities or infrastructure to market, promote or exhibit competing products, this may be a valid defence.

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

This conduct may be considered as a tying arrangement if the buyer does not need the minimum amount or percentage, or the full range of products, and on the other hand the supplier does not validly justify such a requirement. For instance, if experience has shown that unless the buyer has a minimum stock there is a risk of facing a shortage, leaving a client or customer unsatisfied, then it may sound reasonable, or if the full range of products are complementary, or accessories of one another, and customers normally demand two or three of them simultaneously. But again market power as well as an undue purpose or effect must be present for the situation to be considered illegal.

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

This is a mirror version of exclusive dealing, but upstream, where the buyer would have market power in order to affect competition and force the supplier to accept such a restriction. But again all the requirements for an RMP must be met.

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

Unless the distribution system is structured in a way that makes it more convenient to separate wholesalers from retailers, restricting a wholesaler from going directly to a customer may be considered as discrimination or undue market allocation. However, it may also have a rationale similar to the case of *Dual Distribution*, where the manufacturer concurs with the distributors and competes for the end-buyers. Justification may come from the fact that the manufacturer may have a better margin than the wholesaler, and the latter may have a better margin that the retailer. Therefore, should the three of them target the same clients, it might create some kind of chaos, because the manufacturer would have all the clients and consequently the distribution structure would be nonsensical.

45 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?

No. There is a shortage of criteria, decisions and guidelines for this and other important issues. Hopefully, with the new strengthened agencies IFT and COFECE, we shall see important advances and improvements in regulation and competition policy.

Notifying agreements

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

Despite the non-existence of a formal procedure for notification, it is possible to obtain a non-binding opinion from the Commission as to the assessment of a particular agreement. However, considering its non-binding effect, there is little or no incentive to consult the Commission, because if one decided to ask for an opinion and it came back negative, the parties to the potential agreement would lose the opportunity of doing what otherwise could be good and legitimate business. Therefore, firms normally prefer to obtain an expert opinion and from there make a decision as to whether to go ahead.

Authority guidance

47 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?

No further guidance may be obtained, not even from the courts, which have no interpretative powers but only the ability to review whether the Commission's decision was issued in accordance with the Competition Law on constitutional grounds.

Complaints procedure for private parties

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

The procedure is divided into two stages, the first inquisitorial and the second adversarial. Even though it is the same agency that has jurisdiction over the inquisitorial and adversarial stages, the most recent constitutional amendment provides that authorities in charge shall be independent from each other.

Inquisitorial stage

The Commission ex officio may initiate the investigation or respond to a claim filed by a firm, individual or entity. In either case the process begins by publication in the Official Gazette, without disclosing the names of the investigated agents.

When the investigation starts, within the 15 days the Commission will admit, dismiss or issue a deficiency notice, which must be satisfied by the claimant within the following 15 days.

The investigation period will last no less than 30 and no more than 120 days. This time period may be extended for up to four times by 120 days each, when there is a justified reason to do so. That is to say, the whole investigation may last up to 600 working days.

Once the investigation is concluded the Commission will decide whether to continue with the adversarial stage. If so, it will be because it found enough evidence of an alleged infringement. Otherwise the investigation will be concluded.

Adversarial stage

The Commission will summon the defendant so that the latter responds to and defends the infringement allegations, and produces the necessary evidence in its defence, within the next 30 working days. All evidence must be submitted in a period not exceeding 20 days.

Once all the evidence has been received the Commission will adjudicate the case within the next 40 days. The Commission ruling may find the defendant not guilty, or liable for engaging in illegal conduct. As to the sanctions that may be applied see question 51.

The decision may be challenged by the defendant or claimant through an appeal for reconsideration filed before the same Commission within the next 30 working days. Thereafter the Commission shall rule upon the appeal within the next 60 working days, by confirming or reversing totally or partially.

This can be followed by a judicial review by the District Federal Courts, which will adjudicate only on constitutional grounds. This review must be filed within the following 15 working days and it may take from 60 to 200 days to be adjudicated. Following this, a final appeal may be filed before the Circuit Courts of Appeals, which may take an additional 200 days.

Enforcement

49 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?

Vertical restraints have not really been the focus of the Commission, which is why there are no guidelines or rulings that may guide decisions in preparing or executing any contract, formal or informal, incorporating any vertical restraint. From the whole universe of cases tried before the Commission since 2000, no more that 250 were related to vertical restrictions, at the end of the day most of them without merit.

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

As explained in question 51, the Commission may fine the infringing party and issue a cease-and-desist order specifically addressed to the vertical restriction found illegal, without affecting the rest of the agreement, as long as it is an ancillary provision, and unless the very essence of the contract was the vertical restriction itself.

51 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?

Prior to the constitutional amendment, but in accordance with the Competition Law, the sanctions and remedies available in Mexico are cease-and-desist orders, damages and fines:

- Cease and desist orders: in the event that COFECE or IFT deems that an economic agent incurred losses from illegal conduct, such body may order the suspension, correction or elimination of the conduct or restriction.
- Damages: compensation for damage or loss may be awarded in favour of the plaintiff, if it is demonstrated in court that the damage or loss is a direct and immediate consequence of the defendant's monopolistic activity.
- Fines: COFECE may impose a fine on the economic agent responsible for breaching the Competition Law of the equivalent of up to 8 per cent of the revenues of the sanctioned economic agent, for having engaged in relative monopolistic activity.

If the previously sanctioned economic agent engages in new Competition Law violations it may be subject to stronger sanctions – such as transfer of its assets, rights, partnership interests or shares, in the proportions necessary to lose its substantial power in the relevant market.

According to the constitutional amendment, COFECE and IFT are empowered to impose as remedies the disinvestment of assets, rights, shareholdings or stocks of economic agents in the proportions required to eliminate the anti-competitive effects within a certain market; however, the necessary secondary legislation to enforce the constitutional amendment has not yet been enacted.

Investigative powers of the authority

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

The Commission has several investigative powers, such as:

- cease-and-desist orders for any action or conduct that may be considered an infringement;
- requesting the production of documents or information related to the facts being investigated to any party, local, national or international authority or agency;
- summoning any party to appear before the Commission to give evidence; and
- carrying out material inspections at the alleged infringers' domicile, offices and facilities, having access to all documents, books, records and files, either printed, hard-copy or electronic, as well as securing all this information while the whole inspection process takes place.

Private enforcement

53 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?

Legal standing for bringing an action for RMP is limited, since it may only be brought by the individuals or firms affected by the illegal conduct.

Update and trends

On 23 May 2014 an amendment to the Competition Law was published. A new agency was created to attend to competition matters, except those regarding telecommunications and broadcasting. Due to this reorganisation only seven investigations took place during 2014, some of which are still ongoing. Therefore no significant developments have been produced. However, some guidelines have been published for public consultation as to how to follow an investigation for illegal conducts or M&A, and how to apply the leniency programme. It is expected there will be several investigations in the energy sector due to the recent amendments in those markets. During 2015, therefore, multiple vertical contracts will be issued by Pemex (the state Mexican oil company) to govern its contractual relationships downstream with several firms now participating in markets previously closed to them.

Nonetheless, once the procedure has been concluded before the Commission, whoever has suffered damage or loss from a Competition Law infringement is entitled to file a civil or commercial lawsuit in the federal courts, either an individual or a collective action, claiming compensation for damage or loss suffered. The court adjudicating the case may request an informative and non-binding opinion on the case from the Commission.

Other issues

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

No.

León Ricardo Elizondo **leon.elizondo@leag.mx**

Tamarindos No. 400
Torre B Piso 18
Bosque de las Lomas
05120 Mexico City, DF
Mexico

Tel: +52 55 59 50 15 78
Fax: +52 55 59 50 15 99
www.leag.mx

Netherlands

Minos van Joolingen and Martijn Jongmans
Banning NV

Antitrust law

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

The primary legal source is article 6 of the Dutch Competition Act (DCA).

Article 6(1) DCA prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market. Article 6(1) DCA does not distinguish between horizontal and vertical restraints. Article 6(2) DCA renders void (wholly or in part) any agreement falling within the terms of article 6(1) DCA, unless the conditions for an exemption under article 6(3) DCA are met. The conditions of article 6(3) DCA are similar to article 101(3) of the Treaty on the Functioning of the European Union (TFEU).

It is clear from the above that article 6 DCA mirrors article 101 of the TFEU, except for the requirement of an effect on interstate trade.

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 concept of vertical restraint is not defined in the DCA. The DCA is, however, based on the EU competition rules and is construed and applied in accordance with the decision practice of the European Commission and the judgments of the European courts of justice. In its decisions with respect to vertical agreements the DCA usually refers to the EU Vertical Agreements Block Exemption Regulation (Vertical Block Exemption) and the European Commission Guidelines on vertical restraints (Vertical Guidelines) and applies the principles set out in those documents.

In line with article 1(a) of the Vertical Block Exemption, a vertical agreement under Dutch competition law can be defined as an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Following from this definition, vertical restraints are restrictions on competition in the context of such agreements. Restraints subject to Dutch competition law include resale price maintenance, non-compete clauses, exclusive purchase or supply and exclusive and selective distribution arrangements.

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?

The principal aim of the DCA is to protect competition on the Dutch market as a means of enhancing consumer welfare. According to its strategy document increasing consumer welfare is the primary goal of the ACM. This is reflected in the ACM's mission statement: 'ACM promotes opportunities and options for businesses and consumers.'

Responsible authorities

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

From the date of the entry into force of the DCA (1 January 1998) the Netherlands Competition Authority (NMa) was responsible for enforcing prohibitions on anti-competitive vertical restraints. In 2013 the NMa, the Netherlands Consumer Authority (CA) and the Netherlands Independent Post and Telecommunications Authority merged into one single regulator, the Netherlands Authority for Consumers and Markets (ACM). Consumer protection and market oversight have thus since 2013 been under the umbrella of a single authority. The ACM has independent status from the Ministry of Economic Affairs. The independent status of the ACM is formally enshrined in its legal status of autonomous administrative body under Dutch law. The Minister for Economic Affairs (the Minister) is empowered to set out general policy rules, but is prohibited from giving instructions to the ACM relating to individual cases.

Next to the ACM, civil courts play an important role. For all types of competition law matters – including anti-competitive vertical restraints – private enforcement actions are available in the Netherlands. Generally speaking, claimants may seek damages, restitution, injunctions and declaratory judgments. A claimant may, for instance, ask a court to declare that an agreement contains an anti-competitive vertical restraint. Courts can furthermore issue an injunction, if necessary subject to a periodic penalty, prohibiting the continuation of conduct that constitutes a breach of competition law. Damages can be awarded to claimants that suffered prejudice as a result of an anti-competitive practice.

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?

Central to the question of whether a vertical restraint is subject to Dutch competition law is the place where the agreement is implemented. Vertical restraints that have or may have an effect on part or the whole of the Dutch market are subject to the DCA. Neither the place of establishment nor the factual location of the undertakings involved is relevant.

The DCA is applicable in a pure internet context (see *Sectorscan internet sales*, June 2009) and applies, for example, in cases where the supplier wishes to prohibit the sale of its products by 'pure internet players'.

Agreements concluded by public entities

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

The Dutch competition rules apply to undertakings. The concept of undertaking is interpreted broadly and in line with EU competition law, that is, every entity engaged in economic activity, regardless of its legal status and

the way it is financed. Public entities may qualify as undertakings and are subject to the antitrust rules on vertical restraints to the extent that they carry out economic activities.

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.

Generic exemptions on the basis of article 15 DCA exist for cooperation agreements in the retail sector and for the protection of industries in new shopping malls. Since 2005 the Law on Fixed Book Pricing regulates book prices. The law requires booksellers of Dutch language books to adhere to the fixed price per title determined by the publisher. The Law on Fixed Book Pricing is currently under review.

General exceptions

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

The European Commission has published a De Minimis Notice setting out the circumstances in which agreements (including vertical agreements) will not be viewed by the Commission as infringing article 101(1) TFEU. The De Minimis Notice provides that, in the absence of certain hard-core restrictions such as resale 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 the parties' market shares for the products in question do not exceed 15 per cent.

A different approach than that of the De Minimis notice exists under the DCA. Pursuant to article 7 DCA, hard-core restrictions also benefit from de minimis treatment if certain conditions are met.

Under the de minimis rule of article 7(1) DCA, the cartel prohibition does not extend to restrictive agreements where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies whose primary business is in the affected markets) or €1.1 million (for other companies) are involved. Article 7(2) DCA exempts restrictive horizontal agreements, again including hard-core restrictions, where the parties' aggregate market share does not exceed 10 per cent, provided that the restrictive agreement at hand does not have an appreciable effect on inter-state trade. In our view, the limitation of article 7(2) DCA to horizontal agreements is inexplicable as it leads to the extraordinary situation that the de minimis rule under Dutch competition law is more lenient for horizontal agreements than for vertical agreements.

Pursuant to article 9 DCA, the ACM may apply article 6(1) DCA to a restrictive agreement that falls within the scope of the de minimis exemption if, in view of market relationships on the relevant market, the agreement has a significant detrimental effect on competition.

Agreements

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

The DCA does not provide a definition of the concept 'agreement'. The interpretation of this term under Dutch competition law is the same as under EU competition law.

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?

In line with EU competition law, no formal written agreement is required for article 6(1) DCA to apply. There must be a 'concurrence of wills' among the two parties to conclude the relevant restriction. This can be inferred from circumstantial evidence. Oral agreements, general conditions, conscious parallelism, tacit agreements, gentlemen's agreements and the like constitute an agreement under Dutch competition law.

Parent and related-company agreements

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

Article 6(1) DCA applies only to agreements between independent undertakings. Vertical agreements between a parent company and a related company therefore do not fall within the scope of article 6(1) DCA if the companies form a 'single economic entity'. In line with EU competition law, a parent company and a related company form a single economic entity when the related company does not enjoy real autonomy in determining its course of action on the market, but carries out instructions from the parent company. The single economic entity doctrine also applies to agreements between related companies that have the same ultimate parent company when the commercial behaviour of the related companies is determined by their ultimate parent company.

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?

Agent–principal agreements are assessed under Dutch competition law in line with the criteria set by the EU courts and the European Commission. Agency agreements are therefore not caught by article 6(1) DCA if the principal bears the commercial and financial risks related to the selling and purchasing of contract goods and services and obligations imposed on the agent in relation to the contracts concluded on behalf of the principal. However, agency agreements containing single branding provisions and post-term non-compete provisions, may infringe article 6(1) DCA if they lead or contribute to a (cumulative) foreclosure effect. Agency agreements may also fall within the scope of article 6(1) DCA where a number of principals coordinate their activities by using the same agent.

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?

No specific rules or guidance for the assessment of agent–principal agreements are provided for under Dutch competition law. There are no recent authority decisions on what constitutes an agent–principal relationship for these purposes. On 5 January 2013 the ACM issued a press release announcing that the Dutch travel association had changed its general conditions applicable to agents after concerns raised by the ACM. The concerns, however, related more to potential price fixing, and not so much to what constitutes an agent–principal relationship. Pursuant to to article 7:428 of the Dutch Civil Code (DCC), however, a commercial agency agreement is:

> *an agreement in which one of the parties ('the principal') instructs the other party ('the agent'), who has engaged himself to this instruction on payment of a commission (remuneration), to provide intermediary services in arranging contracts to be concluded by the principal with third persons and, where appropriate, to conclude such contracts in the name and for account of the principal, without being his subordinate.*

The definition in the Dutch Civil Code does not, however, deal with the distinction between 'genuine' and 'non-genuine' agents from a competition law point of view.

Intellectual property rights

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

Vertical agreements with IPR provisions that are not the 'primary object' of the agreement and are directly related to the use, sale or resale of the contract goods or services are assessed under Dutch competition law in the same way as 'normal' vertical agreements. If the provisions on IPRs however, constitute the primary object of the vertical agreement, the agreement may fall within the scope of the European block exemption for technology transfer agreements.

Analytical framework for assessment

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

Apart from the de minimis rule of article 7 DCA, the analytical framework for the assessment of vertical restraints under Dutch competition law is very similar to the EU framework.

The first step is to assess whether the vertical agreement:

- is concluded between public entities carrying out non-economic activities (see question 6);
- falls under the de minimis exemption of article 7 DCA (see question 8);
- is concluded between undertakings that form a single economic entity (see question 11); or
- concerns a genuine agency agreement (see questions 12 and 13).

If any of these situations is applicable the vertical agreement at hand is not caught by article 6(1) DCA.

If none of the above situations is applicable, the second step is to assess whether the vertical agreement contains one or more hard-core restraints. Hard-core restraints under Dutch competition law are identical to those under EU law: for example, resale price maintenance and restrictions on the territory in which the buyer can resell the products. If the agreement contains hard-core restrictions the agreement will not benefit from the safe harbour of the Vertical Block Exemption (see question 18) and it is highly unlikely that the agreement would satisfy the conditions for an individual exemption under article 6(3) DCA.

If the agreement does not contain any hard-core restrictions, the third step is to assess whether the agreement falls within the Vertical Block Exemption (under Dutch competition law, the EU block exemptions also apply to purely national situations where trade between member states is not affected; see question 18). If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a safe harbour. An individual assessment is not necessary, the agreement is deemed not to infringe article 6(1) DCA.

If the vertical agreement cannot benefit from the Vertical Block Exemption, the fourth and final step is to conduct an 'individual assessment' of the agreement in order to determine whether the agreement has as its object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market (article 6(1) DCA) and, if so, whether the conditions for an exemption under article 6(3) DCA are satisfied. It should be noted that civil courts do not render a hard-core restraint automatically in violation of article 6(1) DCA. On 16 September 2011 the Dutch Supreme Court ruled that even for hard-core restraints the restriction of competition needs to have an appreciable effect for it to be caught by article 6(1) DCA. In other words, the requirement of appreciable effect is not only applied to agreements that may have the effect but also to agreements whose object is to restrict competition by civil courts. After the CJEU *Expedia* judgment on 13 December 2012 (C-226/11) there has been a discussion whether object restrictions can still escape article 6(1) DCA merely because of lack of an appreciable effect. However, the civil courts have continued to use the appreciability criterium for restrictions by object even after *Expedia* (see, eg, the Court of Appeal of 's-Hertogenbosch, 15 februari 2013, *Confectie/Setpoint,* the Court of Appeal of Arnhem-Leeuwarden, 22 March 2013, *Batavus/Vriend*, the District Court of Rotterdam, 23 March 2014, *Koelhuis Dronten/The Greenery*, the Court of Appeal of Arnhem-Leeuwarden, 15 October 2013, *Vedes AG/Otto Simon BV*; the District Court of Amsterdam, 21 August 2013, *Drachten Storage Holding ao/City Box Holding*). The administrative competition law court of first instance, however, has not given a clear view on *Expedia* yet and seems to assess appreciability for restrictions by object in light of article 6(1) DCA separately from article 101(1) TFEU (see, eg, the District Court of Rotterdam 12 June 2014 *paprikacartel* and 17 July 2014 *flowercartel*). It awaits to be seen how the most recent judgment of the CJEU in *Cartes Banciares* 11 September 2014 (C-67/13) will influence the assessment of restricitions by object in the Netherlands.

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?

Similar to the application of EU competition law, the assessment of vertical restraints under Dutch competition law takes account of the overall economic situation in which the agreement exists and the level of competition in the market. Both the market shares of the supplier and the market positions of competitors are relevant when assessing the legality of individual restraints. In order for an agreement to benefit from the safe harbour provided for under the Vertical Block Exemption, neither the supplier nor the buyer may have a market share in excess of 30 per cent.

The existence of parallel networks of similar vertical restraints (of other suppliers) is relevant under Dutch competition law. On 20 December 2013 the Dutch Supreme Court ruled that an exclusive purchasing obligation in an agreement between an oil company and an owner of a petrol station infringed article 6(1) DCA, taking into consideration the existence of parallel networks of similar vertical restraints. In particular, the extent to which the specific agreement contributed to the cumulative effects was important in assessing its compatibility with article 6(1) DCA. On 6 June 2013 the ACM issued a market analysis on brewery contracts. The ACM examined whether arrangements between brewing companies and bar owners and the existence of parallel networks of similar vertical restraints are a reason for ACM to take enforcement action under the DCA. In short, ACM's analysis revealed that the beer market is sufficiently dynamic, with breweries competing for outlets and bar owners competing for customers.

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?

Buyer market shares are relevant when assessing the legality of individual restraints inasmuch as for an agreement to benefit from the Vertical Block Exemption safe harbour. Neither the supplier nor the buyer can have a market share in excess of 30 per cent. The market share of the buyer may not exceed 30 per cent on the relevant purchasing market.

In horizontal and concentration cases the ACM has repeatedly shown a fundamentally favourable attitude towards buyer power, as consumers can benefit from the creation or strengthening of buyer power (see NMa decisions 4 May 2010 (*Van Drie – Alpuro*) and 3 June 2013 (*Brink's/GSN*). A purchaser subject to competitive pressure on the downstream market is, according to the ACM, likely to use its buyer power on the upstream market to obtain benefits to pass on to its consumers.

In principle the ACM will consider adverse buyer power effects only in the context of their impact on competition on the downstream sales market, for instance, if rivals are restricted in their access to important upstream input or prices are temporarily reduced to force competitors to leave the market. Neither the ACM nor the Dutch courts have yet given specific consideration to buyer market shares in cases relating to online sales.

Block exemption and safe harbour

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

As mentioned in question 7, Dutch law provides for a few generic exemptions on the basis of article 15 DCA.

In addition, on the grounds of article 12 DCA, the EU block exemptions have been incorporated into Netherlands competition legislation. If a particular agreement is exempted from the application of EU cartel prohibition, because it falls under an EU block exemption, then this agreement will also be exempted from the application of the Netherlands cartel prohibition.

Pursuant to the Vertical Block Exemption, vertical agreements in which the market share of the supplier and the market share of the buyer do not exceed 30 per cent, may benefit from safe harbour if they do not contain any of the following hard-core restrictions: imposition of fixed or minimum resale prices, imposition of export bans and restrictions on passive sales (both in terms of territories and types of customers), restrictions on resale to end-users and cross-supplies to members of a selective distribution system, and certain limitations on the sales of components as spare parts.

Types of restraint

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

Agreements or concerted practices between a supplier and a dealer with the object of directly or indirectly establishing a fixed or minimum price

or price level to be observed by the dealer when reselling a product or service to his customers, will generally be considered to constitute a hard-core restriction under Dutch competition law.

Both contractual provisions or concerted practices that directly establish the resale price and more indirect means of resale price maintenance (such as fixing the distribution margin or the maximum level of discount the distributor may grant from a prescribed price level, or threats, warnings, or sanctions against a dealer who does not respect a certain price level) infringe article 6(1) DCA unless the agreement can benefit from the de minimis rule of article 7 DCA (see question 8).

Setting maximum resale prices or 'recommended' resale prices from which the distributor is permitted to deviate without penalty is permissible. The level of enforcement activity in relation to resale price maintenance in the Netherlands is relatively low in comparison with neighbouring jurisdictions. We are not aware of any recent ACM decisions. In a few instances, however, courts have nullified agreements in their entirety for containing RPM clauses, in particular in franchise cases where the franchisor engaged in resale price maintenance. However, on 21 August 2013 the District Court of Amsterdam ruled that a RPM clause in a franchise agreement does not infringe article 6(1) DCA, because the franchisee failed to demonstrate that the RPM arrangement resulted in an appreciable restriction of competition (*Drachten Storage Holding ao/City Box Holding*). See also question 15 in relation to the requirement of an appreciable restriction of competition.

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'?

It is to be expected that the ACM – in line with the Vertical Guidelines of the Commission – will actively consider arguments as to the efficiencies associated with resale price maintenance restrictions where such restrictions relate to the launch of a new product or the conduct of a short-term low-price campaign. However, we are not aware of any recent decisions on this subject by the ACM.

For an interesting example of a loss leader case see *Albert Heijn/ Peijnenburg* (President of the Civil Court Den Bosch, 10 February 2005). In this case Peijnenburg refused to deliver goods to Albert Heijn, because Albert Heijn sold the goods for a price that Peijnenburg claimed caused them to suffer losses. Albert Heijn claimed delivery of the goods and stated that it was not bound by the price mentioned by Peijnenburg on the ground that such a statement infringed cartel provisions. The president of the court ruled that Peijnenburg had reasonable grounds for termination of the agreement, because it suffered losses as a result of the price strategy of Albert Heijn. However, this ruling of the court seems to be an isolated case. It is questionable whether the ACM would rule in the same way.

Finally, reference is made to the generic exemption on the basis of article 15 DCA for cooperation agreements in the retail sector. Provided the agreement meets the definition of a cooperation agreement under this generic exemption, resale price maintenance is allowed in relation to promotions or a sales campaign, if the promotion period is limited to eight weeks (maximum) and applies to no more than 5 per cent of the range of products (see also the Court of Appeal of 's-Hertogenbosch, 12 February 2013, *Confectie CV/Setpoint BV*).

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

There are no guidelines in this regard. A link between resale price maintenance and other forms of restraints seems to have been made by the Civil Court of The Hague in its decision of 19 February 2007 in *Make It Easy Gelderland VOF ao/Make It Easy BV ao*. The court had to rule in this case on the validity of non-compete clauses as well as a resale price maintenance clause in a franchise agreement.

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

Yes, the ACM has addressed efficiencies that can possibly arise out of resale price maintenance in a case following the enactment of the Law on Fixed Book Pricing (see question 7). The Dutch Publishers Association requested a similar price-fixing exemption for publishers of national and foreign magazines and foreign newspapers as laid down in this law. The ACM refused the exemption, because the Dutch Publishers Association had not established that resale price maintenance would contribute to the improved distribution of a wider range of magazines and foreign newspapers (see ACM decision of 14 October 1999, Case 587, *Nederlands Uitgeversverbond*).

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.

Under Dutch competition law pricing relativity agreements that affect competition to an appreciable extent are assessed under article 6 DCA and the Vertical Block Exemption. Since pricing relativity agreements restrict the ability of the buyer to determine its retail prices for competing brands it is doubtful whether such agreements will be able to benefit from exemption under the Vertical Block Exemption. More likely is that parties to a pricing relativity agreement will have to demonstrate that their agreement satisfies the conditions for an individual exemption under article 6(3) DCA. So far neither the ACM nor the Dutch courts have given specific consideration to pricing relativity agreements.

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.

Under Dutch competition law wholesale MFNs that affect competition to an appreciable extent are assessed under article 6 DCA and the Vertical Block Exemption. Although wholesale-price MFN clauses are very common in commercial agreements, we are not aware of any ACM decisions or Dutch court cases in which the competitive impact of wholesale MFNs is assessed. In line with EU competition law wholesale MFN might raise red flags under Dutch competition law if it is imposed by or for the benefit of a party with a high market share. Also, in markets where wholesale MFNs are widespread across several parties that together account for a large proportion of the relevant market, wholesale MFNs could raise competition law concerns. However, as wholesale MFNs allow scope for retail price competition we do not expect much ACM enforcement activity with respect to such agreements.

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.

Under Dutch competition law retail MFNs that affect competition to an appreciable extent are assessed under article 6 DCA and the Vertical Block Exemption. We are not aware of any ACM decisions or Dutch court cases in which the competitive impact of retail MFNs is assessed. In line with EU competition, law retail MFN clauses are most likely to produce anti-competitive effects where at least one of the parties to the agreement possesses market power. Also, in transparent markets with relatively homogeneous products retail MFNs could raise red flags under Dutch competition law.

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 a case before the District Court of The Hague on 13 November 2014 (*Tronios/Detronics*), the Court considered a MAP (Minimum Advertising Price) and Retail Internet Price (RIP) clause. It argued that such clauses amount to resale price maintenance. The Court found such a clause in principle incompatible with competition law unless specific circumstances would make it an admissible form of resale price maintenance. In this case there were no substantial arguments justifying the MAP/RIP. Under the Guidelines on Vertical Restraints, any agreement or practice that directly or indirectly sets a fixed or minimum resale price is a hard-core restriction which is unlikely to be exempt from the competition rules. Even though resellers are free to price the products subject to a MAPP or (internet minimum advertised price IMAP clause in-store individually, those clauses could result in resellers selling at or above the minimum price set by the supplier for external advertising and therefore would be incompatible with

competition law. The Dutch competition authority has not yet dealt with the issue of MAPP or IMAP clauses.

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.

We are not aware of any ACM decisions or Dutch court cases in which the competitive impact of a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most favoured supplier is assessed.

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?

There are no specific differences between the Dutch and the EU approach. The restriction of the territory into which a buyer may resell contract products is assessed under article 6(1) DCA and most likely prohibited, unless it is covered by the Vertical Block Exemption. As the Dutch approach is consistent with the EU approach, a supplier that has implemented an exclusive distribution network may restrict active sales into the exclusive territories of appointed distributors (for analytical framework of assessment see questions 15 and 18). This protection of exclusively allocated territories must, however, permit passive sales in such territories.

29 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?

There are no specific differences between the Dutch and the EU approach. Restrictions on the customers to whom a buyer may resell contract products is assessed under article 6(1) DCA and most likely prohibited, unless it is covered by the Vertical Block Exemption. As the Dutch approach is consistent with the EU approach, a supplier may require a buyer not to resell products to customers or customer groups the supplier has reserved for itself. Furthermore, if the supplier has implemented an exclusive distribution network the active sales to the exclusive customers or customer groups of appointed distributors may be restricted (for an analytical framework of assessment see questions 15 and 18). This protection of exclusively allocated customers and customer groups must, however, permit passive sales to such customers.

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

There are no specific differences between the Dutch and the EU approach. Field-of-use restrictions may be exempted under article 6(3) DCA in combination with the Vertical Block Exemption.

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

The Dutch approach is consistent with the EU approach. Restricting the buyer's ability to generate or effect sales via the internet is assessed under article 6(1) DCA and the Vertical Block Exemption. It is generally considered a hard-core infringement in the Netherlands to impose a complete ban on internet sales on distributors. The ACM has not published any explicit guidance with respect to internet sales. We are not aware of any recent decisions of the ACM on this subject.

However, there have been several civil court judgments regarding the restriction of internet sales and the termination of the distribution agreement as a result. The Civil Court of Zutphen ruled on 8 August 2007 (*Groen Trend BV en Schouten Keukens BV/Atag Etna Pelgrim Home Products*) that a supplier of kitchens was allowed to apply different prices for online and offline sales owing to the extra costs incurred by offline sales. This decision was rendered before the current Vertical Block Exemption came into effect. On 2 September 2010 the Civil Court of Utrecht in *Verfcentrum Waalren/BASF* ruled – in a case initiated by the exclusive distributor claiming that internet sales by the supplier were unlawful – that internet sales as a passive form of sales do not infringe the exclusivity granted to a distributor. On 16 September 2011 the Supreme Court (*Batavus*) ruled that terminating a distribution agreement with a dealer under pressure from other dealers is contrary to article 6(1) DCA. In this particular case, dealers complained to the supplier about the low prices offered by the other dealer on the internet. For a similar case, see also the decision of the Civil Court of Arnhem dated 18 December 2007, *MF Design/Eastborn*.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No, so far the ACM has not distinguished between different types of internet sales channels, neither in decisions nor in guidelines.

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

Selective distribution agreements are assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines. There is no specific requirement for the selection criteria to be published.

The lawfulness of selective distribution systems is mainly dealt with in civil proceedings. In particular the question whether the refusal to admit a certain distributor is compatible with competition law regularly arises in civil proceedings. On 16 September 2011 the Supreme Court ruled in *Batavus* that a supplier operating a qualitative selective distribution system must apply this objectively and without discrimination. The Higher Court of Leeuwarden ruled on 17 January 2011 (*Auping/Beverslaap*) that Auping, which operated a quantitative selective distribution system, acted unlawfully by refusing a new distributor. The court ruled that Auping had not applied its quantitative criteria objectively. Furthermore, the court determined that Auping was unable to disclose the actual criteria. The court did not rule on the obligation to publish the criteria beforehand. It is plausible the court would rule differently on the assessment of 'quantitative selective' distribution in light of the judgment of the Court of Justice in the *Auto24/Jaguar Land Rover* case dated 14 June 2012.

34 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?

The Dutch approach is consistent with the EU approach. The implementation of a selective distribution system may fall outside article 6(1) DCA, where the selective distribution system is necessary to preserve the quality or the proper use of a certain product. This is in particular the case for technologically complex products, luxury products with a strong brand name and reputation and products with strong safety implications. Examples of selective distribution in Dutch case law concern bicycles, beds, perfumes and cars (all having strong brand names).

35 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 Dutch approach is consistent with the EU approach, with the Vertical Block Exemption and accompanying guidelines to the fore. For civil proceedings we refer to the cases mentioned in questions 31 and 33. Most civil cases in the Netherlands have been ruled on the basis of the previous Vertical Block Exemption. It is likely that in the future new cases will be brought before the civil courts based on the current Vertical Block Exemption.

36 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?

There are no recent decisions regarding this subject. Guidance may be found in the Vertical Block Exemption and the Vertical Guidelines.

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

Yes, the ACM interprets article 6(1) DCA in accordance with EU competition law, so possible cumulative restrictive effects would normally be taken into account (see also question 16).

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

There are no recent decisions regarding this subject. Guidance may be found in the Vertical Block Exemption and the Vertical Guidelines.

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

The restriction on the buyer obtaining the supplier's products from an alternative source is assessed under article 6(1) DCA and the Vertical Block Exemption. We refer to article 5 of the Vertical Block Exemption regarding exclusive purchase obligations on the buyer. The same assessment is applied under Dutch competition law.

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

This issue has not been addressed by the ACM, but it would normally be assessed under article 6(1) DCA and the Vertical Block Exemption. It is most likely that an 'inappropriate discussion' would be subject to civil court proceedings, where the focus would be more on the interpretation of the contractual agreement.

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

Dutch law does not provide for specific rules on this except for the general cartel prohibition of article 6(1) DCA, which follows the interpretation of article 101(1) TFEU. If the obligation is not covered by the Vertical Block Exemption (for non-compete clauses), the ACM would assess whether the object or effect of the obligation is to appreciably restrict competition within part of the Dutch market.

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

This restriction is assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines.

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

The Dutch approach is consistent with the EU approach.

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

The Dutch approach is consistent with the EU approach.

45 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?

No.

Notifying agreements

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

There is no formal procedure for notifying agreements containing vertical restrictions under Dutch competition law. It is not possible to notify such agreements and to obtain a 'clearance' decision. Parties to an agreement need to self-assess whether their contractual provisions comply with the DCA.

Authority guidance

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

In cases in which new or unsolved questions arise with regard to the application of the prohibition on cartels, undertakings may request an informal opinion from the ACM. The ACM exercises some reserve in giving such advise, which is also referred to as an informal opinion. The informal opinion is published on a no-name basis. Formal deadlines are not applicable.

In agreeing to issue an informal opinion the ACM adheres to a 'Yes, provided that...' policy. An informal opinion is issued provided that the following cumulative conditions are met:

- the legal question must be new;
- the social or economic importance of the question must be considered; and
- it must be possible for the ACM to draw up an advisory letter on the basis of the information provided by the applicant, without the need for the ACM to conduct a further investigation regarding the facts.

In issuing informal opinions, the ACM will ensure that this is not done at the expense of carrying out its key tasks.

Furthermore, the ACM will not issue an informal opinion if a similar case is being dealt with by the ACM or in a current court case, or if a similar case is being dealt with by the European Commission or by another competition authority.

Complaints procedure for private parties

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

Anyone can contact the ACM if they have complaints, tip-offs or indications with regard to a violation of the DCA, including unlawful vertical restraints. Entities that have the status of 'interested party' can submit a decision request. When a decision request is submitted the ACM is obliged to take a decision. Consumers are usually not granted the status of 'interested party'. However, the Consumers' Association has been considered an interested party on the basis of article 93(3) DCA since 2007. However, it took until 2013 for the Consumers' Association to actually exercise this right in a specific cartel case. Decision requests cannot be submitted anonymously.

Standardised forms are available to submit complaints, tip-offs, indications or decision requests. In general, confirmation of receipt will be sent within a week of submitting the form.

The ACM receives more complaints and indications concerning potential violations than it can actually investigate, given its investigation capacity. For this reason it is forced to make choices about which complaints and indications it will look into and which it will not. To this end, a prioritisation policy has been made public. An English version of the prioritisation policy has been made available on the ACM website under the heading 'mission & strategy' (www.acm.nl/en).

Enforcement

49 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?

Statistical data on how frequently antitrust law has been applied to vertical restraints by the ACM is not easy to obtain. From its annual reports, one can infer that the ACM carries out around 20 formal investigations of possible violations of the DCA per year. A breakdown of horizontal and vertical restraints is not provided, but it seems safe to assume that only a minority of the formal investigations deal with vertical restraints. Historically, vertical restraints have been a low priority interest for the ACM and its legal predecessor. In a speech on 25 November 2014, the head of the ACM concluded that the ACM will give priority to those situations where there is a high risk of consumer harm. Examples where this is more likely are: where vertical agreements are used as an instrument to facilitate collusion between producers; and where inter-brand competition is already limited

Update and trends

An important decision in the field of vertical restraints was delivered by the civil District Court of Midden-Nederland on 3 December 2014 (*Oase/Voorne Koi*). The dispute between Oase, supplier of pond products, and Voorne Koi, buyer and distributor of Oase products, was about whether their agreement was rightfully terminated. Oase terminated the agreement based on the violation of two specific provisions in it by Voorne Koi: the prohibition to sell through the internet without the prior written consent of Oase, and the prohibition to advertise the products at very low prices in combination with the obligation to ask prior approval for special offers. The court applied the Vertical Block Exemption and found both prohibitions to be hard-core restraints under article 4(a) and article 4(c) of that Block Exemption. It argued that Oase in itself has a justified interest in controlling the way in which the sale of Oase products to end-users takes place in order to secure the prestigious character and the well-known name of Oase products. However, to make the sale through the internet in general dependent on the approval by Oase without making clear more concretely which conditions should be fulfilled by the distributor which are necessary for the good reputation and name of Oase goes too far. According to the court, the prohibition as formulated in this case was too broad and made it possible for Oase to influence the sale to end-users by its distributors more extensively than was necessary for the good name and reputation of its products. The prohibition on advertising at very low prices was found by the court to be a hard-core restraint under article 4(c) of the Block Exemption, because in combination with the required approval for special offers, Oase could effectively influence the (minimum) sale prices of its distributors. The argument that the distributors were free in practice to determine their own sales prices did not alter this finding.

The court subsequently found that both articles had the object of infringing competition because they had the ability to generate negative effects on competition. By influencing the sale, (minimum) sales prices and advertisements of its distributors, Oase could affect competition. The agreement was terminated based on violation of the aforementioned provisions by Voorne Koi so the termination was not justified since those provisions were void based on their violation of article 6(1) DCA. The articles could thus not form ground for termination.

In a decision by the Court of Appeal of Arnhem-Leeuwarden on 11 November 2014 (*Maas Profile/VAB Handel*), the Court stated that where an agreement contains one of the hard-core restrictions as mentioned in article 4 of the Vertical Block Exemption, this does not imply that the agreement has as its object or effect the restriction of competition according to the standards of article 101 TFEU and/or article 6 DCA. An individual investigation into the content and objective of the agreement and its economic and legal context is required to determine whether an agreement can be regarded, by its nature, as being injurious to the proper functioning of normal competition, thereby taking into account the nature of the goods or services concerned and the actual conditions for the functioning and the structure of the relevant market(s).

Another decision by the Court of Appeal of Arnhem-Leeuwarden on 2 September 2014 (*ABB/TenneT*) dealt with the passing-on defence. The Court here argued that when calculating the damages suffered as a consequence of a violation of the cartel prohibition, the passing on of price increases by the claimant should be taken into account and deducted from the award of damages. By applying the passing-on defence in this way, claimants are prevented from being awarded damages that they already passed on to their own buyers, whereas defendants are prevented from the possibility of having to pay the same damages twice.

Chris Fonteijn, the head of the ACM, announced that the ACM will share its views on vertical agreements in a position paper early in 2015.

and vertical agreements are used as an effective means to exercise market power.

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

Agreements that violate the cartel prohibition of article 6(1) DCA are illegal, and null and void on the basis of article 6(2) DCA. In addition, article 3:40(2) of the Dutch Civil Code (DCC) declares void legal acts contrary to mandatory rules. Faced with a claim to perform a contract, a defendant may invoke these provisions as a 'shield'.

In general the voidance does not extend to the whole agreement, but only to those parts that infringe the prohibition, unless they form inextricable parts of the agreement (see articles 3:41 and 3:42 DCC).

On 20 December 2013 the Supreme Court ruled that an agreement that is void on the basis of article 6(2) DCA can not be converted into a lawful agreement on the basis of article 3:42 DCC. The Supreme Court stated that this applies not only to agreements that have as their objective the restriction of competition, but also to agreements that have this effect (which was not entirely clear after a previous judgment on 18 December 2009 by the Supreme Court).

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

Under the DCA the ACM itself has the ability to impose sanctions on undertakings and natural persons for competition law violations without needing to have recourse to any court or government agency. For competition law infringements the ACM can impose a fine, an order subject to periodic penalty payments, a binding instruction, a commitment decision or a combination of any of these. In certain cases it is possible for businesses to make a commitment. Commitments contain conditions businesses promise to comply with in order to prevent future enforcement actions.

Fines imposed on undertakings may be up to €450,000 or up to 10 per cent of the total net annual turnover of the undertaking, whichever is higher. Fines for natural persons may be up to €450,000. A natural person will only be fined if he or she directed the anti-competitive behaviour or omitted to take measures to prevent the behaviour, although he or she was empowered and reasonably bound to do so.

Administrative actions brought against fining decisions of the ACM are exclusively assigned to the Rotterdam District Court (and on appeal to the Trade and Industry Appeals Tribunal in the Hague).

To date, hardly any fines have been imposed by the ACM for vertical restraints. Disputes regarding vertical restraints are typically dealt with in civil court proceedings.

Investigative powers of the authority

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

The officials of the ACM have broad powers of investigation and inspection. The investigative powers are a combination of the individual powers of each of the constituent authorities that have merged into the ACM and are laid down in several laws and regulations. A bill to streamline all of the separate procedures, duties and powers entered into force on 1 August 2014. Within its powers a distinction should be made between surveillance and investigation.

Surveillance entails the general monitoring of compliance with the DCA, while an investigation is conducted where there is a suspicion of an infringement. At the beginning of an investigation the officials must inform the spokespersons of an undertaking of their right to remain silent during an interview (the 'caution').

Based on their surveillance duties, officials have the following powers:

- to enter and search locations, if necessary with police assistance, with the exception of private homes if permission has not been granted by the resident;
- to demand information, including from staff members who have knowledge of possible infringements; and
- to demand access to business data and documents and to make (digital) copies of such data and documents; and to examine vehicles and other means of transport.

Based on their investigative duties, officials have the following additional powers:

- to enter and search private homes, if necessary without permission from the resident, after obtaining authorisation from the examining magistrate responsible for handling criminal cases at the Rotterdam District Court;
- the power to seal business premises, spaces and objects; and
- to exercise their powers, if necessary with police assistance.

Even in purely national cases (ie, cases where the infringement is solely based on an infringement of Dutch competition law) the ACM may demand information from companies domiciled outside the Netherlands. In such cases the ACM typically requests assistance from the competition authority of the jurisdiction concerned.

Private enforcement

53 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?

The DCA does not provide for any explicit statutory basis for private enforcement. Actions for breach of competition law are usually based on tort (article 6:162 DCC). Article 6:162 DCC stipulates that a victim of tort is entitled to compensation for damages. An injunction may be asked on the basis of article 3:296 DCC. In cartel cases, article 6:166 DCC (group liability) or article 6:102 (contributory negligence) may be useful as well. Depending on the circumstances, a victim of a competition law infringement may also base its claim on unjust enrichment (article 6:212 DCC) or undue payment (article 6:203 DCC) with a view to recovering sums paid pursuant to an illegal arrangement.

There are no specialised competition law courts in the Netherlands for civil matters.

An action for breach of competition law may be brought by any person, legal or natural, who has suffered damages as a result of a competition law infringement (including parties to agreements themselves). This will normally include indirect purchasers. If there are multiple claimants, they may decide to jointly bring a legal action in their own name or grant a power of attorney to a party to represent them in the legal proceedings. The remedies available are damages and, for the parties to agreements themselves, annulment of the specific provisions in the agreement violating article 6(1) DCA.

There are no US-style class actions in the Netherlands. However, representative bodies (associations or foundations representing the interest of injured parties) can bring claims in their own names to seek declaratory judgments on the basis of article 3:305(a) DCC. So far, it is not possible for representative bodies to ask for damages, unless individuals have assigned their claims to them. In the latter case, the representative body can claim damages as holder of the individual claims, in its own name on behalf of the injured parties.

Finally, the Dutch 'Class Action' (Financial Settlement) Act of 2005 laid down in articles 7:907 to 7:910 DCC and articles 1013 to 1018a of the Dutch Code of Civil Procedure that class settlements can be approved and declared binding by the Amsterdam Court of Appeal. This instrument has been used for recovering damages suffered by investors, but so far not by victims of competition law infringements. Claim agents seem to find it more attractive to act in their own right after purchasers or indirect purchasers have assigned their alleged claims.

Other issues

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

No.

BANNING

Minos van Joolingen **m.vanjoolingen@banning.nl**
Martijn Jongmans **m.jongmans@banning.nl**

Statenlaan 55
5223 LA 's-Hertogenbosch
Netherlands

Tel: +31 73 6927 715
Fax: +31 73 6927 791
www.banning.nl

Norway

Thomas Sando and Aksel Joachim Hageler
Advokatfirmaet Steenstrup Stordrange DA

Antitrust law

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

The antitrust rules applicable to vertical restraints are laid down in the Norwegian Competition Act (the Act), which entered into force 1 May 2004. An English version of the Act is accessible on the website of the Norwegian Competition Authority (NCA).

Section 10(1) of the Act prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition. Section 10(2) of the Act renders such agreements void, unless they satisfy the conditions for exemption under section 10(3).

The provision in section 10 of the Act is the Norwegian equivalent to article 101 of the Treaty on the Functioning of the European Union (TFEU) and article 53 of the EEA Agreement. According to the preparatory works of the Act, section 10 should be interpreted and applied in accordance with the relevant case law of the European Court of Justice and the EFTA Court, as well as the case law and guidelines of the European Commission and the EFTA Surveillance Authority (ESA).

If an agreement affects trade between the EEA states, both article 53 of the EEA Agreement and section 10 of the Act apply. Pursuant to section 7 of the Norwegian EEA Competition Act, the NCA and the Norwegian courts must apply article 53 of the EEA Agreement in addition to section 10 if the vertical agreement in question affects trade between EEA states.

In order to assist companies and their advisers in ensuring that their agreements meet the conditions for an exemption under section 10(3), several block exemption regulations have been adopted to assist companies when considering whether their agreements meet the required conditions. The following regulations exempt certain categories of vertical restraints from the prohibition contained in section 10(1):

- Regulation No. 898 of 21 June 2010 on the application of section 10(3) of the Competition Act to categories of vertical agreements and concerted practices (the Vertical Block Exemption Regulation);
- Regulation No. 1214 of 24 August 2010 on the application of section 10(3) of the Act to categories of vertical agreements and concerted practices in the motor vehicle sector;
- Regulation No. 733 of 31 May 2010 on the application of section 10(3) of the Act to categories of vertical agreements and concerted practices in the insurance sector; and
- Regulation No. 922 of 6 July 2006 on the application of section 10(3) of the Act to categories of technology transfer agreements.

The aforementioned regulations are accessible from the NCA's website, in Norwegian only.

General guidelines have not been published on the assessment of vertical restraints, such as those issued by the ESA and the European Commission; however, and in accordance with the preparatory works of the Act, the NCA applies ESA's Guidelines on Vertical Restraints as a source for guidance. These guidelines are based on the Commission Guidelines on Vertical Restraints. Further, on 21 January 2013 the NCA published specific guidelines on the assessment of restrictions on the buyer's ability to determine its resale price. The guidelines are accessible on the NCA's website, also in Norwegian only.

If one of the parties to an agreement has a dominant position on the relevant market, section 11 of the Act (which is the Norwegian equivalent of article 102 of the TFEU) may also be applied in parallel with section 10.

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 same types of vertical restraints are subject to Norwegian antitrust law as EU and EEA antitrust law. The Act does not define vertical restraints, as section 10 merely contains a non-exhaustive list of both vertical and horizontal restraints covered by the Act.

A definition of the concept is found in the secondary legislation, and 'vertical restraints' is defined in the same way in the Vertical Block Exemption Regulation as in the corresponding EU/EEA block exemption regulations.

'Vertical restraints' covers all restraints in agreements between two or more undertakings that operate at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Examples of vertical restraints are exclusive distribution, selective distribution, territorial restrictions, customer restrictions, resale price-fixing 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?

Pursuant to section 1(1) the purpose of the Act 'is to further competition and thereby contribute to the efficient utilisation of society's resources'. According to section 1(2), and when applying the Act, 'special consideration shall be given to the interests of consumers'.

According to section 3(2) of the Act the 'King may by regulation exempt certain markets or industries from all or part of this Act'. Further the Act states that 'the King in Council shall in regulation provide for the exemptions from sections 10 and 11 that are necessary to implement agriculture and fisheries policies'.

The provisions in section 3 are clearly open for other considerations than the protection of competition. Several regulations have been adopted within the agriculture and fishery sector, the private practice health-care sector and within the book sector. Of these regulations only the regulation within the book sector, Regulation No. 367 of 29 April 2005 contains provisions that exempt vertical restraints from section 10 of the Act.

Responsible authorities

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

According to section 8 of the Act the competition authorities are the King in Council, the Ministry of Trade, Industry and Fisheries (the Ministry) and the NCA.

The NCA is the main authority responsible for the enforcement of section 10 of the Act, and the NCA may not be instructed as to decisions in individual cases. However, the King in Council may order the NCA to deal with a case.

Some of the decisions adopted by the NCA may be appealed to the Ministry, eg, if the NCA rejects a request to issue an order to bring an

infringement to an end pursuant to section 12(1) of the Act. The Ministry may further reverse decisions by the NCA if they are invalid, even if the decision has not been appealed.

Decisions as to administrative fines may not be appealed to the Ministry, as the undertakings will have to bring action against the state to contest such decision. The court may try all aspects of the matter.

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?

According to section 5 the Act applies to terms of business, agreements and actions that are undertaken, have effect or are liable to have effect within the Kingdom of Norway.

The King in Council has by Regulation No. 1126 of 17 October 2008 decided that the Act applies to Svalbard, and may also by regulation decide that the Act governs terms of business, agreements and actions that have effect, or are liable to have effect, exclusively beyond the Kingdom of Norway.

The Act has to our knowledge not been applied extraterritorially.

Agreements concluded by public entities

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

Section 10 of the Act applies to 'undertakings', a concept that according to the preparatory works have the same meaning in Norwegian and EU antitrust law. Section 2 of the Act states that 'an undertaking means any private or public entity that exercise commercial activities'. It follows from this that public entities may qualify as undertakings if they are carrying out commercial activities.

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.

As mentioned in questions 1 and 3, specific rules are applicable in the motor vehicle sector, the insurance sector and the book sector.

General exceptions

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

The de minimis exception applies to section 10 of the Act, and agreements and concerted practice will only fall within section 10(1) where they have an 'appreciable' effect on competition. As no specific Norwegian legislation or guidelines apply, the NCA and the undertakings must rely on ESA's Notice on agreements of minor importance that do not appreciably restrict competition under article 53(1) of the EEA Agreement (de minimis). ESA's notice mirrors the corresponding notice from the European Commission.

Agreements

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

There is no definition of 'agreement' in the Act or the secondary legislation. Section 10 of the Act applies to all agreements, decisions by associations of undertakings and concerted practices between undertakings. In accordance with the EU case law, the NCA and Norwegian courts will interpret the concept of 'agreement' under section 10 in a broad manner.

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 with a formal written agreement for section 10 of the Act to apply. Whether the Act applies to an agreement, practice or understanding, will be assessed in the same way as in relation to article 101 of the TFEU and article 53 of the EEA Agreement.

Parent and related-company agreements

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

The 'single economic entity' doctrine applies under section 10 of the Act. Whether section 10 applies to agreements between a parent company and a related company, is assessed in the same way as in relation to article 101 of the TFEU and article 53 of the EEA Agreement.

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?

Whether section 10 of the Act applies to such agent–principal agreements is assessed in the same way as in relation to article 101 of the TFEU and article 53 of the EEA Agreement.

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?

There is no guidance on this issue in the Act or guidelines, nor are we aware of any decisions assessing what constitutes an agent–principal relationship for the purpose determining the application of section 10. Guidance should therefore be obtained from the European Commission's Vertical Guidelines.

Intellectual property rights

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

Whether section 10 of the Act applies when the agreement also contains provisions granting intellectual property rights is assessed in the same way as in relation to article 101 of the TFEU and article 53 of the EEA Agreement.

According to the Vertical Block Exemption, the exemption will only apply to vertical agreements containing provisions that relate to the assignment or use of IPRs, provided that such provisions are directly related to the use, sale or resale of goods or services by the buyer or its customers and do not constitute the primary object of the agreement.

If the agreement's main objective is the licensing of IPRs, the Vertical Block Exemption will not apply. The appropriate legislation when analysing such vertical agreements is Regulation No. 922 of 6 July 2006 on the application of section 10(3) of the Act to categories of technology transfer agreements.

Analytical framework for assessment

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

The analytical framework applied by the NCA is identical to the EU framework. This means that the Guidelines on Vertical Restraints published by the European Commission and ESA, respectively, are both relevant when applying section 10 of the Act and the Vertical Block Exemption. Below we provide a very brief explanation of the framework.

Before considering a vertical restraint it should be determined whether the agreement is subject to section 10 of the Act at all. Is the agreement concluded between undertakings? Are the undertakings independent, or does the 'single economic entity' doctrine apply? Is the agreement a genuine agency agreement?

A further question is whether the agreement affects trade between EEA states. If this is the case, both article 53 of the EEA Agreement and section 10 of the Act apply to the agreement.

If the prohibitions apply, the next question is whether the vertical agreement contains a hard-core restriction. This is important, as agreements containing a hard-core restriction do not benefit from the safe harbours in the

de Minimis Notice and the Vertical Block Exemption. Furthermore, agreements containing hard-core restrictions are not likely to satisfy the conditions for individual exemption in section 10(3) in the Act.

Examples of hard-core restrictions in vertical agreements include the fixing of minimum resale prices, restrictions of the territory into which a buyer party to the agreement may sell the contract goods or services, restrictions of the customers to whom a buyer party to the agreement may sell the contract goods or services and restrictions on members of a selective distribution system supplying each other or end-users.

Where there is no hard-core restriction in the agreement, the next question is whether the agreement may 'appreciably' restrict competition. What are the market shares of the parties? Are the criteria of the de Minimis Notice met?

If the agreement still falls within section 10 of the Act, the question is whether the agreement falls within the Vertical Block Exemption and therefore may benefit from the safe harbour. If the agreement does not fall within the Vertical Block Exemption, the legality of the agreement will depend on an individual assessment of the agreement. First, does the agreement fall within section 10(1)? Second, if the agreement restricts competition, are the conditions for an individual exemption under section 10(3) satisfied?

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?

In the assessment of individual restraints both the supplier's market share and the market shares of the supplier's competitors are relevant. The NCA will also consider the general market structure. Possible common restrictions or types of agreements in the relevant market may be relevant. The assessment made by the NCA under section 10 of the Act will be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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?

As pointed out in question 16, the assessment made by the NCA under section 10 of the Act will be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

In line with the European Commission's review of its Vertical Block Exemption and Vertical Guidelines in 2010, the Norwegian Vertical Block Exemption was amended accordingly. The new Norwegian regulation therefore also introduces the requirement that neither the supplier nor the buyer can have a market share in excess of 30 per cent for the agreement to benefit from the safe harbour.

Block exemption and safe harbour

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

As pointed out in question 1, several block exemption regulations have been adopted in order to assist companies when considering whether their agreements meet the conditions for an exemption under section 10(3). The regulations, which mirror the corresponding EU/EEA block exemptions, provide a safe harbour for agreements falling within their scope. Below, we provide a brief explanation of the Vertical Block Exemption.

The Vertical Block Exemption provides a safe harbour for certain agreements containing vertical restraints. This means that if an agreement meets the conditions in the regulation, section 10 of the Act will not apply, unless the NCA has issued a prior decision to 'withdraw' the benefit of the Vertical Block Exemption pursuant to section 10(4).

The Vertical Block Exemption applies only to vertical agreements, ie, agreements between parties that operate at different levels of the distribution chain. As mentioned in question 17, the Vertical Block Exemption will apply only if neither the supplier nor the buyer has a market share in excess of 30 per cent on the relevant market for the products in question. The introduction of a requirement on the buyer's market share has certainly reduced the number of agreements that fall within the regulation. Further, and as pointed out in question 15, the Vertical Block Exemption will not apply if the vertical agreement contains any hard-core restrictions. The agreement may benefit from the Vertical Block Exemption even where certain lesser restraints are included, such as non-compete clauses exceeding five years in duration, post-term non-compete obligations and restrictions obliging members of a selective distribution system not to stock the products of an identified competitor of the supplier. Such particular restraints may, however, be unenforceable even if the agreement survives.

Types of restraint

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

As mentioned in question 1, the NCA has published specific guidelines on the assessment of restrictions on the buyer's ability to determine its resale price. The guidelines are accessible on the NCA's website, in Norwegian only.

According to the guidelines the determination of fixed or minimum resale prices constitutes a hard-core restriction of competition. Such restrictions will almost always fall within section 10(1), and will not benefit from the safe harbour of the Vertical Block Exemption. According to the NCA it is further unlikely that such restrictions will qualify for exemption under section 10(3).

While referring to the European Commission's Vertical Guidelines, the NCA states in its own guidelines that fixed or minimum resale prices may be imposed by different means, eg, by fixing the distributors margin or level of discount, or by demanding the distributors to maintain a certain price level. Therefore, section 10 of the Act will be assessed in the same way as article 101 of the TFEU and article 53 of the EEA Agreement.

In the guidelines the NCA also states that recommended resale prices and maximum resale prices are accepted and automatically exempted by the Vertical Block Exemption if neither of the parties has a market share in excess of 30 per cent. When the market share threshold is exceeded such restraints may qualify for an individual exemption under section 10(3) of the Act.

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'?

In the specific guidelines on the assessment of restrictions on the buyer's ability to determine its resale price, the NCA accepts that restrictions on the resale price may have positive effects on competition. The NCA explicitly refers to paragraph 225 in the European Commission's Vertical Guidelines, where the European Commission provides some examples where a restriction may qualify for individual exemption, eg, when launching a new product or brand.

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

The Norwegian guidelines do not address such possible links between resale price maintenance and other forms of restraints.

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

Yes, see question 20.

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.

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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.

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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.

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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.

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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.

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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?

Vertical market sharing by territory is generally viewed as a hard-core restriction that is caught by section 10(1) of the Act. Such restrictions will therefore most often not qualify for an individual exemption under section 10(3).

Provided the market share thresholds are not met, the Vertical Block Exemption allows the supplier to prohibit its distributors to actively selling into territories exclusively reserved to other distributors or to the supplier itself. Similar restrictions on passive sales are not covered by the exemption. If the market share thresholds are met, such territorial restrictions must be assessed under section 10(3) with regard to a possible individual exemption.

29 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 are generally considered as hard-core restrictions falling within section 10(1) of the Act, and it is unlikely that such restrictions will qualify for individual exemptions under section 10(3).

As with territorial restrictions, customer restrictions that only apply to active sales (and not to passive sales) to customers or customer groups exclusively reserved to another buyer or to the supplier itself, will fall within the Vertical Block Exemption, provided the other conditions in the regulation are met.

Restrictions on a wholesaler selling direct to end-users may also fall within the Vertical Block Exemption. The same applies to restrictions on a buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier. According to the Vertical Block Exemption, the supplier may also restrict distributors appointed within a selective distribution system from selling to unauthorised distributors. Finally, customer restrictions may also be objectively justified, eg, by the nature of the products (dangerous goods) or clauses implemented to protect particular groups in the population, eg, clauses preventing sales of alcohol to children.

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

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

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

We are not aware of any Norwegian decisions or guidelines addressing this particular issue, although the NCA has been concerned with cases relating to agreements on sales on the internet (see further below). The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and ESA under article 101 of the TFEU and article 53 of the EEA Agreement.

According to the NCA itself, it has recently either investigated or made observations in at least three different cases relating to agreements on sales on the internet, namely within the e-book sector, the international platforms for online hotel booking and the Norwegian regulation that requires internet portals to provide general access to residential property advertisement on non-discriminatory conditions.

The latter regulation (Regulation No. 1169 of 9 September 2009) was implemented 1 January 2010. The legal basis for the regulation is section 14 of the Act, which states: 'If necessary to promote competition in the market, the King may by regulation intervene against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act.'

According to the preparatory works of the Act, a regulation to promote competition is necessary when the antitrust rules are not applicable, it is difficult to prove an infringement, or where an individual decision would not be a sufficient means to prevent anti-competitive behaviour in the market.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

We are not aware of any Norwegian decisions or guidelines addressing this issue. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and the EFTA Surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

Selective distribution systems are assessed under Norwegian Competition Law similarly to the assessment made under article 101 of the TFEU and article 53 of the EEA Agreement. A block exemption regulation adopted pursuant to the Act exempts selective distribution systems from the applicable prohibition provided that the market share threshold and the specific conditions of the regulation are observed. The NCA will to a significant extent rely on guidelines from the European Commission and EFTA Surveillance Authority in evaluation selective distribution systems.

34 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?

The assessment of the selective distribution system under the Act mirrors the assessment made pursuant to article 101 of the TFEU and article 53 of the EEA Agreement. In principle, the Norwegian Block Exemption Regulation for vertical restraints applies to selective distribution systems irrespective of the nature of the product concerned. However, the characteristics of the distributed product may be relevant to the question of whether to withdraw the block exemption and for assessments of selective distribution arrangements falling outside the block exemption regulation.

35 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 NCA has not adopted a formal position with regard to these questions and future cases must be expected to be resolved with the input from practice under, eg, article 101 of the TFEU and article 53 of the EEA Agreement. In principle, dealers should also be free to sell to all end-users using the internet.

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

The NCA has not adopted any formal decisions in this respect.

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

The NCA interprets the prohibition against vertical restraints in a manner similar to that set out in guidelines and practice from the European Commission and the EFTA Surveillance Authority. The possibility of cumulative restrictive effects is therefore a part of the authority's assessment.

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

The NCA has not adopted any formal decisions or issued any guidance in this respect.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by the European Commission and EFTA Surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and EFTA surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and EFTA surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and EFTA surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and EFTA surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

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

The NCA has not adopted any formal decisions or guidelines in this respect. The assessment made by the NCA under section 10 of the Act will therefore be in line with the assessment made by European Commission and EFTA surveillance Authority under article 101 of the TFEU and article 53 of the EEA Agreement.

45 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 NCA has not adopted any formal decisions or guidelines in this respect.

Notifying agreements

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

The Norwegian Competition Act follows the principle of self-assessment, similar to EU regulation 1/2003. As a consequence, there is no formal procedure for notifying agreements containing vertical restraints and undertakings assume the risk for their own competition law compliance. Undertakings may, of course, submit their agreements to the NCA and thereby potentially trigger a formal investigation. However, lack of intervention by the authority does not imply consent or acceptance, and an investigation leading to a finding of infringement could lead to fines and other sanctions.

Authority guidance

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

The NCA is, first, obliged by section 9 of the Act to provide guidance on both the interpretation of the Act and its application in individual cases. However, the guidance given under section 9 is rarely very specific and often riddled with caveats. In addition to the individual guidance, the NCA publishes on its home page interpretative notices and general guidelines regarding specific competition law issues, which signals how the NCA interprets and applies the law with regard to certain topics. Third, the NCA may offer informal guidance to undertakings and is often more willing to engage with difficult competition law issues in an informal setting. Norwegian courts may address the interpretation and legality under competition law as part of litigation and in that context it is possible to obtain a declaratory judgment on the legality of a specific agreement under competition law.

Complaints procedure for private parties

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

In principle, any party may lodge a complaint with the NCA regarding allegedly unlawful vertical restraints. The NCA has published two different forms for notifying it about allegedly unlawful conduct, one for complaints and one for tip-offs, although neither is compulsory. Tip-offs may be lodged anonymously. There is no formal procedure in place for evaluating complaints or tip-offs. The NCA enjoys wide, discretionary latitude in deciding which cases to follow up and will usually consider carefully its available resources against the likelihood of finding an infringement and the competitive structure of the market in question. Cases that are pursued may be developed with varying levels of urgency, unless special considerations apply. From 1 January 2014, the possibility of having the NCA's dismissal of a complaint reviewed administratively has been restricted significantly.

Enforcement

49 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?

Vertical restraints are rarely dealt with by the NCA. In January 2013, the NCA adopted a guideline regarding resale price maintenance in which it stated that it would give priority to cases where the RPM could lead to reduction in the inter-brand competition. Otherwise the NCA's dealings with cases involving vertical restraints have been limited to decisions dismissing complaints for, eg, lack of resources.

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

It follows from section 10 of the Act that 'any agreements... prohibited pursuant to this section shall be automatically void'. In practice, the agreement as a whole will be void only if the individual clauses that are prohibited cannot be eliminated from the rest of the agreement without disrupting the contractual relationship. Under Norwegian law, courts will conduct an overall assessment of whether the remainder of the agreement can be maintained between the parties or whether the annulment of the prohibited clauses renders the agreement unreasonable or otherwise inoperable between the parties.

51 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 NCA may impose administrative fines directly on infringing undertakings, adopt final and interim cease-and-desist orders and commitment decisions, as well as compel compliance with its decisions by ordering periodic penalty payments. Undertakings may then challenge these sanctions before the courts.

The largest administrative fines so far meted out by the NCA is a cartel decision from 2013 involving two prominent road entrepreneurs sanctioned for a three-year market-sharing and bid-rigging arrangement. The fines totalled 360 million kroner. One party was granted full immunity under the leniency programme and thus avoided a fine of 220 million kroner.

It is difficult to discern a clear trend with regard to the level of fines owing to the specifics of individual cases, but the NCA has previously signalled that it intends to increase the fines over time. The parameters used in setting fines are set out in a regulation. Individuals may also for certain types of infringement face criminal sanctions from the prosecuting authority.

Update and trends

The Act recently underwent extensive revision, and the new amendments to the Act entered into force on 1 January 2014. The aim of the revision was to simplify the regulation by streamlining the processes for both industry players and the NCA, and to further harmonise the Act with legislation in the EU. Among the amendments in the Act are significantly higher filing thresholds for notifications of concentration. Although this is not directly relevant to vertical agreements, these substantial procedural changes in the merger control legislation will have a major practical impact in terms of reducing the number of transactions in which filings are mandatory. The reduced number of merger filings will indeed give the NCA the opportunity to focus more on enforcement of matters relating to section 10 of the Act, including vertical agreements, and more available resources may therefore result in more decisions on vertical agreements in the future.

Another possible change of note is that the Ministry appointed an expert committee in May 2014, whose task was to consider specific solutions in order to establish an independent appellate body specifically for competition law cases. The expert committee should also provide proposals for the necessary legal amendments. The expert committee delivered its recommendations in a report 11 November 2014 (NOU 2014: 11), and the Ministry will submit the report on a hearing imminently. The expert committee proposes the adoption of a new act concerning the Appeals Board for competition cases, as well as amendments to the Act itself. Among the proposals are, for example, a repeal of the Ministry's current powers to set aside a decision of the NCA on political grounds, and that all decisions by the NCA, including those imposing administrative fines, may be appealed to the new Appeals Board.

Investigative powers of the authority

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

When investigating potentially illegal vertical restraints, the NCA may request from any party written or oral information or tangible items (documents, computers) it deems necessary to perform its duties under the Act or fulfil its obligations towards antitrust enforcers in other jurisdictions.

Furthermore, the NCA may conduct unannounced inspections (dawn raids) when authorised by a court finding a 'reasonable suspicion' of an infringement. Such raids may be made at both business properties, private dwellings and other places at which evidence may be obtained. As an important new development, the leniency programme and the possibility of obtaining reduced administrative fines has now been strengthened and enshrined in the Competition Act itself.

The geographical reach of the Act and thus the powers of the NCA are based on the 'effects doctrine', whereby the Act targets infringements that have effects within Norway irrespective of where the infringing parties are domiciled.

STEENSTRUP STORDRANGE

Thomas Sando **thomas.sando@steenstrup.no**
Aksel Joachim Hageler **aksel.hageler@steenstrup.no**

PO Box 1829 Vika
0123 Oslo
Norway

Tel: +47 22 81 45 00
Fax: +47 22 81 45 01
www.steenstrup.no

These investigative powers are, however, subject to various limitations, eg, legal privilege and protection from self-incrimination. The European Convention on Human Rights applies as Norwegian law and takes precedence over conflicting competition law legislation. The investigative powers of the NCA are further delineated in a regulation.

Private enforcement

53 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 enforcement action before Norwegian courts of law is a readily available option for aggrieved parties and the number of such private actions are slowly picking up, with at least two high-profile follow-up actions launched in 2013. Under Norwegian law, possible remedies include damages, interim measures and annulment or enforcement of contractual terms. In principle, it is possible for any party to commence legal action, and legislation has been adopted making it possible for, eg, consumers to launch class action law suits in competition law cases. Recent amendments to the Act also ensure that the period of limitation is extended for one year following a finding of an infringement by the NCA or a court. However, parties to the illegal agreement may find their damages claims – but not, eg, claims for annulment – against each other challenged on the basis that by entering into the illegal agreement in the first place they created or at least contributed to their own losses. In practice, lawsuits commence at the trial court level with the possibility for appeal on both law and fact to the appellate courts. If allowed, final scrutiny is conducted by the Supreme Court. Actions before the trial court may take six months to a year, and sometimes longer, depending on the circumstances of the case and the capacity of the court. A successful party is in principle entitled to recover costs from the unsuccessful party, but the court may reduce the successful litigant's claim or divide the cost between the parties.

Other issues

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

No.

Poland

Dorothy Hansberry-Bieguńska and Małgorzata Krasnodębska-Tomkiel
Hansberry Tomkiel Spk

Antitrust law

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

The Act on Competition and Consumer Protection of 16 February 2007 (the Competition Act) was in force until 18 January 2015, when it was amended. The prohibition of cartels and vertical restraints (article 6 of the Competition Act) covers similar anti-competitive conduct to article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The Competition Act (in article 8) also sets out an exemption to the prohibition of horizontal cartels and certain vertical agreements, similar to article 101(3) of the TFEU.

The following regulations issued by the Council of Ministers support the Competition Act's treatment of vertical restraints:

- the Block exemption for certain vertical agreements (Regulation of the Council of Ministers of 30 March 2011) (the Vertical Regulation);
- the Block exemption for certain transfer agreements (Regulation of the Council of Ministers of 30 July 2007);
- the Block exemption for certain specialisation and R&D agreements (Regulation of the Council of Ministers of 13 of December 2011); and
- the Exemption of certain agreements in the insurance sector (22 of March 2011).

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?

EU and Polish competition law are applicable in Poland. The Competition Act follows EU substantive principles, and its article 6 is modelled upon article 101 of the TFEU. Agreements (or clauses in agreements) that contain or constitute restrictive practices are invalid ab initio in whole or in part. Article 6, which applies both to vertical and horizontal restrictions, prohibits agreements that have as their object or effect the elimination, restriction or any other infringement of competition in the relevant market. Article 6 sets out the following, non-exhaustive list of prohibited practices:

- price fixing (the fixing of purchase or selling prices and other trading conditions);
- tying;
- bid rigging;
- limiting output;
- dividing markets or customers;
- limiting access to the market or eliminating from the market undertakings that are not parties to an agreement; and
- discriminatory trading conditions.

Agreements found to be in violation of article 6 are void in their entirety or in part, subject to articles 7 (the de minimis exemption) and 8 (rule of reason defence and block exemptions) of the Competition Act.

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?

The objective of the Competition Act, including its prohibition of anti-competitive vertical agreements, is the protection of competition and consumers. The Office for the Protection of Competition and Consumers (the OPCC) acts in the public interest and not in any others.

Responsible authorities

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

The chair of the OPCC is responsible for enforcing the Competition Act and, since 1 May 2004, has been authorised to conduct investigations pursuant to article 101(1) of the TFEU if a suspected violation affects trade between member states.

The OPCC is a central administrative body, whose headquarters in Warsaw is supported by nine regional branches that conduct local investigations and issue decisions on behalf of the chair.

Before June 2007, the OPCC chair was selected through a competition process for a five-year term. An amendment dated 20 June 2007, however, dispensed with the competitive selection and empowered the prime minister to select and dismiss the chair. Another amendment dated 24 March 2009 clarified the selection and eligibility requirements for candidates.

Given the Prime Minister's power to dismiss the chair, the OPCC can no longer be considered a truly independent agency.

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?

The Competition Act applies to anti-competitive agreements or arrangements, such as vertical restraints, between undertakings if such conduct has or could have an effect in Poland, regardless of where the illegal conduct occurred.

Agreements concluded by public entities

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

Prior to the Competition Act amendment that came into force on 18 January 2015, the Competition Act applied solely to the conduct of undertakings. The Act's definition of an 'undertaking' has a broad meaning and includes natural and legal persons that carry out an economic activity in their own names. Public companies and state-owned companies that conduct economic activity in their own names are considered undertakings for the purposes of the application of the Competition Act. The amendment broadened the reach of the Competition Act by the introduction of individual liability of managers for conduct in violation of article 6, which prohibits certain vertical and horizontal restraints.

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.

As set out in question 1, the Council of Ministers has issued four regulations applicable to an assessment of vertical restraints. Only one, the Exemption of certain agreements in the insurance sector, concerns a specific industry.

General exceptions

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

The Competition Act contains a de minimis test. Under this test, the general prohibition on anti-competitive vertical agreements does not apply to agreements between undertakings acting at different levels of the economic chain if the market share of each of them in the calendar year preceding the conclusion of the agreement does not exceed 10 per cent.

It is important to note that the de minimis exclusion explicitly does not apply to horizontal or vertical agreements aimed at fixing prices (directly or indirectly) or any other conditions of purchase or sale of products, limiting or controlling production, supply, technical development or investments, market division or collusive agreements between bidders in a tender.

Agreements

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

Article 4(5) of the Competition Act specifically defines an agreement as:

- an agreement between undertakings, between associations thereof and between undertakings and their associations, or certain provisions of such agreements;
- a concerted practice undertaken in any form by two or more undertakings or associations thereof; and
- a resolution or other acts of associations of undertakings or their statutory organs.

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?

There is no requirement that an agreement be in writing in order for it to be found to violate the Competition Act. Evidence supporting the establishment of an informal or unwritten understanding is sufficient.

Whereas it is rare to find written agreements among competitors in horizontal restraints cases, it is not unusual to find written agreements, emails and other forms of correspondence between producers and distributors evidencing a vertical restraint. In many decisions of the OPCC chair finding the existence of a vertical restraint, there has been written evidence to prove the charge.

Parent and related-company agreements

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

As long as companies belong to the same capital group, the vertical restraints rules do not apply to agreements between or among them. The definition of a capital group, set out in article 4(14) of the Competition Act, is a group of 'all undertakings directly or indirectly controlled by another undertaking, including that undertaking'.

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?

The Competition Act does not directly regulate whether, or in what way, an agency agreement falls within its prohibition of vertical restraints. In considering such an issue, the OPCC would likely look to European Commission Notice, Regulation (EU) No 330/2010, the Block Exemption Regulation (BER), which provides a safe harbour for many vertical agreements. The BER renders, by block exemption, the prohibition of article 101(1) TFEU inapplicable to vertical agreements that fulfil certain requirements. Under the BER, genuine agency agreements, do not fall within the scope of application of article 101 TFEU. Non-genuine agency agreements are examined under the Competition Act, using the same test as that applicable to the assessment of all vertical agreements (see question 15 for an explanation of the approach to vertical restraints analysis).

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?

There are no guidelines or specific rules on what constitutes an agent–principal relationship. As explained in question 12, the OPCC would likely follow the EU Vertical Guidelines if it were to consider such an issue.

Intellectual property rights

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

Section 7.1 of the Vertical Regulation specifically refers to its coverage of agreements with provisions concerning the grant of intellectual property rights upon the conditions that such provisions:

- are not a primary subject-matter of such agreements; and
- are directly related to the use, sale or resale of goods covered by the agreement by a buyer or its customers.

If the section 7.1 conditions are not met, the assessment of the legal compliance of such an agreement can be made pursuant to the block exemption for certain technology transfer agreements (Regulation of the Council of Ministers of 30 July 2007).

Analytical framework for assessment

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

In an investigation, the OPCC will collect evidence and first assess whether it has jurisdiction. To establish this element, the OPCC will determine whether the investigated practice has an effect in the Territory of Poland. If that is established, it will assess:

- the market shares of the parties to the agreement or conduct;
- whether the de minimis exemption of article 7 of the Competition Act is applicable; if not
- whether any of the four exemption regulations listed in question 1 is applicable; if not
- the evidence supporting the compliance or lack thereof of an alleged illegal agreement or conduct;
- the effect, if any, of the alleged illegal agreement or conduct;
- whether a rule-of-reason defence, if one is advanced by a party, fulfils the requirements for such a defence, set out in article 8 of the Competition Act; and
- the appropriate level of a fine, if one is to be issued.

In deciding upon the level of a fine, the OPCC chair follows the Competition Act's fine provisions as well as its Fine Guidelines of 1 January 2009.

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?

The market shares of a supplier and distributor are relevant during an investigation of alleged vertical restraints. The market shares of parties to an agreement will be determinative in the OPCC's assessment of whether:

- the Vertical Regulation or any of the other regulations listed in question 1 are applicable;
- the de minimis exemption of article 7 of the Competition Act is applicable;
- the alleged vertical restraint has led to an abuse of dominance by one

or more of the parties to an agreement; and
- the level of a fine, should one be imposed, is appropriate.

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?

See question 16.

Block exemption and safe harbour

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

Although Poland's Vertical Regulation for the most part follows the EU Vertical Regulation, it differs from the EU Vertical Regulation in that it does not provide the OPCC chair with the right to withdraw the benefit of the block exemption in individual cases. The inability of the OPCC chair to withdraw the exemption gives certainty to companies that fulfil the exemption requirements of the Vertical Regulation. As a result, the exemption should be available if the market share (including the shares of the parties' respective groups in the relevant markets) of each party is below 30 per cent and there is no alleged violation of any of the Vertical Regulation's hard-core restrictions, such as resale price maintenance.

Types of restraint

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

To date, fixing resale prices within a distribution network is the most common vertical practice sanctioned by the OPCC. EU standards apply to the assessment of the nature of imposed prices – it is absolutely prohibited to impose minimum and rigid prices, whereas within the framework of available exemptions, it is acceptable to apply maximum prices or to recommend prices. During its proceedings, the OPCC routinely examines the real nature of the resale price and not just its name (eg, the OPCC may assess a suggested price or a maximum price as in fact an imposed rigid price in a situation in which the organiser of the distribution system enforces compliance in the charging of the 'suggested' price by distributors).

In its Decision No. RLU-24/2014, the OPCC fined the cosmetics producer Inglot-RSC for imposing rigid prices to be charged on its wholesale distributors in the wholesalers' sales of a wide range of cosmetics and toiletries.

The Tutek Company, a manufacturer of baby carriages, was fined for imposing minimum retail prices at online stores and auction sites. Distributors who did not follow the minimum pricing arrangement were threatened with termination of the supply contract (RLU-25/2014).

In its Decision No. DOK-7/2013, the OPCC found an agreement between Sport & Freizeit and its distributors of the Fischer brand sporting equipment and accessories, including Intersport Poland, to be illegal as it amounted to an agreement on minimum retail prices.

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'?

To our knowledge, there are no such decisions of the OPCC chair.

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

The chair of the OPCC issued a number of decisions between 2006 and 2009, finding resale price maintenance between paint producers and various do-it-yourself (DIY) retail stores. These decisions referred to the horizontal pricing effect among the DIY stores that did not result from any direct communications among the DIYs but from the agreements reached by the respective DIY stores with a number of paint suppliers.

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

We are not aware of any such decisions to date concerning a vertical restraint in the described context. In a horizontal restraint case, however, the OPCC did consider the efficiencies that were argued to have existed (RKT-32/2011 *Flisacy Pienińscy*).

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.

We are not aware of any decision of the OPCC chair on this type of matter.

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.

Depending upon the facts of a case, such a wholesale MFN could be considered by the OPCC as a violation of article 6 of the Competition Act or article 101 TFEU. If a MFN is not justified by, for example, a buyer's high volume of purchases, payment terms or by other objective conditions demonstrating the buyer's dissimilarity compared with other buyers, it can constitute a case of discrimination if other similarly situated buyers have not been granted similar terms. The practice could be considered in compliance with the law under the Vertical Regulation if both the supplier and the buyer had market shares of less than 30 per cent.

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.

In the Tutek baby carriages case, the producer requested that distributors refrain from selling its baby carriages out of the largest Polish online sales service, Allegro, as well as other online stores at prices lower than those shown on the producer's website. The punishment for not complying with the producer's recommendations was contract termination. The producer was penalised for imposing minimum prices.

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.

We are not aware of any OPCC decision on this issue.

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.

Please see the answer to question 24. The principles described in the answer to question 24 would in all likelihood apply to the situation described in this question.

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?

The Vertical Regulation does not exempt agreements or arrangements that have the aim or effect of restricting the territory where or a group of customers to which a buyer may sell contract goods. Article 11(2), however, sets out the exceptions to this prohibition, which are:

[T]he territory or group of customers, where or to which a buyer may sell goods covered by a vertical agreement:
- *a) regarding the premises or area where a buyer conducts its business activity,*
- *b) active sale to a specific territory or a specific group of customers reserved for a supplier or assigned by a supplier to another buyer, if those restrictions do not prevent the buyer's customers from selling goods covered by a vertical agreement,*
- *c) sales to end-users by a wholesale distributor,*

d) with regard to distributors operating under the selective distribution system – of resale of goods covered by a vertical agreement to distributors not belonging to that system, in a territory where a supplier conducts its business activity or has taken measures proving that it intends to conduct a business activity under that system, and

e) of the right of a buyer to resell components covered by a vertical agreement to other undertakings which would use them to manufacture goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for goods being sold by a supplier.

29 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?

See question 28.

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

We are not aware of any decision issued by the OPCC in which it has assessed this type of situation.

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

An example of an OPCC approach to constraints in online sales is the decision (discussed in questions 19 and 25) in the *Tutek Company* baby carriages case.

Other examples of this type of decision date back to 2011. In the decision concerning Rational, a producer of convection steam ovens and accessories (RPZ-39/2011), the OPCC found that the company had violated the Competition Act by compelling its distributors to apply publicly accessible offers (on websites, online auctions and printed materials and at fairs and presentations) of maximum rebates amounting to 15 per cent of the catalogue price and thus, in this manner, actually fixing minimum resale prices of its products.

A similar decision issued during the same period concerned Roland Polska, an official Polish distributor of Roland, Boss, Rodgers and Cakewalk musical equipment and accessories (DOK-13/2011). The fixing of minimum prices of the products for online sales was found to be illegal.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

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

The Vertical Regulation's exemption covers vertical agreements, including those establishing selective distribution systems, provided that such agreements fulfil the Regulation's exemption conditions.

A selective distribution system is defined by section 3(5) of the Vertical Regulation as a distribution system in which 'a supplier, directly or indirectly, commits himself to sell goods covered by a vertical agreement exclusively to distributors selected according to criteria specified in that agreement and distributors commit themselves not to resell those goods to distributors not belonging to that system in the territory where a supplier conducts business activity or has taken measures proving that this entity intends to conduct business activity within this system'.

article 11(3) and (4) specifically prohibit the following restrictions of distributors in a selective distribution system:

- the ability of distributors to sell to end-users (this particular restriction, however, will be permitted if it concerns sales by distributors from premises that do not meet the criteria of the vertical agreement that is the basis for establishing the selective distribution system); and
- cross-supply between distributors, including distributors operating at various levels of trade.

34 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?

No.

35 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?

Please see question 31.

36 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?

To our knowledge, the OPCC has not issued such a decision since 2004, when the chair fined Fiat Auto Poland for imposing upon its selective distribution system distributors a total ban on reselling cars to entities that were not end-users

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

To our knowledge, the OPCC has not done so to date.

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

To our knowledge, the OPCC has not done so to date.

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

If the market shares of both the supplier and the buyer do not exceed 30 per cent , the restriction may be subject to the Vertical Regulation exemption.

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

We are not aware of any decision of the chair of the OPCC concerning such a restriction.

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

article 12(2) of the Vertical Regulation prohibits a direct or indirect requirement that distributors in a selective distribution system can sell the goods of only certain competitors of a supplier.

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

First, an assessment must be made whether such a requirement can be considered as a non-compete provision. Section 3(12) of the Vertical Regulation defines a 'non-compete' provision as that 'resulting directly or indirectly from a vertical agreement':

- exclusion of a buyer's rights to manufacture, purchase, sell or resell goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for goods covered by a vertical agreement; and
- obligation of a buyer to make, at a specific supplier or undertakings indicated by it, more than 80 per cent of all purchases of goods covered by a vertical agreement and of goods which, due to their purpose, price and properties, including the quality, are regarded by their buyers as substitutes for those goods, calculated on a basis of the value or, should it be accepted in the specific relevant market – of the volume of purchases made by a buyer in a previous calendar year.

If a supplier's requirement fulfils the conditions of article 3(12), it is necessary to consider the time during which such a requirement is valid as article

12(1) of the Vertical Regulation prohibits such requirements that are for an indefinite period or for longer than five years.

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

Under the Vertical Regulation, this restriction may be exempt from being in violation of the prohibition of anti-competitive agreements provided that each of the market shares in the relevant market of the buyer and of the supplier, including their capital groups, do not exceed 30 per cent the relevant market. If the market share of either exceeds 30 per cent, the agreement must be carefully analysed from the perspective of its economic impact.

However, section 11(5) of the Vertical Regulation forbids a restriction of a supplier's right to sell components to products that are the object of the contract as spare parts to end-users, repair outlets or other service providers to whom the buyer did not entrust repairs or service of the goods manufactured with the use of these components.

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

Please see question 43.

45 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?

Not to our knowledge.

Notifying agreements

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

There are no formal procedures for notifying the OPCC about agreements containing vertical restraints. Moreover, there is no practice of informing the OPCC about such agreements. Similar to the EU competition rules, parties must self-assess whether an agreement is in compliance with the Competition Act.

Antimonopoly proceedings opened by the OPCC to investigate an alleged vertical restraint typically last more than a year. In the event that the chair of the OPCC finds that an agreement violates the Competition Act, he or she will issue a decision at the close of an antimonopoly investigation. The practice to date is that the chair's decisions are reasoned and set out the facts, the parties' positions, the evidence and legal basis for arriving at the conclusion underlying the chair's decision. Customarily, if a decision is that the agreement violates the Competition Act, the parties to the agreement will be fined.

Authority guidance

47 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?

As explained in question 46, there are no formal procedures or informal practices for obtaining guidance on the legal compliance of a contemplated or executed agreement.

Complaints procedure for private parties

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

The only way in which an investigation (other than a merger investigation) can be launched is by the OPCC chair on an ex officio basis. Under article 86 of the Competition Act, a party can only file a complaint with the OPCC chair describing suspected anti-competitive conduct. Such a complaint is referred to as a 'notification', and it is not binding upon the OPCC chair to take action. The OPCC chair must, however, inform a complainant of the OPCC's position on the notification within a two-month period. In the event that the OPCC chair informs a complainant that the OPCC will initiate an investigation, the complainant will not be a party. In other words, the complainant has no right to be heard, has no access to the case files, and cannot appeal a decision issued by the OPCC chair. If the OPCC chair decides not to open an investigation based upon a notification, a complainant has no right to appeal.

Enforcement

49 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?

Annually, the OPCC chair issues approximately 100 antitrust decisions and usually, several of them concern verticals. In 2014, the OCCP chair issued 13 such decisions.

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

Under article 6(2) of the Competition Act, anti-competitive agreements, including anti-competitive vertical agreements, are null and void in their entirety or in relevant part. Nullity is unconditional and takes effect from the moment of executing the illegal agreement and pertains to the entire agreement or to the relevant clause, if that clause can be separated from the agreement. The OPCC chair is not authorised to decide whether an entire agreement is invalid or only a part thereof. Competencies in this respect are reserved for the common courts.

Agreements containing prohibited vertical restraints and found to be in violation of article 6 are void in their entirety or in part, subject to articles 7 (the de minimis exemption) and 8 (rule-of-reason defence and block exemptions) of the Competition Act.

51 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?

Article 106(1) of the Competition Act empowers the OPCC chair to impose an administrative fine on an undertaking being party to vertical or horizontal anti-competitive conduct of up to 10 per cent of the gross revenue earned by the undertaking in the accounting year preceding the year in which the fine was imposed. Fines are set as a percentage of an undertaking's turnover and are not limited to a percentage of the value of an undertaking's turnover affected by the illegal conduct.

The amended Competition Act, in force from 18 January 2015, now empowers the OPCC chair to sanction individuals engaging in horizontal or vertical violations of article 6 by the imposition of a fine of up to €500,000.

article 106(2) empowers the OPCC chair to issue a decision imposing an administrative fine in an amount of up to the Polish equivalent of €50 million if an undertaking – even unintentionally – does not provide information requested by the OPCC, provides false or misleading information in response to an OPCC request, or does not cooperate during a dawn raid. A person who holds a managerial position or is a member of a management board may be fined for the same offences as those listed above in an amount up to 50 times the average monthly salary.

The OPCC's guidelines for setting fines in competition cases (the fines guidelines) have been in force since 1 January 2009. The fines guidelines distinguish three types of violation: very severe, severe and 'other' violations. They also describe a formula for setting a base amount and outline factors that the OPCC chair will consider as being mitigating or aggravating, and that thus influence the level of a fine. The guidelines are not legally binding upon the OPCC, but the chair has announced that the office will follow them.

Investigative powers of the authority

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

Investigations of both vertical and horizontal restraints, referred to as 'antimonopoly proceedings', may only be instituted ex officio by the OPCC. In most cases, investigations begin with 'explanatory proceedings', in which there are no formal parties. The purpose of such proceedings is for the

Update and trends

The amendments to the Competition Act have been in force since 18 January 2015. A number of the amendments concern the investigation, treatment and substance of anti-competitive vertical agreements.

Individual liability and leniency
An individual may be fined up to the equivalent of €500,000 for being involved in a horizontal cartel or for taking part in an illegal vertical agreement. Individuals may now apply for leniency for taking part in a cartel or an illegal vertical agreement. Prior to the amendment, only undertakings could be liable for a violation of article 6 and seek leniency under the Competition Act.

Confidentiality of leniency materials
If any material submitted by a leniency applicant includes business secrets, such information is deemed confidential and not disclosable. Under the amendment, parties continue to be permitted to read the leniency evidence at the close of an investigation, but would be prohibited from making copies of the evidence without the written permission of the leniency applicant. A breach of this rule subject to a fine of up 20,000 zlotys.

Ceasing involvement in a cartel
An applicant who has not withdrawn from participation in the agreement prior to filing the application is required to withdraw from it immediately after filing (article 113a(6)).

Leniency plus
A further amendment introduced a leniency plus programme under which an undertaking or an individual may bring evidence of illegal activity in a second market to the OPCC chair in exchange for leniency with respect to that conduct and a further reduction in the fine in the first investigation.

OPCC to determine whether a violation of the Competition Act has taken place that would justify opening antimonopoly proceedings. Explanatory proceedings are supposed to last for four months – and certainly no longer than five months for complicated cases – but in practice often last for several months.

A company or an individual (in matters involving a possible violation of article 6 of the Competition Act) is notified by the OPCC when it is the subject, and thus a party, to an antimonopoly investigation. The requirements of such a notification are extremely broad. Usually, a notification is limited to an announcement that an undertaking is suspected of having violated the Competition Act by, for instance, engaging in vertical or horizontal price fixing in a certain industry for a specific period.

During its investigations, the OPCC issues to parties and industry players formal requests for information and documents. The OPCC rarely interviews witnesses, other than during a dawn raid. Although article 60 of the Competition Act supports the examination of witnesses in a hearing at which other parties may be present (and during which no business secrets may be disclosed), the OPCC has conducted such hearings infrequently.

Parties have a right of access to the OPCC's case files throughout an antimonopoly investigation. Thus, they can read and copy a complaint, any written queries and demands of the OPCC to parties and industry players, and the responses and material submitted. Case files do not include references in the responses of undertakings that are considered business secrets.

Leniency is available to undertakings or individuals who have entered into an illegal vertical or horizontal agreement, but only at the close of an investigation are submissions of leniency applicants available for inspection by other parties. If any material submitted by a leniency applicant includes business secrets, that information is deemed confidential and is not disclosed to any party other than the OPCC.

Once an investigation is officially closed, the OPCC formally notifies the parties of such closure, invites them to review the case files and – if a party wishes – to submit its written position on the pending charges and case file evidence. The charges are often unchanged from the general language used at the outset of the investigation. There are no statements of objections.

After the parties' positions on the charges and evidence have been submitted, the OPCC chair issues a decision setting out his or her findings. If the OPCC chair ascertains a violation of the Competition Act, he or she has the authority to impose a fine upon the parties charged.

Although anti-monopoly investigations should take no longer than five months, pursuant to article 92 of the Competition Act they can be extended by the OPCC, and most often take at least a year to complete.

Private enforcement

53 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?

Only the OPCC chair can enforce the Competition Act through administrative proceedings. Although an injured party can file a civil claim to declare conduct to be in violation of the competition law and to be awarded damages, there are no specific regulations or acts in Polish law that regulate private antitrust actions. The legal means by which private litigants can and have filed civil actions alleging anti-competitive conduct are by using the Civil Code, the Unfair Competition Act or the Act on Pursuing Claims in Group Proceeding (as a member of a class). To claim damages, a civil plaintiff (either an individual or an entrepreneur) has the option of filing a claim pursuant to the following:

- article 405 of the Civil Code, which requires the return of an undue benefit when the economic benefit was obtained at the expense of another;
- article 415 of the Civil Code, which requires the redress of damages based upon tort liability and provides that whoever by his or her fault caused damage to another person shall be obliged to redress it; and
- article 471 of the Civil Code, which addresses damages due to the failure to perform or due to the improper performance of a contract.

HANSBERRY TOMKIEL

Dorothy Hansberry-Bieguńska **dorothy@hansberrytomkiel.com**
Małgorzata Krasnodębska-Tomkiel **malgorzata@hansberrytomkiel.com**

ul Złota 59
00-120 Warsaw
Poland

Tel: +48 22 222 46 57
Fax: +48 607 400 41
www.hansberrytomkiel.com

Private damage claims are calculated on the basis of the principle of full compensation. Plaintiffs can sue for damage claims and claims to return unjust profits derived from the illegal conduct. Damages should cover actually incurred costs rather than be a means of enrichment of a plaintiff. Damages include both actual losses as well as the loss of future and certain profits. An injured party has the discretion whether to sue for a monetary award or for the restoration of pre-infringement conditions. As awards for damages are based upon the civil law's general structure of liability, a plaintiff must show the loss that results from the infringement, its amount, the defendant's guilt and their nexus.

Other issues

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

Leniency is available for both individuals and undertakings involved in a vertical restraint in violation of article 6 of the Competition Act.

The Competition Act provides that the leniency procedure is applicable to violations of article 6 of the Act or article 81 of the EC Treaty (now article 101 of the TFEU). Consequently, a vertical agreement in violation of the Competition Act or article 101 TFEU can be subject to a leniency application. To date, the majority of cases investigated in accordance with the leniency procedure have involved vertical agreements. In some decisions, the OPCC chair found that vertical agreements had a horizontal effect.

The legal basis and a description of how to file a leniency application can be found in article 113a to 113j of the Competition Act, as well as in the Council of Ministers' Leniency Regulation of 26 January 2009 (the Leniency Regulation) and the OPCC's 2009 Leniency Guidelines.

Pursuant to the 2015 amended Competition Act, a leniency applicant must meet the requirements of article 113a of the Competition Act and follow the procedures set out in the Leniency Regulation and the OPCC's Leniency Guidelines. To qualify for a full waiver, an undertaking must be the first applicant to submit a motion demonstrating that it did not coerce others into taking part in the cartel, and that its motion contains evidence that is sufficient to render it possible for the OPCC chair to either open an antitrust investigation or contribute significantly towards issuing a decision charging a cartel. If, however, the first leniency applicant cannot show that it did not coerce others into taking part in the cartel, it will be eligible only for a reduction of a fine and not for a full waiver.

Regardless of whether the first applicant is eligible for a full waiver of a fine, the second and subsequent leniency applicants will not be eligible for a full waiver of a fine, but rather may benefit from a reduction in any fines imposed as long as they provide the OPCC with evidence that will significantly contribute to a final decision and declare that they have ceased their participation in the cartel.

Regardless of whether the first applicant is eligible for a full waiver of a fine, the second and subsequent leniency applicants will not be eligible for such, but rather may benefit from a reduction in any fines imposed as long as they provide the OPCC with evidence that will significantly contribute to a final decision and declare that they have ceased their participation in the cartel at the time of filing their leniency motions.

Each applicant, no matter what place he or she holds in the leniency queue, must cooperate fully with the OPCC chair during the investigatory proceedings in order to be granted leniency at the close of the investigation.

Portugal

Joana Gomes dos Santos
Caiado Guerreiro & Associados

Antitrust law

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

The main legal source on antitrust law, including vertical agreements, is Law No. 19/2012 of 8 May 2012, known as the Competition Legal Regime.

Another important source of competition law are the decisions and regulations issued by the national competition authority, the Autoridade da Concorrência (the AdC). The decisions of the Courts of Commerce, of the Competition, Regulation and Supervision Court and higher courts (Courts of Appeal and the Supreme Court of Justice) are also important in understanding such laws and regulations.

Decree-law No. 125/2014 of 18 August 2014 should also be taken into consideration, since it approved the new statutes of the AdC, setting out its duties and powers.

The relevant regulations issued by the AdC are:

- Regulation No. 9/2005 of 3 February 2005, which establishes the procedure for the prior analysis of agreements, decisions and practices to grant negative clearance or individual exemptions;
- Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure; and
- Regulation No. 60/2013 of 14 February 2013, which approves the notification form of merger operations.

Of particular relevance for vertical restraints is Decree-law No. 166/2013 of 27 December 2013, regarding abusive economic practices.

Additionally, the Portuguese Republic's Constitution establishes that one of the main duties of the state is to assure the efficient functioning of the markets, in order to guarantee balanced competition between undertakings, to counteract monopolistic organisations and to repress abuse of dominant position and other practices deemed harmful to the general interest.

Other legislation that may be relevant for competition purposes, although not its prime object includes:

- Decree-law No. 433/82 of 27 October 1982 (which approves the general regime on administrative offences), applicable on a subsidiary basis to the administrative procedure on anti-competitive agreements, decisions and practices, and to the judicial review of sanctioning decisions; and
- the Code of Administrative Procedure, since the general principles for administrative action are also applicable to sanctioning procedures under the Competition Legal Regime.

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 concept of vertical restraint is not specifically defined in antitrust law, being included in the concept of forbidden or abusive practices.

Similarly to what happens under EU law, the Competition Legal Regime prohibits (except when considered justified) agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, whose object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, in particular those that:

- directly or indirectly set purchase or selling prices or any other conditions of the transaction;
- limit or control production, distribution, technical development or investments;
- share out markets or sources of supply;
- apply to commercial partners different conditions for equivalent transactions, thereby placing them at a disadvantage towards competitors; or
- subject the execution of contracts to the acceptance of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Furthermore, the Competition Legal Regime prohibits the abusive exploitation, by one or more companies, of a dominant position in the national market or in a substantial part thereof. The following practices may be considered abusive:

- directly or indirectly setting purchase or selling prices or any other conditions of the transaction;
- limiting or controlling production, distribution, technical development or investments;
- applying to commercial partners different conditions for equivalent transactions, thereby placing them at a disadvantage towards competitors;
- subjecting the execution of contracts to the acceptance of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts; and
- refusing to grant, against appropriate payment, any other undertaking access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, unless the dominant undertaking can demonstrate that such access is not reasonably possible for operational or other reasons.

Similar to abuse of dominant position is abuse of economic dependency, which is also forbidden. In fact, insofar as it may affect the functioning of the market or the structure of competition, undertakings are forbidden from engaging in the abusive exploitation of the economic dependence of any supplier or client on account of the absence of an equivalent alternative.

In particular, the following may be considered abusive:

- any of the above stated practices, except for refusal of access to an essential network or infrastructure; and
- the unjustified termination, total or partial, of an established commercial relationship, considering the prior commercial relations, the recognised usage in that area of economic activity and the contractual conditions established.

For the purposes of the above, an undertaking is understood as having no equivalent alternative when:

- the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
- the undertaking cannot obtain identical conditions from other commercial partners in a reasonable space of time.

Aside from this, the AdC and the Portuguese courts apply EU regulations that define and regulate vertical agreements (in particular Regulation No. 330/2010, the Vertical Block Exemption Regulation).

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?

Although one of main concerns is related to economic objectives, consumer protection is always present. In fact, some prohibited practices are considered justified when they contribute to improving the production or distribution of goods and services or promoting technical or economic development, provided that, they cumulatively:

- offer the users of such goods or services a fair part of the benefit arising therefrom;
- do not impose on the undertakings in question any restrictions that are not indispensable to attaining such objectives; and
- do not grant such undertakings the opportunity to restrict competition in a substantial part of the goods or services market in question.

Decree-law No. 166/2013 aims not only to avoid practices that distort competition but also individual practices whose effect is not so significant but which are less transparent. The rules established by this law also protect small businesses and are relevant to vertical agreements.

This law forbids an economic agent to prohibit another from selling at a lower price, from applying different prices or sale conditions, as well as sales at a loss.

Responsible authorities

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

The main authority responsible for enforcing prohibitions of anti-competitive vertical restraints is the AdC, the Portuguese competition authority. The decisions of the AdC are subject to appeal to the Competition, Regulation and Supervision Court.

In the case of merger operations in a sector that is regulated (such as telecommunications), the AdC should consult the regulator of that sector, which should issue its advice.

In the case of practices leading to a distortion of competition in a regulated sector, the AdC also requires the opinion of the relevant authority.

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?

Portuguese competition law is deemed applicable to practices that restrict competition, including vertical restraints, that take place in Portuguese territory or that may produce effects in the same. This means that foreign undertakings that act directly in Portugal are subject to antitrust legislation.

However, we are not aware of any decision of the AdC that has been applied extraterritorially or that has applied antitrust rules in a pure internet context.

As for Decree-law 166/2013 (which regulates other abusive economic practices), it applies only to companies established in Portugal.

Agreements concluded by public entities

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

Competition law is also applicable to the public sector. Public undertakings and those to which the state has granted special or exclusive rights are covered by the provisions of the Competition Legal Regime. In fact, several professional associations, such as the medical, dentist and veterinary associations, have been convicted for restricting competition when establishing the minimum and maximum prices that should be applied by their members.

We have no knowledge of decisions that have been made public at the time of writing regarding agreements entered into between or with public entities.

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.

No.

General exceptions

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

The EU Regulation applies directly and there is no Portuguese rule on this matter.

However, and as mentioned in question 3, some prohibited practices may be considered justified by the AdC.

Agreements

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

There is no definition of 'agreement' in the Competition Legal Regime or in the applicable regulations. Therefore the general understanding of agreement is applicable: any form of cooperation, even informal, oral or written, voluntary or binding, express or implied.

Additionally, it should be noted that the concept of prohibited practices includes not only agreements, but also decisions of undertakings and concerted practices between undertakings, whatever form they take, whose object or effect is appreciably to prevent, distort or restrict competition in the whole or part of the national market.

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?

As mentioned in question 9, the concept of agreement includes informal and unwritten understandings. This means that any type of understanding considered a prohibited practice (therefore aiming at distorting or restricting competition) falls under the relevant antitrust rules. However, since vertical agreements are mainly distribution agreements it is difficult (but possible nonetheless) to establish proof of vertical restraints in the absence of a written agreement and we have no knowledge of any decision of the AdC regarding unwritten understandings that represent vertical restraints.

Parent and related-company agreements

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

For the purposes of the Competition Legal Regime, an undertaking is considered to be any entity exercising an economic activity that consists of the supply of goods and services in a particular market, irrespective of its legal status or the way in which it functions. In fact, a group of undertakings is considered as a single undertaking if, though legally distinct, they make up an economic unit or maintain ties of interdependence or subordination among themselves arising from the rights or powers of disposing, directly or indirectly, jointly or separately of:

- a majority holding in the share capital;
- more than half the votes;
- the ability to nominate more than half the members of the management or supervisory bodies; and
- the power to manage the undertaking's business.

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?

Antitrust law is applicable where such agreement falls under the definition of prohibited practices, since there are no specific rules in Portugal for vertical agreements. A vertical agreement whose object or effect would be preventing, distorting or restricting competition would be considered a prohibited practice.

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?

The rules that regulate an agent–principal relationship are mainly contained in the Agency Law (Decree-law No. 178/86 of 3 July 1986, as amended by Decree-law No. 118/93 of 13 April 1993). However, such law does not focus on antitrust and does not contain any provisions on this matter.

Intellectual property rights

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

Portuguese antitrust law regards only the effects of the agreement (affecting competition). Whether IPRs are involved, such as the buyer being permitted to use the supplier's trademark, is not relevant per se for competition purposes, including vertical restraints.

Analytical framework for assessment

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

When assessing vertical restraints, under Portuguese law the steps to be followed do not differ significantly from the steps to be taken when assessing other types of agreements potentially violating competition rules.

Hence the first step is to determine the relevant product and geographic market where the involved undertakings act and the market share of each. The second step concerns the effects of the agreement at an antitrust level, namely if they prevent, distort or restrict competition in the whole or a part of the national market.

Since the Portuguese Competition Authority follows the EU regulations and guidelines on vertical agreements, such effects concern mainly:

- foreclosure of other suppliers or other buyers by raising barriers to entry in the relevant market;
- reduction of inter-brand competition between the companies operating on a market;
- reduction of inter-brand competition between distributors; and
- limitations on the freedom of consumers to purchase goods or services.

Restrictions on competition may also result from the abuse of a dominant position or the abuse of the economic dependency of the supplier or client (because, for example, they do not have a viable alternative; this happens when the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings, and when the undertaking cannot obtain identical conditions from other commercial partners within a reasonable period of time).

The third step would be to verify if such practices (except in the case of abuse of dominant position or of economic dependency) can be justified under article 10 of the Competition Legal Regime, namely if the agreement contributes to improving the production or distribution of goods and services or promoting technical or economic development, provided that, cumulatively, it:

- offers the users of such goods or services a fair part of the benefit arising therefrom;
- does not impose on the undertakings in question any restrictions that are not indispensable to attain such objectives; and
- does not grant such undertakings the opportunity to restrict competition in a substantial part of the goods or services market in question.

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?

Although market shares are essentially relevant for merger purposes, supplier market shares are also relevant for the purposes of determining if such supplier is acting with abuse of dominant position or abuse of economic dependency of the buyer.

According to the Competition Law (revoked by the recent Competition Legal Regime) an undertaking is deemed to have a dominant position in the market for a particular good or service in the following situations:

- an undertaking that is active in a market in which it faces no significant competition or in which it predominates over its competitors; or
- two or more undertakings that act in concert in a market in which they face no significant competition or in which they predominate over third parties.

However, the new Competition Legal Regime no longer has such provision, although authorities are likely to hold this reference in future cases.

The conduct of other suppliers may be relevant for the definition of abuse of economic dependency since such dependency exists when the other party does not have an alternative to contracting. Such absence of alternative is deemed to exist when:

- the supply of the good or service in question, in particular that of distribution, is provided by a restricted number of undertakings; and
- the undertaking cannot obtain identical conditions from other commercial partners within a reasonable period of time.

Otherwise the conduct of other suppliers is not relevant nor is it relevant if certain types of restriction are widely used by suppliers in the market.

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?

As in question 16, aside from merger situations, market shares are relevant for determining if there is a dominant position in the relevant market or if the other party is in an economically dependent situation.

Block exemption and safe harbour

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

Aside from what is established in EU regulations and guidelines that apply directly in Portugal, there is no such block exemption or safe harbour.

Types of restraint

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

Since the direct or indirect determination of prices is considered a forbidden practice, it is considered unlawful under competition rules to determine the resale price or the minimum resale price of the products as well as any limitation to the buyer's free will to sell the products.

In July 2012, the AdC fined Lactogal €341,098 for practices that were considered harmful to competition in the dairy products distribution and commercialisation market. The AdC considered that the determination by Lactogal of minimum resale prices of its products through trade channels (HORECA – the hotel, restaurant and catering sector), as well as of the commercialisation margins and other direct or indirect remuneration of its distributors, to be harmful. Lactogal had entered into 59 distribution agreements with 55 distributors who were obliged to respect the resale prices and margins predetermined by Lactogal.

Lactogal's interference in the determination of prices by the free market rules amounted to a breach of the competition rules, since its purpose was to prevent, restrict or distort competition.

This decision, including the amount of the fine, was fully confirmed by the Competition, Regulation and Supervision Court in May 2013, which

considered that Lactogal breached the competition rules and that its actions were a vertical constraint of competition.

Recently, in January 2014, following the appeal filed by Lactogal, the Lisbon Court of Appeal also fully confirmed the decision of the AdC and the amount of the fine.

Any other practices that limit the full functioning of the free market and that distort competition would also be considered unlawful under Portuguese law.

Additionally, according to Portuguese law, in particular Decree-law No. 166/2013, sales at a loss (sale of a product at a price inferior to the one for which it was purchased) are forbidden except in specific situations (perishable goods in danger of spoiling, goods whose commercial value has decreased because, for example, the reason for the original sale no longer exists, goods whose price is aligned with a competitor's price, sales, etc).

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'?

There is no guideline on this matter or decision of the AdC regarding new products or brands or even specific promotion or sales campaign. There is also no specific decision or guideline regarding a retailer using a brand as a loss leader. However, temporary measures duly justified that have a beneficial effect from a consumer perspective could be authorised by the AdC.

There is, however, legislation that regulates sales and promotions that could potentially be applicable.

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

The AdC has not issued public decisions addressing this matter.

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

The AdC has not issued public decisions addressing this matter.

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.

We believe that this practice would also be prohibited in Portugal since this would tamper with the free market rules and would have as objective or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part. Furthermore, the competition regime expressly forbids agreements between undertakings that directly or indirectly fix purchase or selling prices or any other trading conditions.

However, if the result of this practice would be to lower prices of supplier A's products, one could argue that this practice could be justified if it was considered that it would contribute to improving the distribution of goods, allowing users of these goods an equitable part of the resulting benefit, but at the same time not imposing on the parties any restrictions that are not indispensable to the attainment of these objectives. Additionally, this agreement would also only be considered justified if it does not afford the parties involved the possibility of eliminating competition from a substantial part of the market for the goods in question.

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.

A supplier is forbidden from applying to a specific purchaser discriminatory prices or sale conditions regarding equivalent situations, in particular, when this situation is reflected in establishing different execution deadlines, or different packaging, delivery, transport and payment conditions that are not related to the costs of each supply.

This means that even though a supplier may warrant the buyer that he will supply the contract products on the terms applied to the supplier's most favoured customer, at the end this would not have a significant impact since a supplier cannot discriminate against buyers without justification.

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.

Our educated guess is that a supplier may make such commitment and agree to sell a product via a certain platform at the same price as it sells via another.

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.

This would be deemed as establishing a minimum resale price, which is not allowed unless duly justified. It is possible for suppliers to suggest resale prices but they may not interfere with the same or even with the price at which the products are advertised. Prices should be freely established by the sellers.

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.

In our opinion, such warranty would be in breach of the competition rules as it would distort competition, not allowing the free determination of prices by the market.

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?

The general rule is that such territorial restriction (not allowing sales out of a certain territory, including sales to other EU countries) may be deemed as having anti-competitive effects. However, such restriction may be allowed if it is considered justified under article 10 of the Competition Legal Regime or if it falls under the EU block exemption.

Furthermore, while the restriction to active sales could be justified, a restriction to passive sales, where a distributor would be prevented to reply to unsolicited orders would hardly be permitted.

29 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?

There are no specific rules or guidelines on this matter. Therefore, if such practice restricts competition, which in principle it does, in particular if it is a restriction on passive sales, preventing the buyer to attend to unsolicited orders, and if not justified under article 10 of the Competition Legal Regime or if it does not fall under the EU block exemption, it is considered as a prohibited practice (or an abuse of dominant position or economic dependency).

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

The AdC has issued no public decisions or guidelines on this matter. In principle, limitations that aim at protecting a brand reputation are allowed unless they indirectly affect competition and are a way for the seller to gain market share or of abusing its market position.

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

There are no public decisions or guidelines on this matter issued by the AdC or any court cases. Such activity is regarded the same way as any vertical restriction.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

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

The same reasoning applies as before. Since there are no specific rules, public decisions or guidelines on the matter, if there is no justification for applying such restrictions or if the same do not fall under the EU block exemption, and the same are deemed to reduce or distort competition, the relevant clauses of such agreements are unlawful and the concerned entities may be subject to a fine.

34 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?

No.

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

There are no court cases, legal particularities or public decisions or guidelines issued by the AdC on this matter. Additionally, the same criteria apply to internet and offline sales.

36 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?

No.

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

There are no court cases on this matter, nor has the AdC issued any public decisions or guidelines. In any case, the AdC looks at the global effects on the market and therefore it would take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market.

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

There are no publicly available decisions of the AdC specifically concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products.

In a related matter, the AdC has considered as illegal certain clauses of a partnership agreement between the TV channel SIC, PT Multimédia and the cable company formerly known as TV Cabo (owned by PT Multimédia) since the clauses restricted competition. Briefly, it was understood that the anti-competition clauses of such agreement made it difficult for competitors of SIC to enter into the basic offer of channels of TV Cabo (which had a market share of 70 per cent and was the only cable service that covered almost all of Portuguese territory) and that, on the other hand, such clauses created barriers to competitors of TV Cabo that intended to distribute on their network SIC's theme channels, at the time included in the basic offer of channels of TV Cabo. In fact, SIC had a pre-emptive right to supply theme channels to TV Cabo included in the basic offer of channels. On the other hand, PT Multimédia would be granted the right to exclusively distribute SIC's free access channels. This agreement would be valid for a 10-year period, renewable for five more years. The AdC considered that SIC's pre-emption right led to a restriction in the production and supply of channels in the channel's commercialisation market. It also considered that PT Multimédia, through its exclusivity right in the access and commercialisation of cable channels produced by SIC, would acquire the control of the supply of the basic offer of its competitors and indirectly would also acquire part of its competitors' revenue. The AdC considered this clause as a vertical restraint in the cable TV services market.

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

Exclusive distribution agreements are possible as long as the exclusive period is less than five years.

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

Although there are no public decisions or guidelines on this matter issued by the AdC or any court cases, such restrictions may be considered justified. Additionally, a case-by-case analysis should be made in order to assess if such a restriction significantly affects competition.

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

This could potentially be considered unlawful. Again, a case-by-case analysis should be made in order to assess if such a restriction significantly affects competition. There are no public decisions or guidelines on this matter issued by the AdC or any court cases.

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

There are no public decisions or guidelines on this matter issued by the AdC or any court cases that have considered such clauses as affecting competition.

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

It is possible to appoint an exclusive distributor, particularly in those cases where such exclusivity has in return other obligations for the distributor. Additionally, other buyers should have the opportunity to purchase products from said exclusive distributor.

Other types of restrictions would not be allowed, particularly since this would restrict competition and would not result in any benefit to the users of the products or services.

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

This restriction would only be allowed if it had a reasonable justification, but in principle it would not be allowed, in particular in the case of unsolicited orders. Such restriction could be justified by the buyer's economic efforts to comply with the requirements set out by the supplier.

45 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?

No.

Notifying agreements

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

Only merger agreements must be notified. Nonetheless, it is possible to submit agreements to the AdC asking for its prior evaluation of the same. The AdC evaluation may take a few months to be issued (normally it should issue its opinion within 90 days).

Authority guidance

47 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?

It is possible to submit agreements to the AdC seeking its assessment of the same.

Complaints procedure for private parties

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

A formal claim can be submitted before the AdC either through the online form available at its website or by completing a form, also available at the AdC's website.

Whenever the Authority becomes aware, from whatever source, of possible practices prohibited by the Competition Legal Regime, it opens an investigation. When the investigation is complete, the AdC may:

- initiate proceedings by notifying the accused undertakings or associations of undertakings, should it conclude from the investigation that there is sufficient evidence of infringement of the competition rules;
- take no further action, should it deem that there is insufficient evidence of infringement;
- terminate the proceedings, issuing a conviction decision, within a transaction procedure (where the accused entity confesses all the facts); and
- shelve the proceedings by imposing certain conditions.

When the investigation has at its origin an accusation by any interested party, the AdC may not annul the proceedings without first informing the accusing party of its intentions, granting it a reasonable period (not less than 10 days) to make its position known.

In the notification to the accused undertaking, the AdC sets a reasonable period (not less than 20 days) for the accused to make its position known in writing with respect to the accusations and other questions that may concern the decision for the case and with respect to the evidence produced, as well as a reasonable period for the accused to request further inquiries for evidence that they consider proper.

The accused undertaking may present a transaction proposal confessing the facts and acknowledging its responsibility. This proposal cannot be withdrawn and the AdC may accept or reject it.

When the evidence-taking is complete, based on the report of the investigator, the AdC issues a final decision (if possible within 12 months after the notification of the accused undertaking) in which it may, depending on the case:

- declare that there is a restrictive practice, and consider it justified or apply a reprimand, a penalty and other sanctions and measures necessary to stop the restriction to competition;
- issue conviction following the transaction procedure;
- order the discharge of the proceedings under certain conditions; or
- order the discharge of the proceedings unconditionally.

Whenever practices affecting a market which is subject to sectorial regulation are in question, before a decision is issued, the respective sectorial regulatory authority shall provide a prior opinion, which shall be delivered within a reasonable period of time established by the AdC.

Enforcement

49 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?

There are three public decisions on the matter where the AdC has considered vertical restraints unlawful: the above-mentioned distribution agreements entered into by Lactogal with its distributors fixing margins and resale prices in 2012; the distribution agreement entered into by Nestlé and its distributions where there was an exclusivity clause that had no term in 2006; and the exclusive distribution agreement entered into for 10 years between cable TV operators in 2006.

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

Clauses that infringe antitrust law are deemed void; the remainder of the agreement, however, remains valid and enforceable.

Update and trends

In 2014 there were no significant decisions regarding vertical agreements. The focus in 2014 was on cartels and other restrictive practices at the same level of the supply chain. As regards vertical agreements, the most relevant decision was possibly the Court of Appeal confirming the AdC's decision regarding Lactogal (Lactogal breached competition rules by establishing minimum resale prices of its products through trade channels – see question 19 for further details).

In fact, in 2014 there were several decisions from superior courts confirming the AdC's decisions (although the amount of the fines was normally reduced) and we believe that this tendency will continue since the AdC has been shown to pursue only those cases where there is strong evidence that competition rules have been breached. Plus, the leniency regime helps to build strong cases, since the entity that first reports the situation and provides evidence to the AdC will not be fined.

Since there have been recent changes to the competition rules as well as to the AdC's by-laws, no further significant changes to the legislation are expected in the coming year.

51 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 AdC may impose penalties directly, such as fines that can reach 10 per cent of the annual turnover of the undertaking considered as an economic unit and additional penalties. Should the gravity of the infringement justify it, the AdC may, in addition to a fine, order the following measures:

- publication of the decision in the official gazette, the Diário da República, and in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice had its effects, at the offender's expenses; and
- banning the right to participate in tenders relating to works agreements, public works concession agreements, lease or purchase agreements of moveable property, service agreements or in procedures destined to granting licences or permits, as long as the infringement has occurred during or because of the relevant procedure.

In the case against Lactoga, the fine applied by the AdC was €341,098.

In the case against Nestlé, the AdC initially imposed a €1 million fine, which was challenged by Nestlé. The court then sent the proceedings back to the AdC to reformulate the pleadings, since part of the proof that sustained such pleadings was not made available to Nestlé. The AdC finally decided to discharge the proceedings under the condition of Nestlé removing the clauses that restricted competition from its distribution agreements.

In the proceedings involving the TV cable operators, the AdC fined SIC €540,000 and PT Multimédia €2.5 million.

Investigative powers of the authority

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

In exercising its powers to sanction and supervise, the AdC, represented by its institutional bodies and employees, has the same rights and powers and is subject to the same duties as criminal police bodies and may, in particular:

- question the legal representatives of the undertakings or associations of undertakings involved and ask them for documents and other elements of information that the AdC deems useful or necessary to clarify the facts;
- question the legal representatives of other undertakings or associations of undertakings and any other persons whose declarations it deems relevant and request them to supply documents and other information;
- search for, examine, gather, copy or take extracts from written or other documentation, at the premises of the undertakings or associations of undertakings involved, whether or not such documentation is in a

place that is reserved or not freely accessible to the public, whenever such inquiries prove necessary for the obtaining of evidence;
- seal the premises of the undertakings in which elements of written or other documentation are to be found or are liable to be found, for the period and to the extent strictly necessary for the inquiries referred to in the preceding paragraph; and
- to require any other public administration services, including the police, through the proper ministerial channels, to provide the cooperation necessary for the full discharge of their duties.

Private enforcement

53 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?

The general rules on civil liability are applicable. Any entity that suffers damage caused by an illegal act performed by another is entitled to be indemnified for the damage or loss suffered.

It is also possibly to request temporary and urgent measures from a court to avoid damage that would otherwise be impossible or almost impossible to repair. Such measures could be prevention of the application of certain contract clauses or preventing an undertaking from pursuing a certain activity.

Court decisions take at least two years to be issued and it is possible to recover legal costs.

Other issues

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

No.

CAIADO GUERREIRO
& ASSOCIADOS – SOCIEDADE DE ADVOGADOS RL

Joana Gomes dos Santos **jsantos@caiadoguerreiro.com**

39 Rua Castilho, 15th Floor
1250-068 Lisbon
Portugal

Tel: +351 21 371 7000
Fax: +351 21 371 7001
www.caiadoguerreiro.com

Romania

Carmen Peli, Manuela Lupeanu and Oana Bucsa
Peli Filip SCA

Antitrust law

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

Article 5(1) of the Competition Law No. 21/1996 (the Competition Law) prohibits agreements between undertakings having as their object or effect the restriction, prevention or distortion of competition on the Romanian market or a part thereof.

The norms detailing the application of the above rules were abolished following an amendment to the Competition Law that came into force on 5 August 2010. The amendment expressly provides that any assessment of vertical restraints falling under article 5(1) of the Competition Law or article 101(1) of the Treaty on the Functioning of the European Union (TFEU) will be carried out according to European Commission Regulation No. 330/2010 (the Vertical Block Exemption Regulation – VBER), the related notices and guidelines and all other relevant EU sector-specific regulations (see question 7). Since 2010, the Competition Council has invoked the provisions of the VBER and the EU guidelines in several decisions, but it is not fully clear how specific EU rules will be interpreted and applied to block-exempt vertical agreements under the national rules.

In 2014, the Competition Council applied the VBER criteria in individual cases in order to assess vertical agreements involving potential resale price maintenance, market-sharing and limitation of supply practices. In the sector inquiries conducted in 2014, it also analysed vertical agreements involving exclusive or limited distribution systems, minimum acquisitions clauses and targets-related clauses, as well as promotion agreements and provisions that could be qualified as non-compete obligations.

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?

There is no legal definition of the concept of vertical restraint covered by the Competition Law. Vertical restraints that represent hard-core restrictions under the VBER are listed as such in the Competition Law as restrictions of competition that eliminate the benefit of the de minimis thresholds for the agreement in which they are included. The concept of vertical restraints and detailed references to this type of agreement are interpreted by the national competition authority (Competition Council) in the light of the EU regulations. The VBER defines the concept of vertical agreements, which includes any agreement or concerted practice entered into between two or more undertakings – each of them operating, for the purposes of the agreement, at different levels of the production or distribution chain – and related to the conditions under which the parties may purchase, sell or resell products. Examples include: agreements concerning exclusive distribution (territorial exclusivity, trademark exclusivity, exclusive clients' allocation), selective distribution, exclusive purchase and exclusive sale.

Vertical restraints, however, are not exhaustively defined within the VBER. Such restraints are any competition restrictions falling within the scope of article 5(1) of the Competition Law and included in vertical agreements.

The main competition restrictions assessed under competition legislation are: resale price maintenance, territory or client sharing, restriction of active or passive sales within the context of various distribution systems (exclusive, selective), non-compete clauses, franchise arrangements, exclusive sale and tying. Under Romanian antitrust rules and practice, restrictions such as resale price maintenance, limitation of output or sales, and market and client sharing are considered as having an anti-competitive object and are therefore analysed as per se restrictions whose anti-competitive effects do not need to be identified on the market.

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?

The ultimate objective of the Competition Law is to promote consumer welfare.

Article 5 regarding (among others) vertical restraints seeks to protect competition rather than competitors. The Competition Council tends to apply the legal provisions in a conservative manner and usually adopts close to a per se approach, rather than taking into consideration substantially economic grounds.

Responsible authorities

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

The enforcement responsibility of antitrust rules lies principally with the Competition Council, an autonomous administrative authority, and secondarily with Romanian courts of law.

A number of regulatory agencies in certain sectors (energy, gas, telecommunications, etc) also share certain competition enforcement powers. The Competition Council may cooperate with those agencies based on protocols most of which have not been made public (for example, the cooperation protocol with the Authority for Administration and Regulation in Telecommunications has been published by the respective authority).

The Competition Council's decisions are subject to appeal, which may be filed with the Bucharest Court of Appeal, within 30 days from the communication of the decision issued. The decision of the Bucharest Court of Appeal may be further challenged before the High Court of Cassation and Justice (High Court).

A sanctioning decision issued by the Competition Council can be suspended upon a party's request to the Bucharest Court of Appeal, subject to the payment of a fee according to the Code of Fiscal Procedure provisions on budgetary receivables. Currently the fee can amount up to 20 per cent of the contested fine.

The courts may resolve private enforcement cases, including the award of damages. In the latter case, the courts will apply general Romanian law rules on civil liability. The Competition Law also expressly stipulates that if a good or service has been acquired at an excessive price, one cannot assume that no prejudice has occurred simply because the good or service has been resold (no recognition of the passing-on defence).

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?

The Competition Law applies to vertical restraints carried out in Romania or abroad, but generating effects on the Romanian market or on a part thereof. To our knowledge, the Competition Council has not yet issued a decision grounded on a purely extraterritorial application of the Competition Law or in a pure internet context.

Agreements concluded by public entities

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

The Competition Law includes a provision allowing the Competition Council to censure any actions of central or local-level public authorities that impede, restrain or distort competition by limiting freedom of trade or undertakings' autonomy or by setting discriminatory conditions for the activity of undertakings. This prohibition concerns the activity of public entities only in their capacity as public authorities. In such cases, the Competition Council could not apply fines to public authorities but could formulate recommendations or order measures such as the elimination of conditions imposed by the respective public authority in breach of the Competition Law.

As regards competition rules, including those on vertical restraints, they apply to public entities acting as undertakings. It is unclear, however, how state and municipal authorities would act in a vertical relationship, other than as mere end-consumers. State-owned companies clearly fall under the scope of the Competition Law.

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.

From 5 August 2010, all Competition Council Regulations on the application of article 5(2) of the Competition Law to vertical agreements in specific sectors (motor vehicle, agreements on technology transfer, insurance, and so on) were abolished and replaced by relevant European Commission regulations. The Competition Council appears to have pursued total harmonisation with EU rules when assessing vertical restraints in these specific sectors.

It is still unknown in what manner the Competition Council will apply these rules to practices having a purely national dimension and effect.

General exceptions

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

The amendments that came into force in 2010 repealed the exceptions according to which competition law did not apply to the labour market and labour relationships or to the money and securities markets. At present, no specific sector is excluded from the scope of the Competition Law. Regular employment relationships might fall outside the scope of the Competition Law, inasmuch as the employee would not be deemed an 'undertaking' within the meaning of the Competition Law (that is, an entity carrying out an economic activity which provides goods and services on a market).

The de minimis rule was amended, and is now in line with EU rules: the competition rules do not apply to vertical agreements concluded by undertakings that are not competitors on any relevant market and whose market share does not exceed 15 per cent on any such market, provided that no such agreement includes the hard-core vertical restraints stipulated by the VBER. This threshold may be reduced to 5 per cent if the market suffers a cumulative effect.

The Competition Law continues to exclude from its scope vertical agreements concluded between undertakings that are part of the same economic group and agency agreements.

Agreements

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

The Competition Law does not include an extensive definition of the concept of 'agreement', which covers any tacit or express 'understandings' between undertakings or associations of undertakings, any decisions issued by associations of undertakings and any concerted practice between undertakings.

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?

In line with European Commission practice and the EU courts' case law, the Competition Council and the courts will find an agreement existing where a 'meeting of minds' happened between the relevant undertakings, whether it was included in a formal, written contract or just an oral understanding or practice. The concurrence of wills may be proved by any type of acceptable evidence pursuant to the Romanian Civil Procedure Code. The Competition Council does not pay extra attention to the 'form' in order to find proof of unlawful vertical restraints. In one case, it decided that a policy paper communicated by e-mail to the distributors and implemented by most of them created an agreement between the supplier and the distributors (Competition Council Decision No. 224/2005, *Wrigley Romania*).

In a 2011 decision, the Competition Council found that an anti-competitive practice was carried out by a supplier and its distributors outside their contractual relation, as the agreements concluded between them did not include any express provision in this sense (Competition Council Decision No. 18/2011, *Interfruct, Albinuta and Profi*).

Parent and related-company agreements

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

Rules prohibiting vertical restraints are not applicable to agreements concluded between undertakings that are part of the same group. The definition of the antitrust concept of 'group' is included in the Competition Council Guidelines on the concepts of concentration, undertaking concerned, full functionality and turnover. As a general rule, the 'group' includes:

- the relevant undertaking (the firm);
- its subsidiaries, defined as the undertakings to which the firm directly or indirectly:
  - holds more than half of the share capital or of the assets;
  - can exercise more than half of the voting rights;
  - can appoint more than half of the members of the board of directors, or of the bodies that legally represent the undertakings; and
  - has the right to direct the businesses of the respective undertakings;
- the firm's control-holders, viewed as the undertakings that are entitled to exercise the above rights or powers over the firm;
- subsidiaries of the firm's control-holders – undertakings over which the firm's control-holders can exercise the above rights; and
- joint ventures that are controlled by two or more of the undertakings previously mentioned.

The underlying justification for the rule is that companies within the same group fall under the control of the same final party or parties and do not act independently in the market while concluding vertical agreements.

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?

Agency agreements are now treated under the EU competition rules. Therefore, as a matter of principle, the Competition Law does not apply to agency agreements, in so far as the vertical restraints concern the agents' obligations under the agreements concluded on behalf of their principal. An agency agreement is qualified as such when the agent does not bear or

bears insignificant risks related to the contracts negotiated or concluded on behalf of the principal or in relation to sector-specific investments.

In a 2011 resale price-fixing decision, the Competition Council assessed an agreement from the perspective of: the transfer of the ownership rights over the goods from the supplier to the retailers; the joint bearing of risks between the parties; the elimination of the intermediary position of the agent between supplier and client; and the existence of specific types of expenses (eg, for the training of personnel or for marketing activities) made by the agent. In refusing the qualification as an agency agreement, the Competition Council paid specific attention to the manner in which the parties reflected the remuneration received in their accounting records: the supplier recorded that remuneration as a genuine discount by decreasing its profits with the amount paid to the retailer and the later reflected these amounts as additional income on which VAT was applied (Competition Council Decision No. 18/2011, *Interfruct, Albinuta and Profi*). Profi contested this decision and in September 2013 the High Court reduced by 75 per cent the fine applied by the Competition Council, as the infringement was considered of minor significance.

Nevertheless, clauses regulating the relations between the agent and the principal (exclusive agency clauses and non-compete clauses) may fall under the prohibition of article 5(1) of the Competition Law, particularly when the inter-brand competition on the relevant market is limited.

Compliance with the above criteria does not offer a full guarantee on the competitive framework applying to an agency agreement. An agency agreement compliant with all the applicable rules listed above will fall under article 5(1) if it facilitates a secret anti-competitive agreement on the relevant market.

Article 5(1) will apply entirely to a non-genuine agency agreement. Furthermore, a clause forbidding the agent from a non-genuine agency agreement to offer a price reduction by limiting its own commission will be seen by the Competition Council as a hard-core restriction.

A sales-based commission payment should not prevent the application of this safe harbour. If the sales-based remuneration is combined with a system where the agent buys and resells the products in question, or where the agent bears risks and investment costs, it is likely that the Competition Council will view such an arrangement as more like a distribution than an agency.

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?

See above. The guidance derives mainly from the EU rules. In its practice until 2010, there were cases where the Competition Council accepted as agency systems agreements where the agent acquired and resold the products in question without bearing significant risks (eg, returning unsold products to the principal); however, since 2011 the practice seems to have adopted the position in line with the EU practice, so that such agency systems are not excluded from the scope of application of the Competition Law.

Intellectual property rights

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

Until the amendment of the Competition Law, the domestic block exemption regulation contained specific rules for licensing agreements related to intellectual property rights. As these rules are no longer in force, such arrangements are generally governed by rules set out in the VBER whenever the licensing or assignment of IPRs does not represent the agreement's core objective and their effect on the market is not similar to one of the non-exempted restrictions. On the other hand, agreements having as their principal objective the transfer of IPRs will have to comply with the European Block Exemption for Technology Transfer Agreements.

Analytical framework for assessment

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

The assessment of a vertical agreement will include the following steps:

- determining whether the agreement falls within the scope of the competition rules;
- identifying structures or clauses that may raise competition concerns under the vertical restraints rules;
- identifying per se infringements: resale price-fixing, market and client-sharing, limitation of passive sales, restriction of selective distributors to supply each other and end-consumers, restriction agreed between a spare parts supplier and a buyer and limiting the supplier's freedom to sell the respective products to other repairers, service providers and end-consumers. The existence of this kind of vertical restraint will lead to the exclusion of the agreement from the benefit of the VBER; and
- assessing whether the VBER may apply. The analysis will include the definition of the relevant markets that are affected by the agreement, the calculation of the parties' (supplier and distributor) market shares and the substantive analysis of the relevant clauses. Parties to the vertical agreement must themselves verify whether their agreement falls within the scope of the block exemption with no intervention from the Competition Council.

If the agreement does not fulfil all the criteria for benefiting from the block exemption, the parties would have to self-assess their agreement and its impact on competition, in order to check the possibility of application of an individual exemption. Until 2010, agreements or concerted practices not qualifying for block exemption could have been individually exempted on the basis of a decision issued by the Competition Council following an investigation procedure. The amendments to the Competition Law now provide that vertical restraints satisfying the benefits conditions listed in article 5(2) of the Competition Law are considered legal without any notification or decision from the Competition Council. Companies will therefore have to assess themselves the competitive impact and effects of the vertical restraints, in line with the following requirements:

- the agreements contribute to improving the production or distribution of products or to the promotion of technical and economic progress while ensuring a corresponding advantage to consumers;
- the agreements do not impose on the undertakings party to the agreement restrictions that are not indispensable for attaining their purpose; and
- the agreements do not allow the undertakings the possibility of eliminating competition on a substantial part of the market affected by the agreement.

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?

The assessment of vertical restraints is based on key economic concepts such as relevant product and geographical market, market shares, market structure, cumulative effects and competitors.

The block exemption does not apply to agreements concluded by a supplier with a market share greater than 30 per cent on the relevant market or, respectively, by a buyer with a market share greater than 30 per cent.

The structure of the relevant market (monopoly, oligopoly, concentrated market or competitive market) is also important. A specific competition concern related to vertical agreements is the existence of parallel networks of restrictive agreements that may lead to market foreclosure. The Competition Council may withdraw or refuse the benefit of the block or individual exemption if cumulative effects appear on the market: if such parallel networks of similar vertical restraints cover more than 50 per cent of the relevant market, even if individually each agreement fulfils the block exemption conditions, the Competition Council may withdraw the block exemption benefit and make the assessment under the individual exemption criteria.

Market-entry barriers, the reduction of intra-brand and inter-brand competition or the maturity of the relevant market may also be relevant factors. In an individual exemption decision (Competition Council Decision No. 95/2008 concerning the exclusive distribution system used by Kraft on the Romanian market), the Competition Council had to assess the impact of an exclusive distribution system combined with trademark exclusivity on the chocolate market. Even though the Romanian chocolate production market is highly concentrated with three producers (including Kraft) holding more than 60 per cent, the authority found that the exclusive distribution system would not have negative effects outweighing the positive ones, as the system included a large number of distributors that were allowed to supply non-authorised distributors within their territory and whose passive sales to other exclusive territories were not restricted.

Even though a non-compete obligation and acquisition targets were imposed, it was concluded that inter-brand and intra-brand competition was not negatively affected and the large number of distributors existing on the market (around 200) would ensure that no entry barriers exist on the chocolate distribution market.

So far the Competition Council has not performed any analysis of the extensive use on the market of certain types of agreements or restrictions in individual sanctioning decisions. Such an assessment has been carried out only within the framework of market research investigations, the equivalent of EU-level sector inquiries, and has been indirectly touched upon in three commitments decisions issued in 2012 in relation to the main Romanian telecoms market operators (Competition Council Decision No. 21/2012, *Orange Romania and its distributors*; Competition Council Decision No. 22/2012, *Vodafone Romania and its distributors*; Competition Council Decision No. 23/2012, *Cosmote Romania Mobile Telecommunications and its distributors*).

In the 2009 sector inquiry on the retail food market, the Competition Council assessed the impact on the market of several vertical restraints used extensively in agreements concluded between retailers and their suppliers (the most-favoured-client clause, several types of shelf taxes perceived by retailers (eg, for the extension and modernisation of retail chains, for promotion campaigns, for covering the risk of unsold products) and category management). The sector inquiry report includes a more in-depth assessment of the notions of buyer market power and the subsequent negotiation power in the conclusion of agreements, particularly in the case of large retailers of fast-moving consumer goods.

In the commitments decisions mentioned above, the Competition Council required the three large telecoms operators and their distributors of mobile telephone prepaid products to propose commitments in relation to similar antitrust concerns regarding possible resale price maintenance issues, market and client sharing aspects and non-compete obligations.

In a 2014 sector inquiry report on the beer market, the Competition Council analysed the impact on the HORECA segment (hotels, restaurants and cafes) of specific agreements concluded by producers representing 85 per cent of the market. The analysis focused on agreements regarding promotional and advertising services and agreements on the free use of equipment for draft beer. According to the Competition Council, these agreements could amount under certain circumstances to non-compete obligations. The Competition Council concluded that a foreclosure effect on the HORECA segment concerning other producers is less probable, but it also underlined that in an oligopolistic market with significant entry barriers (implying significant sunk costs for marketing and advertising campaigns), and in which consumers show a low tendency to change their preferences following price variations, the effect of these specific agreements is to strengthen the position of those brands that are already preferred by consumers.

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?

From 2010 buyer market shares in excess of 30 per cent will exclude an agreement from the scope of application of the VBER. Otherwise, the Competition Council took buyer power into account in cases where an individual exemption was required. In 2009 the Competition Council exempted the exclusive distribution agreements concluded by a large chocolate manufacturer with an important national retail player, because irrespective of the buyer's market share, the relevant market was a competitive one (Competition Council Decision No. 12/2009 concerning the individual exemption granted to different exclusive distribution agreements on the sugar products market, *Cadbury Romania*).

Regarding the assessment of restrictions widely agreed to by buyers in the market, please see above the details on the 2009 sector inquiry on the retail food market.

Block exemption and safe harbour

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

Under the Competition Law, vertical agreements falling under the scope of article 5(1) are exempted on the basis of the VBER and the other block exemption regulations adopted by the European Commission. Companies will therefore have to self-assess the effects of the respective vertical agreements by applying the EU principles. The VBER provides that in order for the block exemption to apply, the market share held by each of the undertakings party to the agreement must not exceed 30 per cent and the restraint in question must not be a hard-core restraint as indicated by the VBER.

The 2010 rules on vertical restraints provide that agreements and concerted practices satisfying the benefit conditions listed in article 5(2) of the Competition Law are considered legal without any notification or decision from the Competition Council.

Types of restraint

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

Resale price maintenance (RPM), as a general principle, is one of the hard-core restrictions and has so far been considered a per se infringement irrespective of parties' turnover or market shares.

A recommended resale price or a maximum resale price will be regarded as legal in so far as it will not lead in practice, because of the supplier's market position and power, to the setting of a fixed or minimum resale price. Accordingly, the Competition Council found that the maximum prices recommended by Wrigley Romania to its exclusive distributors, combined with the existence of a recommended discount list to be applied by the latter, were actually functioning like fixed prices. This was because Wrigley controlled more than 90 per cent of the chewing gum market in Romania (Competition Council Decision No. 224/2005, *Wrigley Romania*).

In *Interfruct, Albinuta and Profi* (see questions 10 and 12), the Competition Council identified the existence of a resale price-fixing practice as the parties agreed that the resale price of the products at stake had to be equal to the purchase price and the retailers would receive from the supplier a monthly discount applied as a percentage to the volume of sales. The practice was qualified as RPM leaving no profit margin to the retailers.

In 2012 the Competition Council addressed potential RPM practices in one sanctioning decision and several commitments decisions. It sanctioned express resale price-fixing clauses included in distribution agreements between a Turkish producer of perfumes and its exclusive distributor in Romania and the respective distributor and its sub-distributors. Even though in some of the cases the prices were only recommended, it was established that such prices worked in fact as focal points for all distributors, as they were published and advertised by the Romanian supplier, thus leading to a reduction of the buyers' incentive to decrease the retail prices (Competition Council Decision No. 99/ 2011, *D&P Perfumum*).

In the commitments decisions issued, the Competition Council required or accepted the suppliers' commitments not to set prices or fix their minimum levels, nor to recommend sale prices or set maximum prices (Competition Council Decision No. 21/2012, *Orange Romania and its distributors*; Competition Council Decision No. 22/2012, *Vodafone Romania and its distributors*; Competition Council Decision No. 23/2012, *Cosmote Romania Mobile Telecommunications and its distributors*). In the case of *Fornetti Romania* (Competition Council Decision No. 65/2012) the Competition Council held that the franchisor (Fornetti) that imposed resale prices on some of its franchisees, and used recommended resale prices for others, used a monitoring system and pre-printed price labels to be attached by its franchisees to the product shelves. These combined activities raised the authority's concerns of the existence of a possible resale price-fixing practice.

In the three aforementioned telecoms operators cases, however, concerns seem to have been raised by practices less obvious than would normally indicate use of a RPM practice. Both in the telecoms cases and the *Fornetti* case the suppliers also undertook commitments in relation to the length and type of promotional activities that involve the recommendation or setting of a price of any kind.

In 2013, a statement of objections (SO) was issued against Antibiotice SA and stressed the existence of a minimum resale price-fixing practice in relation to certain medicines to be offered in tenders organised by hospitals (Competition Council Order No. 91/2013, *Antibiotice and its distributors*). The SO showed that the manufacturer granted discounts of a maximum value equal to the difference between the list prices and the recommended prices. If the awarding price had been lower than the recommended one, the distributor would have had to bear the respective difference and thus it would have had no financial incentive to lower the prices. The price-fixing practice was sustained by monitoring activities by the manufacturer and by

information exchanges sent by distributors that have undertaken reporting obligations. Furthermore, as hospitals requested from the distributors as part of the tender documentation a dealer authorisation to be granted by the manufacturer, Antibiotice would have granted this authorisation to only one distributor per tender, eliminating competition between distributors and ensuring they would comply with its pricing policy.

The board of the Competition Council did not endorse the conclusions of the investigation team, as the SO and the parties' observations resulted in a reasonable doubt in relation to the anticompetitive nature of the object of the agreements. Thus the recommended prices actually represented the maximum value to which the producer would bear the difference between the list prices and the awarding prices in order to ensure the competitiveness of the products in the tenders. The SO did not prove beyond any doubt that the minimum prices were prices for resale and not acquisition prices. Stating that no anti-competitive practice was proved, the board did not sanction the manufacturer and its distributors but recommended distributors to participate independently to tenders organised by hospitals and without any communications with the manufacturer. As for the dealer authorisation, the board considered it an artificial barrier allowing the manufacturer the possibility to choose which of its distributors could submit an offer and thus susceptible of distorting competition between distributors. The Competition Council recommended that the Ministry of Health eliminate this request from the documents for public procurement procedures.

In its previous practice, the Competition Council adopted a rather conservative position in identifying the existence of RPM, while in the *Antibiotice* case it seemed to emphasise the importance of proof that the investigation team should provide in order to demonstrate an RPM practice achieved through indirect means (proof beyond any doubt).

In March 2014, the Competition Council published a sanctioning decision taken at the end of 2013 whereby it fined five companies for concluding a price-fixing agreement in the market for dental products. Following the investigation performed, the Competition Council found that the provider of dental products, Vita Zahnfabrik Germania, agreed with four of its distributors the maximum discounts they could apply at the resale of its products. The fines were applied in the context of a broader investigation launched by the Competition Council in 2011 on the market for dental products and on the market of machines for processing dental products in Romania (Competition Council Decision No. 58/2013, *Vita Zahnfabrik Germania and its distributors*).

Also, at the beginning of 2015, the Competition Council sanctioned 25 companies from the fast-moving consumer goods (FMCG) sector for anticompetitive behaviour, including RPM practices. The fines were applied to retailers Metro Cash & Carry Romania SRL, Real Hypermarket Romania SRL, Selgros Cash & Carry Romania SRL, Mega Image SRL and 21 of their food products suppliers for practices carried out between 2005 and 2009. The decision is yet unpublished but it is much anticipated for its guidance on RPM, especially when the RPM is carried out in conjunction with promotions.

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'?

There has been no decision issued by the Competition Council allowing a manufacturer to fix resale prices even for a limited period of time. Informally, the Competition Council has not expressed either a fully flexible approach related to the efficiencies that resale price maintenance can occasionally bring.

In the *Vodafone* commitment decision (Competition Council Decision No. 22/2012) the Competition Council accepted commitments undertaken in relation to the use of maximum prices or recommended prices in short term promotional campaigns for new products, which would not exceed 60 days per year and would allow distributors to offer supplementary discounts. No reference was made to potential acceptable promotional price-fixing in this case. However, in the *Cosmote* decision, the authority accepted as a commitment the possibility for the supplier, within its periodic promotions aimed at consumers, to require its partners to mandatorily pass on the entire discount granted by Cosmote, with the possibility of adding further discounts if wished. De facto, such a mechanism could lead to a price-fixing practice, to the extent that all distributors would refrain from giving additional discounts. In Fornetti's commitments, the supplier franchisor undertook that the joint marketing activities with franchisees and the periodic promotions for existing or new products will be limited to six weeks.

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

In the *Wrigley Romania* decision, the Competition Council was also called upon to decide on the distribution system used. While the agreements did not contain client or territory allocations, in practice the parties applied an exclusive distribution system, with sanctions applied when sales were made to non-allocated clients. The competition authority did not establish clear connections between the price-fixing and the client allocation and assessed them as two non-related practices. It implied, however, that territorial exclusivity coupled with resale price-fixing eliminated the competition on price. Even though not analysed in strict connection, the above-mentioned vertical restraints were cumulatively assessed by the authority as 'medium-core' infringements. The Competition Council further implied that even if efficiencies could generally result from the allocation of clients between distributors, this was not the case for the system applied by Wrigley Romania, as no investments in specific equipment, skills or know-how were proved. Nonetheless, in some cases, vertical agreements providing interlinked territorial restrictions, minimum acquisitions and even resale price recommendations may be perceived as indispensable for gaining economic effectiveness in a distribution system.

In the 2012 commitments decisions, the Competition Council paid very much attention and concern to reporting obligations that distributors or retailers have towards their supplier, seeing these practices as mechanisms potentially used for the monitoring of fixed or minimum prices.

The Competition Council has not issued any particular guidelines on possible links between resale price maintenance and other forms of vertical restraints, but instead it is competent to directly apply relevant EU regulations and guidelines addressing such types of practice.

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

The Competition Council has not yet issued any guidelines nor individually addressed efficiencies that could arise out of resale price maintenance restrictions. Such restrictions have so far been considered as hard-core restrictions unlikely to bring any efficiency, and thus not potentially benefiting from an individual exemption. In most of its RPM sanctioning decisions (*Interfruct*, *D&P Perfumum*) it has, however, noted that where no block exemption was available for RPM clauses, parties could try to make an individual exemption case based on the efficiencies defence.

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.

There is no practice so far in relation to this type of restraint. The assessment of an obligation for the buyer to set the price at which it resells one supplier's products by reference to the price at which it sells the products of another supplier will be performed in accordance with the relevant general rules on vertical and potentially horizontal restraints.

Such agreement restricts on the one hand the buyer's ability to determine independently its retail prices and on the other hand can also increase transparency on the market, leading to collusion. The EU Guidelines on vertical restraints provide that linking the prescribed resale prices to the resale price of competitors is an indirect mean through which an RPM practice can be achieved. As RPM is a hard-core restriction under the Competition Law, such an agreement is most unlikely to benefit from block exemption under the VBER. The individual exemption is theoretically available, but considering the Competition Council's approach so far, it is less probable that it will accept that the criteria are met in this case.

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.

There is currently no extensive sanctioning practice developed in this regard. The Competition Council will assess such restrictions in accordance with the general vertical and horizontal rules applicable.

Some guidance was provided, however, by the competition authority in a 2009 sector inquiry report it had issued on the retail food market. The Competition Council noted that the most-favoured-client clause is common in supply agreements of large retailers of fast-moving consumer goods (FMCG) in Romania and found that, even though this clause is not anti-competitive per se, it can have negative horizontal effects of coordinating competitors' behaviour and setting the prices at a higher threshold than a normal one. Therefore, a detailed assessment of the clause should be made on a case-by-case basis in order to identify if it is susceptible of distorting competition. The Competition Council found also that, even if positive effects can be generated by the clause, the combination of MFN clause and shelf taxes can have significant distorting effects and should be excluded from the supply agreements concluded on the FMCG retail market.

The use of most-favoured-client clauses in the food commercialisation sector is prohibited by Law No. 321/2009 on food product commercialisation, and its presence in agreements may lead to the imposition of a Ministry of Finance fine on the parties for committing an administrative offence.

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.

There is currently no practice in this respect in Romania. The competitive assessment of such a clause will depend essentially of the type of agreement in which it will be placed.

If the supplier has concluded agency agreements with each online platform for the sale of its products, then theoretically the supplier is selling its products directly through each platform and is free to decide independently to use an identical price. If, however the supplier agrees with its agents to sell the products at an identical price, it cannot be excluded the appearance of horizontal anti-competitive effects from the reduction of competition between the competing platforms. If the horizontal effect and intention appear, then the agreement between the supplier and the platform operators may amount to a hub-and-spoke practice, which will be sanctioned accordingly.

If the supplier concludes distribution agreements with the platform operators and agrees to sell to platform A at the same price as to platform B, then the comments in questions 23 and 24 will apply.

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.

The Competition Council has not been called on so far to analyse this kind of practice formally. The clause will be assessed under the relevant vertical and horizontal rules.

Under the current rules and practice, the risk that the antitrust authority would view a restriction of the buyer's freedom to apply its own pricing policy cannot be excluded. The clause aims at minimising the impact of additional discounts that the buyer might offer to customers and only customers that would otherwise contact the buyer would therefore benefit from the additional discount. The retail price might increase, as resellers will be less motivated to offer discounts to their customers on a price already acknowledged and accepted by such customers. Further, price competition on the market could be reduced by such a clause, to the extent that the supplier includes a minimum advertised price policy clause in its contracts with several buyers or retailers and therefore competing stores might end up applying the same prices.

At the same time, this obligation might impede small firms from gaining visibility on the market by means of advertising lower prices, preventing them from competing with the major players on the market.

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.

There is currently no specific practice in this respect, therefore such clause will be assessed under the relevant vertical and horizontal rules. Similar to the most-favoured-client clause, such an undertaking can have horizontal effects, coordinating competitors' behaviour on the upstream supply market. At the same time, positive effects seem less likely, as the buyer undertakes not to make acquisitions under more favourable terms and, therefore the purchase price and costs tend to align towards the higher end. The analysis of such clauses will have to be made on a case-by-case basis, taking into account the actual economic, commercial and legal context.

The clause obliging the buyer to report better terms obtained from other suppliers may have the same effect as a non-compete obligation and, by increase of the market transparency, may facilitate collusion. Thus it will be assessed on a case-by-case basis.

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?

Within an exclusive distribution system, the distributor's active sales in the territories exclusively allocated to other distributors or retained by the supplier for itself can be legally restricted, to the extent that the restriction does not limit the sales performed by the buyers' clients.

The Competition Council issued three decisions in 2011 related to the restriction of a buyer's ability to resell certain pharmaceutical products in certain territories (Competition Council Decision No. 52/2011, *Baxter and its distributors*; Competition Council Decision No. 51/2011, *Belupo and its distributors*; and Competition Council Decision No. 98/2011, *Bayer, Sintofarm and their distributors*).

The suppliers in the first two decisions sold their products in the Romanian territory based on an exclusive distribution system that restricted both active and passive sales of the products outside the territory exclusively allocated to each distributor.

The parallel trade restriction has been qualified as an infringement by object. The Competition Council also found that the restriction of passive sales could not increase the efficiency of the exclusive distribution system and consequently the parties to the agreement could not claim the benefit of an individual exemption.

29 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?

The restrictions of sales to specific customer categories are prohibited, with the following exceptions:

- within an exclusive distribution system, the supplier can restrict the active sales to categories of customers that have been exclusively allocated to other distributors or retained by it, to the extent that the restriction does not limit the sales performed by the buyers' clients; and
- within a selective distribution system, it is legal to restrict both active and passive sales by members of the system to non-authorised distributors, and to restrict the ability of a distributor acting at wholesale level to make sales of the products to end-consumers.

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

A supplier could be specifically allowed to limit the buyer's ability to resell spare parts to clients that may use them for the manufacturing of similar products competing with the supplier's.

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

Internet sales are generally qualified as passive sales and the buyer should be free to use the internet for sale or advertising. Restrictions on internet advertising or sales could be acceptable only to the extent that the use of the internet would lead to active sales in territories or to client categories exclusively allocated to the supplier or other distributors. Examples of such acceptable restrictions include bans on hyperlinks dedicated to customers located in other territories and unsolicited e-mails.

No national competition practice or case law has been developed so far with respect to internet sales restrictions.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There are no guidelines or other rules issued by the Competition Council that distinguish between different types of internet sales channel. In such a case, relevant EU provisions and case law should further be applied.

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

The Competition Council directly applies to selective distribution systems in Romania the conditions established at EU level. In principle, these agreements could benefit from the block exemption if the market share threshold of the parties does not exceed 30 per cent and provided that the agreements do not include hard-core restrictions (resale price maintenance, restriction of active or passive sales to end-consumers of members of the system acting at retail level and restrictions of supply between the members of the system). The presence of these vertical restraints would affect the validity of the agreement as a whole.

When put into practice, the selective distribution system must rely on sufficiently impartial and non-discriminatory selection criteria. In relation to all distributors, suppliers are bound to transparently provide (for example, through periodic written communications containing the same conditions applied to all distributors) all terms and conditions of the distribution system. Whenever a selective distribution system exceeds the legal antitrust requirements, any affected distributor or competing entity may submit a claim to the Competition Council or directly to national courts.

The publication of the objective and non-discriminatory selection criteria used for the appointment of a distributor was also one of the commitments undertaken by the telecoms operators and their distributors in 2012. The Competition Council required that the selection criteria be either published on the website of the company or be made available upon request in any other way to the interested parties.

34 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?

By definition, selective distribution is used to limit the number of distributors based on criteria determined by the nature of the product. Selective distribution is usually used for the sale of luxury products, which benefit from a certain image, a brand, a specific type of clientele or the sale of technical products that require specific skills or know-how (cars, IT retail, etc).

For this type of products, it is generally considered legitimate to impose selection criteria for distributors, necessary for the preservation of the brand's image or required objectively by the technical nature of the products.

35 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 members of a selective distribution system acting at retail level cannot be restricted to make active or passive sales to end-consumers, including via the internet. Nevertheless, a member can be restricted from carrying on its activity outside the authorised commercial areas. As to our knowledge, the Competition Council and national courts have not so far issued decisions dealing with internet sales restrictions imposed on approved buyers.

36 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?

To our knowledge, the Competition Council has not issued such decisions.

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

The Competition Council may envisage the withdrawal of the block exemption in case of cumulative effects (eg, the market share of those using the selective distribution exceeds 50 per cent).

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

To our knowledge, the Competition Council has not issued such decisions; however, in such a case, the authority will most likely apply the principles applicable at EU level in similar situations.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The obligation for the buyer to buy the contract products only from the supplier or a source designated by it is considered a non-compete obligation, which can be exempted under the VBER if is not assumed for more than five years or for an indefinite period, and all other conditions are fulfilled.

The Competition Council has paid more attention to this restriction in the 2011 decision regarding Belupo and its distributors. The exclusive distribution agreement in place was combined with an exclusive sourcing obligation. The Competition Council found that the combination of exclusive distribution with exclusive sourcing increases the risks of reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination; however, as a result of the reduced market shares of both parties while also taking into account the high number of players on the relevant market, it concluded that this vertical restraint did not have anti-competitive effects on the market.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There is no practice available so far, but such a restriction could be seen as justified if it is part of the conditions defining a selective distribution. Otherwise, a supplier's restricting its distributor's ability to sell non-competing products could fall under the Competition Law prohibition on anti-competitive agreements carried out through conditioning the conclusion of a contract on the acceptance by the contracting party of clauses that, neither by their nature nor according to commercial practice, are related to the agreement's objective.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

The buyer's ability to stock products competing with those sold by the supplier is analysed in light of the relevant EU rules. Generally, a ban on stocking products competing with those bought from the supplier is an indirect non-compete obligation. Such an obligation is not exempted under the VBER if it is applicable for an indefinite period or for more than five years and whenever it involves the members of a selective distribution system and it concerns products of particular suppliers; the effects of such an obligation on the market would have to be assessed on a case-by-case basis.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The assessment of such restriction is now performed in accordance with the EU rules. As a general rule, the obligation to achieve a certain acquisition target (fixed amount, minimum percentage) will be assessed differently, depending on the value of the target and whether it is connected with the grant of a discount or rebate.

If the target represents more than 80 per cent of the buyer's total acquisitions of the said products (including substitutable products), then the clause will be assessed as a non-compete obligation.

If it cannot be qualified as a non-compete obligation, the effects of such clause will be assessed on a case-by-case basis (ie, in vertical agreements concluded by dominant suppliers, this type of clause combined with discounts or rebates could have foreclosing effects).

If the buyer is required to purchase a full range of the supplier's products, such restriction may be assessed as implying tying or quantity forcing (or both), but it will not be seen as a hard-core restriction. Therefore, to the extent that all the conditions are met, this restriction may be susceptible of benefiting from category or individual exemption.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The restriction of the supplier's ability to supply other buyers is subject to assessment under the EU rules on vertical restraints. Such restriction is exempted under the VBER provided that the buyer and the supplier each have less than 30 per cent market share.

The restriction agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users, repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods represents a hard-core restriction and is not exempted under the VBER.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The restriction of the supplier's ability to sell directly to end-consumers is subject to assessment under the EU rules on vertical restraints. Such restriction would be exempted under the VBER provided that the buyer and the supplier have each less than 30 per cent market share.

The restriction agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users represents a hard-core restriction and is not exempted under the VBER.

45 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?

To our knowledge, the Competition Council has not issued any guidance or decisions dealing with other forms of restrictions on supplier. The majority of the decisions issued by the Competition Council up to this moment concern restrictions imposed on the buyer.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Following the amendment of the Competition Law in 2010 there is no formal notification procedure mandatory or available for the clearance of vertical restraints. The parties must perform a self-assessment on the availability of individual or block exemption to their arrangements.

Authority guidance

47 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

The Competition Council can issue guidance letters concerning new issues raised by the application of articles 5 and 6 of the Competition Law. When there is sufficient guidance under the EU regulations, communications or practice of the EU courts, the Competition Council is likely to refuse to give any formal guidance to the parties. The Competition Council may be available, however, for informal consultations on more complex matters.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties having a legitimate interest can submit complaints to the Competition Council. The claimant must prove its direct or indirect legitimate interest. The Competition Council can disregard a complaint filed by a party that cannot prove its interest. The Competition Council requests substantial information from the complainant and there is a special complaint form to be used. The claimant must submit evidence (ie, reasonably obtainable documents) to support its allegations.

The Competition Council responds within 60 days of the date when the claimant receives confirmation that his complaint is complete, either by issuing a reasoned decision rejecting the complaint or deciding to initiate an investigation for a potential breach of article 5 of the Competition Law. When deciding that a vertical agreement does not infringe competition rules or falls outside the scope of the Competition Law, the Competition Council is bound to take into consideration all circumstances addressed by the complainant in its complaint. The decision to dismiss the complaint will prevent the claimant from filing the same file with the Competition Council, unless additional evidence or information is brought.

The Competition Council's decision to reject the complaint can be challenged, within 30 days of its communication date, before the Bucharest Court of Appeal.

Enforcement

49 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?

Until the abolition of the individual exemption procedure the Competition Council's activity in the application of article 5(1) to vertical restraints varied. For example, in 2008, of 102 decisions issued by the authority, only three concerned vertical agreements: one was a sanctioning decision, one an individual exemption decision and one a negative clearance.

In 2009, of 67 decisions issued by the authority, only one individual exemption decision concerned vertical agreements, whereas in 2010 there were no individual exemption decisions concerning vertical restraints. Nonetheless, the authority initiated several investigations on markets where the presence of vertical restraints cannot be excluded (eg, the retail food market, the mobile telephony market, the pharmaceutical sector and the energy sector).

In 2011 the Competition Council's activity in this area increased. Of 11 sanctioning decisions issued, four concerned vertical agreements between suppliers and retailers. In 2012, the competition authority issued 83 decisions, out of which only eight concerned vertical agreements.

In 2013, the Competition Council did not publish sanctioning decisions with respect to vertical agreements. There was only one decision concerning vertical agreements (out of a total of 61), which did not result in the imposition of fines. Additionally, the Competition Council closed one investigation concerning alleged vertical restraints owing to lack of evidence of infringement of the Competition Law.

In 2014, the Competition Council published 51 decisions, of which only five concerned vertical agreements: three sanctioning decisions and two decisions rejecting the complaints made with respect to alleged infringements of Competition Law. At the same time, it launched three investigations regarding possible price-fixing practices on the FMCG retail market (another one) and the markets for the production, distribution and commercialisation of batteries and accumulators.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

All agreements or contractual clauses infringing article 5 of the Competition Law are null and void. The nullity is ascertained by the Competition Council through the sanctioning decision or by the relevant court of law. The regime of the nullity is the one provided by national law, according to which an agreement shall survive the invalidity of the clause, if the annulled clause is not essential for the agreement according to the parties' understanding. Agreements often contain a reinforcement of this principle. Consequently, an agreement containing a vertical restraint may survive, while the illegal clause contained therein is declared null and void.

51 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?

For infringement of article 5(1) the Competition Council may apply fines ranging from 0.5 per cent up to 10 per cent of the undertaking's turnover during the financial year preceding the sanctioning decision. Further details are provided under secondary legislation issued by the Competition Council: vertical restrictions may be fined with a basic level fine of up to 4 per cent of the turnover during the year preceding the sanctioning.

The refusal to answer information requests or the provision of incomplete or inaccurate data may incur a fine ranging from 0.1 per cent up to 1 per cent of the turnover during the year before the sanctioning decision. Additionally, the authority may apply time-based penalties of up to 5 per cent of the average daily turnover from the previous year until the undertaking complies with the authority's request. The Competition Council can also ascertain the nullity of the anti-competitive clauses or agreements, may order the seizure of the profits and revenues resulting from the infringement and may request that the parties comply with certain conditions or obligations. In its decisions relating to vertical agreements the Competition Council can include an obligation for the companies to supply on given terms. Such obligations have been imposed only in abuse of dominant position cases.

For participation in a vertical agreement consisting in sharing the diabetes products portfolio of the producer Eli Lilly, the supplier (Eli Lilly Export SA) and three distributors were fined €22.6 million in total in 2008. Mediplus Exim, one of the distributors, was fined €13 million, one of the largest individual fines in the history of the Competition Council (Competition Council Decision No. 15/2008). The fines imposed on the distributors were reduced either by the Bucharest Court of Appeal or the High Court, after the companies challenged the Competition Council's decision. Even though the grounds for reduction were the same, the percentage by which the fines have been reduced varies from 33.33 to 73.4 per cent. The fines applied in 2011 for vertical restrictions are not as impressive, as they depended largely of the level of turnover of the companies sanctioned (for instance, three companies were fined a total of €4 million for RPM restrictions).

At the beginning of 2015, the Competition Council announced that it has sanctioned 25 companies from the FMCG retail market with fines amounting to approximately €35 million. The four retailers, Metro Cash & Carry Romania SRL, Real Hypermarket Romania SRL, Selgros Cash & Carry Romania SRL and Mega Image SRL, and the 21 suppliers were sanctioned for price-fixing practices and for anti-competitive behaviour during promotions.

Update and trends

In 2014, the Competition Council published its preliminary findings in two sector inquiries, one in the pharmaceutical sector and the other in the beer market in Romania, the latter having a special focus on the wholesale distribution of beer and the HORECA segment. It also launched three individual investigations on price-fixing practices, one of which targeted the FMCG retail market players, while the previous one (open in 2009) was not yet closed.

The Competition Council's interest in the FMCG sector has also been underlined by its new project announced in November 2014. The Romanian competition authority and consumer protection associations in Romania will cooperate in the creation of an online platform, 'The monitor of the consumer goods prices', which will display weekly the prices of products which are part of the daily basket of Romanian consumers.

In terms of changes of legislation, the novelty brought by 2014 was the harmonisation of the leniency programme with the EU rules. Following an amendment which came into force in October 2014, serious anti-competitive vertical agreements no longer benefit from the leniency procedure.

The beginning of 2015 may also bring further changes to the Competition Law, which seems to be under scrutiny by the Competition Council.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

After opening an investigation, the Competition Council is entitled to request documents or information, to obtain statements from the undertaking's management or employees, to carry out inspections on notice and dawn raids, during which is entitled to examine all types of documents of the undertakings inspected, regardless of the place or the physical or electronic means where they are stored, to ask for explanations with respect to the facts or the documents related to the object or purpose of the inspection and to note down or record the answers received in this respect, to pick up copies or excerpts of all documents related to the undertaking's activity, to seal documents or premises for the time and to the extent necessary for the investigation; also, the Competition Council has the right to inspect the domicile, transport vehicles or any other private premises belonging to management representatives or other employees.

Until recently, the Competition Council was required to obtain judicial authorisation only in order to perform an inspection of the private premises mentioned above. With effect from February 2014, judicial authorisation is also required for inspections or dawn raids performed at the premises, lands or transport vehicles of the undertakings subject to the investigation.

The authority is entitled to demand information from any undertaking whose actions may have anti-competitive effects on the Romanian market, irrespective of its domicile. In practice, the Competition Council would require cooperation from the relevant authority in the jurisdiction where the supplier is domiciled.

The Competition Law now limits the Competition Council's investigative powers by defining the documents that may not be taken during an inspection (namely, preparatory documents drafted by the undertaking for defence purposes and documents subject to legal professional privilege).

In 2012, the Competition Council exercised its inspection powers and performed at least 12 dawn raids, while with respect to 2013 we have information regarding 11 dawn raids, which targeted companies active in the cinematographic market. In 2014, according to the information available on the Competition Council's website, the authority performed dawn raids in the context of seven investigations.

Private enforcement

53 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?

Any party that has suffered loss as a result of an anti-competitive practice has the right to be indemnified for such loss following a private damages claim. The courts may also declare vertical restraints clauses null and void. Under Romanian law a claimant must prove its interest in the specific case.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Before the entry into in force in October 2014 of the amendments to the leniency rules, leniency had also been available in cases of serious anti-competitive vertical agreements.

PELIfILIP

Carmen Peli carmen.peli@pelifilip.com
Manuela Lupeanu manuela.lupeanu@pelifilip.com
Oana Bucsa oana.bucsa@pelifilip.com

SkyTower Building , 246C Calea Floreasca, 15th floor
014476 Bucharest, 1st District
Romania

Tel: +40 21 527 2000
Fax: +40 21 527 2001
www.pelifilip.com

Russia

Alexander Egorushkin and Igor Panshensky
Antitrust Advisory

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main source of antitrust rules applicable to vertical restraints is Federal Law No. 135 on Protection of Competition (the Competition Law) adopted in October 2006, which has undergone several rounds of amendments. The relevant articles of the Competition Law are articles 11, 12 and 13. In addition, the Russian government has enacted several block exemptions, one of which is applicable specifically to vertical restraints (see questions 8, 15, 16 and 18). Competition law issues are also addressed in some other laws, such as the Law on Natural Monopolies and the Trade Law (see question 7), as well as block exemptions, regulations and guidelines issued by the Russian government and the competition authority.

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 Competition Law does not define vertical restraints per se; rather it defines the notion of vertical agreement and provides for a set of specific bans and restrictions applicable to such agreements. In particular, article 11 of the Competition Law prohibits the following types of vertical restraints:

- resale price-fixing except for maximum resale price; and
- buyer's exclusivity undertaking, ie, the obligation not to sell products of the seller's competitors, except for the agreements for branded sale of products (downstream exclusivity).

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?

The official objectives of the Competition Law have to do with protection and promotion of competition, freedom of economic activity and effective functioning of commodity markets. However, in practice the competition policy of the agency responsible for the enforcement of the Competition Law (see question 4) is also driven by more general considerations, including consumer protection, particularly when it comes to prices for food products and other staples.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

There is a single federal agency responsible for the enforcement of the Competition Law, including in respect of anti-competitive vertical restraints: the Federal Antimonopoly Service (FAS), currently headed by Igor Artemiev. The FAS is subordinate to the Russian government.

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?

The territorial scope of application of the Competition Law is based on the effects doctrine. Therefore, the rules of the Competition Law in respect of vertical restraints would apply to any arrangements that have a negative impact on competition in Russia, even if the parties to such arrangements are non-Russian entities or individuals and the applicable law is foreign law. Although we are not aware of cases where this doctrine was applied by the FAS in the context of vertical restraints, it has been applied in the merger control context.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The general rules on vertical restraints set out in articles 11 to 13 of the Competition Law do not apply to agreements concluded by public authorities, which are not commercial entities. There is a specific set of bans applicable to agreements concluded by public authorities (article 16 of the Competition Law), but it does not address specifically vertical restraints, which does not mean that they are not covered by more general bans provided for such agreements. However, commercial entities that can be parties to agreements subject to bans related to vertical restraints include publicly owned entities (such as state-owned and municipal enterprises).

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.

Sector-specific regulations of vertical restraints are still scarce in Russia. One of the examples of such regulation is the Trade Law adopted in 2009, which sets out specific rules applicable to vertical restraints in agreements between retailers and suppliers of food products. In addition, the FAS has addressed competition issues specific to certain industries and sectors of economy by issuing some sector-specific regulations (such as block exemptions for agreements between banks and insurance companies formally approved by the Russian government) and non-binding recommendations (such as in respect of distribution of motor vehicles).

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The Competition Law provides a general exemption from its rules on vertical restraints ('safe harbour') for the following categories of vertical agreements:

- franchising agreements; and

- vertical agreements between business undertakings with market shares not exceeding 20 per cent (article 12).

In addition, article 13 of the Competition Law provides for the criteria of permissibility of vertical agreements based on both impact on competition and efficiencies generated by such agreements ('rule-of-reason' type of defence). The government can issue more specific block exemptions for categories of agreements and has already used this possibility in the past in respect of, inter alia, certain types of vertical agreements (see question 15).

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Competition Law provides for a very broad definition of agreements including any form of agreements or arrangements whether written or oral. This definition is broader than the definition of contracts in the Civil Code and would cover agreements that would not be deemed valid and binding as a matter of civil law.

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?

See question 9. There is another concept of the Russian Competition Law that can apply in the absence of express agreement (written or oral), namely that of concerted actions, but it applies only in respect of parallel conduct of competing undertakings in the market and therefore is not very relevant to vertical restraints.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Vertical agreements are exempt from vertical restraints rules if they are concluded between related companies, meaning specifically:

- a parent company and a company under its control (direct or indirect); or
- two or more companies controlled by one and the same entity.

Control for this purpose is defined as based on the ownership of more than 50 per cent of shares in a respective company or the performance of the functions or its executive body.

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?

Agency agreements are expressly excluded by the Competition Law from the definition of vertical agreements and therefore rules on vertical restraints do not apply to them. However, excluded 'agency agreements' are understood to include only one of the varieties of agency arrangements provided under the Civil Code so that other types of the latter (such as 'commission agreements') would not now seem to be excluded from the scope of bans on vertical agreements, although at least one such ban related to resale price-fixing cannot apply to them because such agency arrangements do not involve resale.

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?

There is no such official guidance other than the wording of the definition of vertical agreements and the definition of agency agreements in the Russian Civil Code. However, the FAS has on certain occasions confirmed its narrow understanding of the exceptions for agency agreements described in question 12.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

There is a specific carve-out from the rules on vertical restraints (as well as other types of anti-competitive agreements) in respect of agreements involving transfer of IP rights or 'means of individualisation' of legal entities, products or services such as corporate names, brand names, etc. However, this exemption should not be read over-broadly and be relied upon to avoid the application of the bans in respect of vertical restraints in cases where the transfer of IP and similar rights is not the actual subject matter of the agreement but just an ancillary element thereof. In addition, there is a specific safe harbour for franchise agreements, ie, such agreements are not subject to any bans on vertical restraints (see question 15).

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

As mentioned in question 2, the Competition Law currently identifies two specific types of vertical restraints that are presumed to be unlawful: resale price-fixing and buyer's exclusivity undertaking (downstream exclusivity). However, this presumption of unlawfulness is rebuttable and subject to a set of exceptions and permissibility tests set out in the Competition Law, which can be summarised as follows:

(i) exceptions included in the very description of the vertical restraints in question (ie, maximum resale price for resale price-fixing and agreements for branded sale of products in the context of downstream exclusivity);
(ii) the exception for intra-group agreements meeting specified criteria described in question 11;
(iii) the general exemption for vertical agreements between parties whose respective market shares do not exceed 20 per cent (article 12 of the Competition Law);
(iv) the exception for franchise agreements and other agreements involving the transfer of IP or analogous rights (see question 14); and
(v) the 'rule of reason' set out in article 13 of the Competition Law for agreements that restrict but do not exclude competition in the market, do not involve restrictions on the parties or third parties that do not correspond to the purposes of such agreements and provide certain efficiencies or benefits for buyers.

The rule-of-reason analysis can also be applied to agreements that do not necessarily contain the specific types of vertical restraints mentioned above but that otherwise restrict competition (eg, contain other unnamed types of vertical restraints, such as a territorial restriction, restrictions to sale through certain channels, etc). Such agreements would also be subject to the exceptions described in items (ii) to (iv) above. In addition, anti-competitive vertical agreements can be eligible to block exemptions that can be enacted by the Russian government from time to time in respect of specific categories of agreements. Currently, there is one block exemption applicable specifically to vertical agreements, which was approved by Decree No. 583 of the Russian government (Vertical Block Exemption). This block exemption defines the conditions of permissibility of certain types of vertical restraints, such as territory allocation, quantitative restriction on the buyer's ability to procure competing goods from other suppliers, etc.

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?

As explained above, market shares of the parties are relevant for the assessment of vertical restraints: thus vertical agreements between parties whose respective market shares do not exceed 20 per cent are generally exempt from the rules on vertical restraints set out in the Competition Law. In addition, the Vertical Block Exemption ties the permissibility of certain other types of vertical restraints to the market share of the supplier or the buyer, as the case may be, not exceeding 35 per cent (see question 18).

The legal assessment of vertical restraints is not generally affected by the fact of their being widely used by suppliers in the market. Although the Russian Civil Code contains the concept of 'business usages' as a

supplemental source of law (ie, applicable in the absence of statutory or regulatory rules), it specifically disclaims the applicability of business usages that contradict the express requirements of the law. Thus the existence of common practices may potentially be invoked as a defence only if they do not contradict any bans of the Competition Law, ie, where there is no legal basis for a challenge under this law in the first place. We are not aware of instances where reliance on prevailing business practices helped in the context of an antitrust challenge.

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?

See question 16.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

As explained in question 15, there is currently a block exemption in respect of vertical agreements meeting certain criteria (the Vertical Block Exemption). Those criteria are as follows:

- the market share of a supplier of products to multiple buyers or that of a single buyer of the supplier does not exceed 35 per cent;
- the supplier and the buyer do not compete with each other or compete in the market where the buyer purchases the product for the purpose of its resale; and
- the buyer does not manufacture products substitutable for those of the supplier.

If a vertical agreement meets all of these criteria, it should be analysed on the merits based on the substantive test set out in the Vertical Block Exemption.

For example, if a distribution agreement meeting the above general criteria provides for the allocation of a territory to the distributor (which presupposes that the supplier's market share does not exceed 35 per cent in the relevant market), such vertical restraint would be permissible if both of the following conditions are met:

- the adjacent territories are allocated on an exclusive basis to another distributor or reserved by the supplier itself; and
- the buyer contractually undertakes not to enter into agreement with suppliers of substitute goods providing for a fully or partially overlapping territory.

On the other hand, if the buyer undertakes not to purchase or limit the purchase of substitute goods from other suppliers, such vertical restraint may be permissible under the block exemption, inter alia, if limited in duration to three years, subject to the same general criteria mentioned in the preceding paragraph. It should be noted that in the case of downstream exclusivity (ie, undertaking of the buyer not to sell goods competing with those of the supplier), this would constitute a vertical restraint specifically prohibited by the Competition Law, as mentioned in question 2. However, as this ban has not been absolute since January 2012, such undertaking can now be justified under the 'rule of reason' and therefore the conditions of permissibility set out in the Vertical Block Exemption should apply.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

As mentioned above, resale price-fixing is one of vertical restraints specifically prohibited by the Competition Law, and this has been the case for many years. However, since January 2012, this resale price-fixing ban is subject to the exception related to maximum resale price that can be set by the seller. Unfortunately, since the introduction of this exception there has been little, if any, guidance from the regulator in respect of the limits of its application. There is just one implied limitation on the use of maximum resale prices: it should not be set by the seller at a level that creates the high probability of the buyer setting resale price at the level of maximum resale prices because in this case it will be equivalent to resale price fixing.

Thus the only permissible form of control over resale prices in the context of vertical agreements relates to the seller's ability to limit resale price. Any restrictions on the buyer's ability to reduce resale price (eg, in the form of discounts or rebates) would be a priori impermissible.

The FAS has always been proactive in combating any forms of resale price-fixing including where they were disguised as recommended resale prices. One of the most notable precedents related to Danon's practice of printing recommended retail prices on consumer packaging of its products. The FAS came to the conclusion that such form of 'recommendation' created a substantial pressure on retailers to sell Danon's products at such recommended prices, which was equivalent in effect to resale price-fixing. Resale price-fixing has also been tested recently in the courts. In the 2014 decision on the case against the major Russian petrochemical distributor United Trade Company, the Arbitration Court of the Moscow Region upheld the position that distribution agreements containing resale price-fixing provisions may be considered permissible under the rule of reason if they are aimed at creating a pan-Russia coverage of sales and hence result in benefits for consumers.

There is no clear FAS position or guidance as to how other practices affecting the resale price, such as an agreement on the level of discounts to be set by resellers, should be assessed. We aware of at least one case initiated by the FAS territorial division in the Kurgan Region in which the FAS challenged an agreement between Kazan Fat Factory and its clients on discounts to be applied to the clients' customers as unlawful price-fixing.

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'?

Such practices have not to our knowledge been the subject matter of specific scrutiny by the FAS, although as mentioned above any restriction on the buyer to reduce prices by granting discounts, etc would probably be deemed prohibited by the Competition Law. As for launches and promotions, where a supplier incentivises the buyers (eg, retailers) to temporarily reduce prices, they are rather common in practice and do not involve a significant risk of violation of the Competition Law as long as they allow buyers sufficient leeway in setting resale price, for example where the base resale price is set by buyers independently from the seller (subject to the maximum resale price, if any, properly set by the seller) and where the buyers are not required by the seller to grant discounts in the precise amount defined by the seller.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

While there are no specific guidelines addressing the possible links between resale price maintenance and other forms of vertical restraints, in its enforcement practice the FAS sometimes identified such links, such as in the case of upstream exclusivity that resulted in the FAS's view in resale price-fixing. There were a few cases where the FAS found that the exclusive supply agreements (ie, the supplier has only one buyer) between a supplier with a significant market share and a buyer resulted in price increases due to the limited competition between the distributors of the supplier's product. In these cases, the FAS came to the conclusion that even in the absence of express resale price arrangements between the supplier and its distributor the mere fact of de facto exclusive agreements between them led to effective resale price maintenance prohibited by the Competition Law. It is important to note that courts sometimes do not support such approach by the FAS. For example, in the 2011 decision on the case against OJSC Sylvinite, a Russian fertiliser manufacturer, the Arbitration Court of the Moscow Region concluded that there could be no resale price maintenance unless an explicit agreement or arrangement existed.

In addition, if competing suppliers de facto agree on prices with each other when setting resale prices to the same buyer, this is considered a cartel agreement and is also prohibited per se. This was the case in the 2011 FAS decision against United Trade Company, where manufacturers of liquid soda were found to participate in price collusion through price arrangements with United Trade Company, their common distributor.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

The possibility of invoking efficiencies as a defence against the ban of minimum and fixed resale prices was introduced to the Competition Law at the beginning of 2012. Since then, there have been just a few cases involving minimum and fixed resale prices. To our knowledge, the efficiencies were neither invoked nor considered in these cases.

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.

We are not aware of any cases in which such an issue was considered. It is likely that it can be viewed as resale price maintenance, which is prohibited by the Competition Law.

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.

There is no clear general FAS guidance on this issue, but – at least in the food sector, in which the specific rules of the Russian Trade Law apply – such restriction can be viewed as anti-competitive and unlawful at least in the contractual relations involving retail chains. The Trade Law rules, which apply regardless of the market shares of the parties, prohibit retail chains from imposing on suppliers of food products a contractual obligation to supply products on no less favourable terms than to other retailers. Moreover, if such obligation leads to the setting of the same prices for food products intended for different categories of customers, the FAS can view this as a creation of discriminatory conditions prohibited under the Trade Law (this is in line with the FAS's position in a recent case involving Metro Cash & Carry). These Trade Law rules are almost identical to the rules of the Competition Law (non-specific as to industry) applicable to dominant companies. Therefore, if a party to an agreement holds a dominant position in the relevant market there is a risk that an MFN clause can be also deemed anti-competitive under the 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.

There is currently no guidance as to the application of the most-favoured-nation clause in the internet trading context. This issue is most likely to be analysed as described in question 24.

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.

Neither a minimum advertised price policy (MAPP) nor internet minimum advertised price (IMAP) is expressly prohibited by the Competition Law. Further, no specific guidelines or FAS practice exist with respect to MAPP or IMAP. In view of this, these practices should be analysed from the 'rule-of-reason' perspective, so that any possible anti-competitive effect of MAPP or IMAP must be balanced against economic efficiencies and benefits for consumers.

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.

The same rules as described in question 24 apply to the buyer's most-favoured supplier arrangement.

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?

There is no express ban on territorial restriction in a vertical agreement. The anti-competitive effect of the restriction must be shown by the competition authority and such effect must outweigh possible efficiencies and benefits for consumers (ie, the 'rule of reason' applies). In addition, all safe harbours for vertical agreements (ie, the 20 per cent market share and franchise agreements exceptions) apply to territorial restrictions. In a recent case won by Coca-Cola against the FAS in 2013, the court upheld the company's position that the restriction on active sales is not illegal per se and requires a higher standard of proof of the anti-competitive effect than a restriction on passive sales.

In addition, as explained in question 15, the Vertical Block Exemption allows territorial restrictions (zoning), subject to certain conditions. The Vertical Block Exemption rules apply to the buyer's sales, but not to sales of the buyer's clients. Moreover, agreements imposing an obligation on the buyer to prohibit its customers from further resale of the products purchased from the seller cannot be considered permissible in accordance with the Vertical Block Exemption.

29 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?

The analysis of customer allocation practice is generally the same as the assessment of the territorial restriction (ie, no strict ban, proof of anti-competitive effect is required, safe harbours for vertical agreements and efficiencies defences are applicable). The major difference is that the Vertical Block Exemption expressly states that the customer allocation cannot be considered permissible based on its provisions. Although there is currently no clear guidance as to what specific forms of customer allocation would be considered by the FAS as permissible, in the recent 2014 case initiated against Mercedes-Benz the FAS clarified that the requirement not to resell products to certain customers can be justified if this restriction decreases the risk of corruption and improves the quality of services for such customers (see question 33).

30 How is restricting the uses to which a buyer puts the contract products assessed?

As mentioned above, there are specific rules for restricting resale of products. Restricting other forms of use is not specifically addressed in the Competition Law or any published guidance. Therefore, the general analytical framework applies.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

As there are no specific guidelines, regulations or FAS practice with respect to internet sales, the general analytical framework applies.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No, there are no specific guidelines, regulation or FAS practice with respect to the internet sales.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The FAS usually analyses 'selective' distribution systems in the context of abuse of dominance cases, ie, where the supplier holds a dominant position and has a discriminatory trade or commercial policy governing the selection of its distributors. Although generally there is no affirmative requirement for dominant suppliers to publish such polices, the FAS often imposes this obligation in its decisions on abuse of dominance or merger control cases. The FAS clarified that commercial policy requirements must be exhaustive, achievable by potential customers and measurable.

The above analysis is applicable to all suppliers of food products (even non-dominant) because under the Trade Law they are prohibited from setting discriminatory conditions that include discriminatory trade policies containing 'selective' distribution systems. In addition, suppliers selling food products to retail chains are required by the Trade Law to disclose all rules and policies governing the selection of customers. This can be done by means of publication on a website or by provision of such information to any retailer upon its request. The same requirement applies to retail chains in respect of procurement of food products from suppliers.

If there are no dominance and food sector issues, agreements setting out criteria and procedures for selecting customers should be analysed on the basis of the general analytical framework for vertical agreements. For example, in the recent 2014 case initiated against Mercedes-Benz by the FAS de facto approved the 'selective' distribution system under which Mercedes-Benz's dealers were prohibited from selling Mercedes-Benz vehicles to public customers and government officials – these clients were supplied directly by Mercedes-Benz. According to the FAS such restrictions are justifiable because they (i) decrease corruption risks associated with the sale of vehicles to 'public' clients by excluding intermediaries from the supply chain; and (ii) improve the quality of services for such clients by increasing the transparency of the sales.

34 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?

Legally speaking, it is difficult to draw such distinction in respect of specific types of products except for food products, the distribution of which is subject to more stringent rules provided in the Trade Law, as explained above.

35 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There are currently no specific guidelines, regulations or clear FAS position as to restrictions on internet sales within selective distribution systems. Therefore, the general analytical framework for vertical agreements should apply to any such restrictions.

36 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?

Yes, there were several FAS decisions regarding buyers engaging in unauthorised sales, such as sales to clients that were not approved by the supplier. Overall, the FAS's position in respect of such restrictions on buyers is negative, consistent with the Vertical Block Exemption that treats as impermissible any restrictions on buyers to resell products to a particular category of customers subject to the exception for territorial restriction discussed in questions 18 and 33.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The only example of the FAS taking into account the cumulative effect of multiple selective systems we are aware of relates to territorial allocation. As explained in question 18, under the Vertical Block Exemption the permissibility of such allocation of territories to distributors is conditional on the latter not agreeing to a similar territorial allocation with other suppliers. However, we cannot exclude that the FAS can take this factor into account when analysing other types of cumulative effect of multiple selective distribution systems.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

Yes, the territorial restrictions in this case are usually assessed as described in questions 18 and 37.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

The Competition Law generally prohibits a supplier from imposing an obligation on a buyer to not purchase competing contract products from the supplier's competitors. Competing products may include products manufactured by the same supplier or manufacturer but sold by another supplier. Therefore, the restraint in question will most likely violate the above-mentioned ban of the Competition Law if there is competition between the supplier and an alternative supplier selling the same manufacturer's products. However, this is not an absolute ban, ie, safe harbours for vertical agreements and the 'rule of reason' for anti-competitive agreements will be applicable.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There are no specific guidelines, regulation or clear FAS position as to such restraint. Therefore, the general analytical framework for vertical agreements should apply to all such restrictions.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

There are no specific guidelines or regulation applicable to such restraint. Most likely, restrictions on the buyer's ability to stock competing products will be assessed in terms of their impact on the purchase and resale of competing products. If this effectively precludes the buyer from purchasing and selling competing products it can be viewed as a violation of a specific ban of the Competition Law applicable to vertical agreement (downstream exclusivity).

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The Vertical Block Exemption provides that a contractual undertaking of the buyer in a qualifying agreement (see question 18) to purchase from the supplier more than 50 per cent (in value terms) of the total volume of contract products purchased by the buyer during a year is permissible provided:

- the requirement is introduced for the first time and is limited in duration to not more than three years (does not apply to buyers that are retailers); or
- the buyer runs its business on the land or in the premises of the supplier on any legal grounds.

If the amount or minimum percentage of the contract products that the buyer must purchase from the supplier is very significant (eg, 99 per cent) this can potentially lead to the exclusivity of the buyer (downstream exclusivity) which is prohibited by the Competition Law, as mentioned in question 39. However, even if this is the case, such vertical restraint may still be justified under the Vertical Block Exemption or general 'rule of reason' rules provided in the Competition Law.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The Competition Law does not expressly prohibit this type of upstream vertical restraint. However, in practice, the FAS tends to view such restraints as anti-competitive, especially if the market share of the parties is significant and the supplier is strictly prohibited from selling its products to other buyers (ie, upstream exclusivity). Having said this, the Competition Law does not exclude the possibility of justifying such vertical restraints on the basis of the general 'rule of reason'. For example, the following efficiencies outweighing the anti-competitive effect of upstream exclusivity were acknowledged by the FAS in the case against IMZ, a major Russian manufacturer of weapons, in 2009:

- general increase of sales volumes;
- increase of product flow and decrease of stock in storage;
- optimising capacity utilisation and planning;
- minimising production costs and operational and storage costs;
- incentivising marketing and market research activities;
- introducing new R&D projects and improving the quality of investment planning; and
- increasing sales coverage due to the development of logistics and infrastructure of the distributor.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

If the market share of the product in question is significant, there is a risk that such restraint can be viewed as anti-competitive upstream exclusivity, as mentioned in question 43. This risk is even higher if retail prices for the product increase after the introduction of the restraint. The general rule-of-reason justification applies here as well.

The Vertical Block Exemption also expressly states that the buyer cannot restrict the supplier's ability to sell the products to end-consumers if such products are spare parts or a component of the goods manufactured by the buyer. These rules are aimed at protecting competition in the market of so-called 'original' spare parts, which are usually sold by the manufacturers of the relevant complex products (such as vehicles), and spare parts for the same complex products manufactured by independent manufacturers who sell them directly to end-customers.

45 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?

No, not to our knowledge.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

The Competition Law provides a formal voluntary procedure for clearing potentially anti-competitive agreements with the FAS (an 'article 35 filing'), whereby the FAS is requested by the parties to assess such agreement from the standpoint of its compliance with the Competition Law. This is done by filing a special application form with the FAS together with the draft of the agreement and various other documents. Usually it takes from one to three months to receive a decision from the FAS as to whether the draft agreement complies with the Competition Law, which can include a prescription to amend certain provisions of the draft agreement to comply with the law. The FAS hands the decision over to the parties and usually does not publish it, even if there are no confidentiality issues. The FAS's decision is binding on the parties (which does not mean that they are required to enter into the agreement approved by the FAS) and the FAS but can be revoked by the FAS in some cases, such as if the underlying conditions have changed.

Authority guidance

47 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?

Although there is a formal clearance mechanism, as described in question 46, it is also possible to follow a less formal (and usually faster) route, which provides, however, less legal comfort. In particular, the parties to the proposed agreement can request the FAS to clarify the application of the Competition Law in respect of an abstractly described hypothetical that is based on the specific provisions of the agreement in question without disclosing the latter (as well as the parties if the request is submitted by outside counsel on a no-name basis). The benefit but also the drawback of such an approach is that the FAS's position in this case will not be binding in respect of the agreement itself. The other limitation of this approach is that the FAS may not take all of the relevant provisions of agreements and other important background factors into consideration and therefore can always retract its position when the actual agreement comes under its scrutiny.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes, any interested parties may file a complaint with the FAS about alleged anti-competitive vertical agreements or practices. The FAS must review the complaint within three months from the day of its receipt and decide whether to initiate formal proceedings. If the FAS decides to initiate such proceedings, it will have to issue the decision within three months of their initiation. This period can also be extended, but by no more than three additional months.

Enforcement

49 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?

Based on information provided on the FAS website (www.fas.gov.ru), in 2013 the FAS initiated 261 cases with respect to anti-competitive agreements (information for 2014 was not available at the time of writing). 2.3 per cent of those cases relate to specific bans for vertical agreements (ie, resale price maintenance and downstream exclusivity); 21.8 per cent belong to the category of 'other anti-competitive agreements', which in practice may contain vertical anti-competitive restraints not specifically prohibited in respect of vertical agreements. Unfortunately, it is impossible to single out vertical restraints within this broad category of cases.

The main enforcement priorities of the FAS were as follows:

- vertical restraints under the Trade Law; and
- vertical relationships between car manufacturers and their dealers.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

In general, contractual provisions violating the bans of the Competition Law are deemed legally invalid and unenforceable. However, the other provisions of the agreement should remain valid and enforceable as long as they are severable from the invalid provisions. The test of severability is whether the agreement would have been concluded by the parties without the invalid provisions, which requires a case-specific assessment.

51 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 FAS is entitled to impose on offenders administrative sanctions, which for anti-competitive vertical agreements include:

- turnover-based fines for companies in the amount of up to 15 per cent of the offender's proceeds in the respective market but no more than 4 per cent of the total amount of its proceeds during the calendar year preceding the year in which the offence was discovered; and
- fixed fines on responsible officers of the company in the amount of up to 50,000 roubles or disqualification for up to three years.

The FAS is also authorised to issue an order requiring the parties to an unlawful agreement to remit to the state budget their income received as a result of such agreement. This type of sanction can be applied together with the turnover-based fine.

Finally, the FAS can issue prescriptions imposing certain duties on the parties to an unlawful agreements such as to enter into agreements with other parties or to modify existing agreements.

The largest turnover-based fine for an unlawful agreement containing both vertical and horizontal restraints was imposed in 2011 on United Trading Company, a leading chemicals distributor, in the amount of 912 million roubles. The current trend is towards more frequent and vigorous imposition of turnover-based fines in order to strengthen their deterrence effect.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The FAS's investigative powers are quite extensive and include the following:

- requests for information required in the course of investigations from any legal entities, individuals, federal and municipal bodies and officials including confidential information;
- scheduled inspections and dawn raids during which the FAS may enter any premises (except for residential premises), request oral or written explanations, review documents, make copies and seize relevant materials including electronic ones; and
- in the event of respective parties' failure to provide requested information or to cooperate in the course of inspections or dawn raids, the FAS is entitled to impose fines on such uncooperative parties.

Update and trends

On 22 October 2014, the State Duma of the Russian Federation preliminarily approved the draft of a new set of amendments to the Russian antimonopoly legislation (the 'fourth antimonopoly package'), which is expected to be finally adopted by spring 2015. These amendments provide for the following two innovations related to vertical restraints:

- As mentioned in question 12, agency agreements are expressly excluded by the Competition Law from the definition of vertical agreements. These amendments terminate such provision, which means that agency agreements will become vertical agreements and so the rules on vertical restraints will apply to them.
- The amendments clarify the markets on which the 20 per cent market share should be determined for the purposes of the safe harbour rule for vertical agreements mentioned in question 8 and in item (iii) of question 15. According to the amendments, a vertical agreement is deemed lawful if the shares of each of the parties do not exceed 20 per cent 'in the market of the product which is the subject matter of such vertical agreement'.

Notable cases from 2014 involving vertical restrains are:

- the case initiated by the FAS against Mercedes-Benz, where the authority considered the selective' distribution system of Mercedes-Benz to be permissible because it decreases corruption risks and improves the quality of services for specific clients (see question 33); and
- the decision of the Arbitration Court of the Moscow Region on the case against United Trade Company, according to which distribution agreements containing resale price-fixing provisions may be considered permissible under the 'rule of reason' if they are aimed at creating a pan-Russia sales coverage (see question 19).

Private enforcement

53 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?

The Competition Law expressly provides that any parties whose interests are infringed as a result of a violation of the Competition Law (including unlawful vertical restraints) are entitled to bring an action directly to the relevant Russian court without having to file a complaint with the FAS before doing so. The list of potential claimants includes consumers, parties to unlawful vertical agreements and other interested parties. They can claim for damages, lost profits, injunctions, restoration of rights infringed and reasonable legal costs. Having said this, we note that private antitrust enforcement is not yet well developed in Russia for various reasons, one of which is that it is usually very hard to prove in court the damage resulting from violation of the Competition Law. Moreover, antitrust private enforcement requires significant resources which are often unavailable to potential claimants owing to the lack of specific regulation of antitrust class actions in Russia.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Yes, there is a peculiar concept of Russian antitrust law relevant to the subject of vertical restraints which it does not share with most of other jurisdictions (such as the EU and US). It is the notion of 'coordination' by one party of the economic activity of other unrelated parties that results in anti-competitive consequences and as such constitutes a violation of the Competition Law. In this case, the only liable party is the 'coordinator'. For instance, anti-competitive price coordination can be established by the FAS if resale prices for products are set by a supplier ('coordinator') in respect of multiple indirect buyers, such as retailers in the case of sale through distributors. In a 2011 decision against Angstrem, a large food producer, the FAS territorial division in St Petersburg concluded that this company was involved in the unlawful price coordination of retailers because, after Angstrem increased its own prices, it monitored corresponding price increases in retail and persuaded retailers who were slow to do so to increase their shelf prices. It should be noted that since January 2012, coordination is not possible through vertical agreements, so this concept is more relevant in the case of indirect sales.

Antitrust Advisory

Alexander Egorushkin **alexander.egorushkin@at-advisory.com**
Igor Panshensky **igor.panshensky@at-advisory.com**

Narodnaya str 8
Moscow 115172
Russia

Tel: +7 916 980 7556
Fax: +7 495 912 8282
www.at-advisory.com

Serbia

Guenter Bauer and Maja Stankovic
Wolf Theiss

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The antitrust law applicable to vertical restraints is set out in articles 9 through 14 and articles 60, 68 and 69 of the Competition Protection Law (Official Gazette No. 51/2009, 95/2013) (the CPL). The CPL entered into effect on 1 November 2009, whereas the current version applies as of 8 November 2013. The Serbian government adopted the Regulation on the Block Exemption of Vertical Agreements (Official Gazette No. 11/2010) (the BER) on 18 February 2010. The BER entered into force on 13 March 2010. In addition, in late 2010, the Serbian government passed the Regulation on the Level and Method for the Setting of Fines (Official Gazette No. 50/2010) and the Regulation on the Conditions for Immunity from Fines (Official Gazette No. 50/2010 and 91/2010).

On a separate note, the Banking Act (Official Gazette No. 107/2005, 91/2010) sets out certain general provisions that relate to vertical restraints in the financial sector. The Banking Act entered into effect on 10 December 2005, whereas the current version applies as of 11 December 2010.

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 CPL does not define the concept of 'vertical restraints' as such. However, the CPL contains a definition of 'vertical agreements' and a definition of 'restrictive agreements'.

'Vertical agreements' are defined as agreements between undertakings, each of which operates, for the purposes of the agreement in question, at a different level of the production or distribution chain.

'Restrictive agreements' are defined as agreements that have as their object or effect the prevention, restriction or distortion of competition in Serbia.

Further, for the purpose of the CPL, the term 'restrictive agreement' is understood to include all agreements (explicit or tacit), individual provisions of agreements, concerted practices and decisions by associations of undertakings and, in particular, where:

- the purchase or sale prices or other conditions of trade are fixed directly or indirectly;
- the production, marketing, technical development or investments are limited and controlled;
- unequal conditions of operations are applied in respect of the same activities for different undertakings, through which the undertakings are put into an unfavourable position in relation to their competitors;
- the contract or agreement is subject to the acceptance of additional obligations that, by their nature and trading customs and practices, do not relate to the subject of the agreement; or
- the markets or sources of supply are shared.

Restrictive agreements are prohibited and void, except if exempted from the prohibition on restrictive agreements in accordance with the CPL.

The CPL does not list the exact types of vertical agreements that could be prohibited under antitrust law. However, it follows from the practice of the Commission for the Protection of Competition that one needs to be particularly cautious in the case of agreements that involve exclusivity (eg, exclusive sale agreements, exclusive distribution agreements, exclusive supply obligations, certain exclusive agency agreements). In addition, franchise agreements and restrictive technology transfer agreements can be expected to raise the interest of the authority.

The Banking Act generally prohibits banks from entering into agreements that substantially prevent, restrict or distort competition. The Banking Act empowers the National Bank of Serbia (NBS) to set out in detail the criteria for what exactly constitutes a prevention, restriction or distortion of competition in the financial sector. However, no such criteria have been specified by the NBS as of the time of writing.

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?

The objective pursued by the antitrust rules of the CPL and the Banking Act is economic.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Commission for the Protection of Competition (the Commission) is the agency responsible for enforcing prohibitions on anti-competitive vertical restraints within the meaning of the CPL. The Commission is an independent organisation empowered to implement competition law in the public interest. The Commission reports to Serbia's parliament in this context.

The decision-making bodies within the Commission are the Council and the president of the Commission (who also represents the Commission in its dealings with third parties). The Council consists of the president of the Commission and an additional four members, all elected by parliament. The Council's members must not engage in any other public function or professional activity during their term (except teaching and scientific activities). Moreover, such members cannot be officials of a political party.

Under the Banking Act, the NBS is responsible for deciding whether an agreement concluded by a bank substantially prevents, restricts or distorts competition in the financial sector. If the NBS comes to the conclusion that an agreement does prevent, restrict or distort competition in the financial sector within that meaning, the NBS is empowered to initiate proceedings before a Serbian misdemeanour court, which may impose fines of 300,000 to 2 million Serbian dinars. The NBS is the central monetary institution of Serbia. It is independent in this function and accountable to Serbia's parliament. The government takes no part in the election of the decision-making bodies of the NBS. In general, however, the NBS cooperates with the government and, in particular, the Ministry of Finance in all areas concerning the goals and functions of the NBS.

On 11 February 2008, the Commission and the NBS signed a protocol on cooperation in antitrust matters in the financial sector. By virtue of

this protocol, the two institutions undertake to exchange information and cooperate in a harmonised manner in the event of a violation of competition law in the financial sector.

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?

The CPL applies to agreements that have an effect in Serbia, irrespective of whether the agreement has been concluded in the territory of Serbia or elsewhere. Thus, vertical restraints agreed upon by foreign undertakings may be subject to the CPL if the agreement results in anti-competitive effects on the market in Serbia.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Under the CPL, public or state-owned entities are subject to the antitrust rules on vertical restraints if they are deemed to be undertakings within the meaning of competition law. The latter is generally the case if the entity concerned pursues an economic activity. The CPL does not, however, apply to public or state-owned entities that carry out activities in the public interest and to entities endowed with such activities or a fiscal monopoly if such application would prevent these entities from carrying out their activities.

In 2014, in application of these principles, the Commission initiated proceedings against the Serbian Attorney Bar Association for, in particular, allegedly having imposed excessive fees on attorneys for joining the bar association. In the decision initiating the proceedings, the Commission specifically deals with the question of whether the CPL applies to the bar association which is, in part, deemed a public entity as it is entrusted by law with carrying out activities in the public interest. The Commission took the preliminary view (in its decision initiating the proceedings) that the CPL does apply with regard to the bar association's power to determine the fees for joining it as this power significantly affects the economic activity of rendering legal services in the market. These proceedings are still pending.

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.

Other than the Banking Act, there are currently no comprehensive laws or regulations that apply to the assessment of vertical restraints in specific sectors of industry (cars, insurance, etc).

The CPL introduced the possibility of the Commission investigating a particular sector of the economy (or a particular type of agreement across various sectors) if the prices or other circumstances suggest that competition may be restricted or distorted on a certain market. The Commission, so far carried out three such sector inquiries:

- in the market for wholesale and retail sales of liquid petroleum gas (LPG) (2009);
- in the milk sector (2010); and
- in the sector of manufacture, import, refinement, wholesale and retail sale of petrol and petrol derivatives (2010).

The findings on the LPG sector and on the petrol sector were published in 2011, and the findings on the milk sector were published in August 2012. In short, the Commission was unable to establish the existence of restrictive agreements in these sectors. The Commission, however, pointed out that it would continue to closely monitor these sectors following, in particular, the liberalisation of the regulation of the petrol sector.

In its 2013 activity report the Commission stated that most of the requests for an individual exemption that it had received in 2013 had concerned the insurance sector. The Commission held that it may be necessary to conduct a sector inquiry regarding the insurance sector and that there may also be a need to adopt a specific block exemption regulation for this sector.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The CPL introduced a de minimis rule in Serbia's antitrust law. This rule sets out that a vertical agreement of minor importance is allowed unless its purpose is price fixing or market partitioning.

An agreement of minor importance is an agreement entered into by undertakings whose total share of the relevant market in Serbia is:

- below 15 per cent, for vertical agreements; or
- below 10 per cent, for those agreements that have features of both horizontal and vertical agreements.

Further, the CPL provides that the Commission may grant an individual exemption from the general prohibition of anti-competitive agreements for vertical restraints if such restraints contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that such agreement does not:

- impose on the undertakings concerned restrictions that are not indispensable for the attainment of those objectives; or
- eliminate competition in respect of a substantial part of the relevant goods or services (article 11 of the CPL).

Such an individual exemption can only be granted by the Commission upon a written request by the undertaking applying for an exemption; hence, there is no (automatic) legal exemption. The individual exemption cannot be granted for more than eight years (see further question 46).

The CPL also provides that vertical restraints may be block-exempted from the general prohibition of restrictive agreements if they fulfil the general exemption criteria of article 11 of the CPL and if they meet the conditions specified in the BER. Despite the explicit mention in article 11 of the CPL, we believe this merely suggests that where an agreement fulfils the conditions of the BER, it will generally also meet the general exemption criteria of article 11 of the CPL (see further question 18).

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The CPL does not define 'agreement' as such (see also question 10).

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 to have a formal written agreement in place for the CPL to apply. Written agreements, oral agreements, meetings of trade associations, gentleman's agreements as well as exchanges of information (eg, benchmarking) can engage the antitrust law in relation to vertical restraints. Even a unilateral policy of one party that received the tacit acquiescence of the other party may be caught.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Related companies as defined by the CPL (a definition that encompasses parent and subsidiary companies, but also companies related by other strong economic ties) are deemed to be one company for the purpose of the CPL. Therefore, it appears that vertical agreements between a parent and a related company fall outside the ambit of the general prohibition on restrictive agreements.

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?

Agency agreements are subject to the CPL depending, in particular, on the commercial or financial risk borne by the agent with regard to the activities for which the agent has been appointed by the principal. An agency agreement which in principle is subject to the CPL may be block-exempted under the conditions described in question 18.

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?

In general, it is understood that the CPL does not apply to 'genuine' agency agreements (that is, agency agreements where the agent does not bear any, or bears only insignificant, commercial and financial risks). In October 2012 the Commission published an opinion explaining that, when assessing agency agreements, it will generally take both local and EU competition law rules and guidelines into account. In this opinion the Commission further explained that certain provisions that are otherwise deemed restrictive (such as territorial and customer restrictions and restrictions regarding the price the agent may charge) would not fall within the scope of the CPL when they appear in genuine agency agreements. However, the Commission also stated, very generally and without providing further explanation, that the CPL would nevertheless apply to those provisions of a genuine agency agreement that by and in themselves infringe competition or when such agreements contribute to or enable secret forbidden arrangements between undertakings. We are not aware of decisions by the Commission that deal specifically with what constitutes an agent–principal relationship in the online sector.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

The BER sets out that an agreement containing a vertical restraint and provisions granting IPRs may be block-exempted, if it fulfils the general criteria of the BER (see question 18), and where:

- the transfer of IPRs is not the primary object of the agreement;
- the agreement does not aim at restricting competition; and
- the IPRs are directly related to the use, sale or resale of the contract goods by the (direct or indirect) buyers.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The Commission has to apply the following criteria when assessing whether a vertical agreement prevents, restricts or distorts competition:

- the structure of the relevant market and the degree and dynamics of changes in that structure;
- the limitations and possibilities of new competitors entering the relevant market;
- the reasons for existing competitors to leave the market;
- any changes that may limit the possibility to supply the market;
- the level of consumer benefits; and
- other circumstances that may have an effect on the competitive situation on the market.

In our experience to date, the Commission is generally open to taking account of EU regulations and the European Commission's guidelines and case law.

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 are an important factor when assessing individual restraints. The Commission would also take account of other economic factors such as the structure of the market or the position of competitors when assessing the legality of individual restraints.

The Commission would consider it relevant whether parallel networks of similar vertical restrictions (either by the same or other parties) cover a substantial part of the relevant market. More particularly, the BER sets out that agreements containing vertical restraints can in principle no longer benefit from the BER where networks of similar restraints widely used by suppliers cover more than 40 per cent of the relevant market. It is not entirely clear whether the agreement containing a vertical restraint can be individually exempted in such circumstances. This presumably depends on the possible cumulative restrictive effects of all similar agreements entered into on the relevant market as well as on the extent to which the agreement in question contributes to such effects.

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?

The market share of the buyer is also taken into account for the assessment of individual restraints. For example, the applicability of the BER requires that the market share of each party to the agreement (ie, also the buyer's market share) does not exceed 25 per cent of the relevant market. However, from the wording of the BER and the Commission's practice to date, it is not clear whether the relevant market share is the buyer's share of its purchasing market or of its selling market.

In line with the above (see question 16), it also follows from the BER that agreements containing vertical restraints can in principle no longer benefit from the BER where networks of similar restraints widely agreed to by buyers cover more than 40 per cent of the relevant market.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The BER entered into force on 13 March 2010. It lists in particular the following groups of vertical agreements that may benefit from the block exemption, if the market share of each party to the agreement does not exceed 25 per cent of the relevant market:

- exclusive distribution agreements;
- agreements on exclusive customer allocation;
- exclusive supply agreements;
- selective distribution agreements;
- trade agency agreements, where the agent does not bear the commercial risk;
- franchise agreements;
- agreements on the transfer of intellectual property rights, where such transfer is not the primary object of the agreement; and
- agreements between associations of retailers (or their members, or both), and between associations of retailers and their suppliers, under certain conditions.

The BER also contains a list of hard-core restrictions that lead to the exclusion of the whole vertical agreement from the scope of the application of the BER. The list of hard-core restrictions contained in the BER is largely in line with EU Regulation No. 330/2010.

The CPL also provides for a safe harbour in the form of a general de minimis exemption (see question 8).

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

An agreement which limits the right of a buyer in a vertical agreement to freely determine its resale price is generally deemed a restrictive agreement which cannot benefit from the de minimis rule and the BER. However, imposing a maximum resale price may be permissible under the CPL. Furthermore, price recommendations may be lawful provided that there is no pressure on or incentives for the buyer to honour the recommendation.

In an opinion published in December 2009, the Commission held that a vertical agreement fixing the level of rebate which a buyer can grant to its customers qualifies as resale price maintenance. Such an agreement

cannot be exempted, nor can it benefit from the safe harbour of the de minimis rule. In 2012 the Commission imposed fines on various manufacturers and wholesalers in the pharmaceutical sector for having agreed on several vertical restraints including resale price maintenance in the form of fixing the rebates to be applied down the supply chain.

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'?

In an opinion of 2012, the Commission addressed maximum and recommended resale prices during a promotional period. The Commission confirmed the general rule that maximum and recommended resale prices are permitted provided that the supplier does not exert pressure on, or offer incentives to, the buyer to actually apply the maximum or recommended resale price. In this opinion, the Commission also stated that it would take account of the effects a particular promotional pricing arrangement has on the market (eg, according to the Commission, a high market share of the supplier or a long duration of the relevant period would provide an indication of restrictive effects).

In 2013, the Commission issued another opinion in response to the question of whether a manufacturer can lawfully advertise a promotion by printing the discounted price on a product's packaging. Under the particular circumstances of the question at hand, the Commission held that this practice would exceptionally be lawful if the manufacturer of the products concerned grants a discount to a retailer for specified outlets and a very short period of time and if the entire discount is passed on to the final consumer.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

The opinion on resale price maintenance published by the Commission (see question 19) does not address possible links between such conduct and other forms of restraint. We are not aware of any decisions addressing such links.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

There has been no discussion on the efficiencies that can arguably arise out of such restrictions in the Commission's decisions and opinions published to date.

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.

We are not aware of any precedents by the Commission that would address pricing relativity agreements. Such an agreement may, however, be regarded as a form of resale price maintenance if it has the effect that the retailer is restricted from reducing its retail prices for supplier A's or supplier B's products. We also believe that the Commission would assess whether the agreement has the object or effect of restricting competition between suppliers A and B.

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.

The CPL does not contain specific rules addressing wholesale MFNs. The Commission, however, issued an opinion in February 2010 which sets out how the Commission may assess most-favoured-customer clauses. It appears to follow from this opinion that vertical agreements by which the supplier undertakes to grant to the buyer the 'most favourable terms' currently applied to any of its customers may be deemed anti-competitive if the buyer enjoys a dominant position. Further, the Commission addressed possible competition risks that may arise from continuous discussions between the supplier and the buyer with respect to the terms applied to other customers of the supplier. According to the Commission, such exchange of information may negatively affect competition as it may facilitate collusive practices. The Commission has not provided a detailed reasoning for its position in this regard. Ultimately, the Commission recommended that the precise terms of an agreement should be determined directly in the agreement itself (rather than by reference to 'most favourable terms').

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.

We are not aware of any decisions or guidelines of the Commission which would have assessed such agreements to date.

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.

At the time of writing there have not been any decisions or guidelines of the Commission that have assessed such agreements.

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.

The CPL does not contain specific rules with regard to such clauses.

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?

In general, the CPL provides that a vertical agreement must not include provisions that divide markets or sources of supplies in the territory of Serbia.

The BER provides that vertical agreements that restrict the territory into which the buyer may resell contract goods or which limit the sales of such goods to certain groups of end customers shall not benefit from the BER. However, as an exception to that rule, the following vertical agreements can benefit from the BER:

- the restriction of active sales into the territory or to customer groups which the supplier exclusively allocated to another buyer or reserved to itself, provided that there is no restriction on sales by the customers of the buyer; and
- the restriction of (active or passive) sales to end-users by a buyer active at the wholesale level of trade;
- the restriction of (active or passive) sales to unauthorised distributors by a member of a selective distribution system; and
- the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

29 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?

As a general rule, the Commission would potentially regard such restrictions as unlawful (see, however, question 28).

In an opinion dated December 2009, the Commission held that a provision in a distribution agreement by which the seller reserves the right to sell the products to its 'key customers' (larger customers) in a market otherwise assigned to the distributor is not per se deemed restrictive.

30 How is restricting the uses to which a buyer puts the contract products assessed?

To the best of our knowledge, the Commission has not yet taken an official view in this regard. However, in some opinions of the Commission (which are not directly related to the issue at hand), the Commission takes the general view that the buyers must be free to engage in their business activity as they see fit.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

We consider it likely that the Commission would take an approach similar to the European Commission in this regard.

In particular, the Commission would find the restriction of passive sales (including orders coming via the internet from territories assigned to other buyers) to be restrictive under the CPL, with no possibility of exemption.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

To date, no decisions or guidelines of the Commission have specifically addressed the question of internet sales.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

A selective distribution agreement (to the extent it falls within the ambit of the general prohibition on restrictive agreements) may be exempted under the conditions discussed in questions 8 and 18.

The BER does not exempt agreements containing a restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade. A member of a selective distribution system may, however, be prohibited from operating out of an unauthorised place of establishment. Also, a restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade, will not benefit from the BER.

34 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?

To the best of our knowledge, the Commission has not yet taken an official view in this regard. Given the European Commission's approach, we consider it likely that selective distribution systems in Serbia are more likely deemed to comply with antitrust law where they relate to products that require selective distribution to ensure the quality of the product and its adequate use (such as high-tech products and luxury goods).

35 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?

To date, the Commission has not addressed this question by way of decisions or guidelines. However, it is likely that the Commission would take an approach similar to the European Commission.

36 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?

We are not aware of any such decisions.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

It is submitted that the authorities may take into account the market structure and other economic factors when assessing vertical restraints. Cumulative effects of multiple selective distribution systems in the same market are therefore likely to be considered. However, to the best of our knowledge, the Commission has not yet taken an official view in this regard.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

To the best of our knowledge, the Commission has not yet taken an official view in this regard.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

A restriction of the buyer's ability to source the supplier's products or services from alternative sources is likely to be regarded more favourably than a non-compete clause (provided that it is not imposed on a reseller in a selective distribution system) (see question 41).

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

To the best of our knowledge, the Commission has not yet taken an official view in this regard.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Under the CPL, a restriction limiting the buyer's ability to manufacture, buy or sell products competing with those of the supplier (non-compete obligation) would regularly be regarded as falling within the ambit of the general prohibition of restrictive agreements. However, such a restriction may generally benefit from the BER under the conditions set out in question 18, provided it is concluded for a period not exceeding five years. In addition, it is likely that such an agreement would not be deemed restrictive even if concluded for a period exceeding five years, provided that the parties' market shares are below 15 per cent (ie, provided that the de minimis rule applies).

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

To the best of our knowledge, the Commission has not yet taken an official view regarding such clauses. It can be expected, however, that the assessment of such a clause under Serbian law would mainly depend on the level of the minimum purchase requirement agreed on. An obligation on the buyer to purchase from the supplier more than 80 per cent of the buyer's demand of the contract products would be regarded as a non-compete obligation (see question 41).

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

In general, a restriction of the supplier's ability to sell its products or services to other buyers is likely to be regarded more favourably than a non-compete clause. Agreements containing such clauses may be exempted under the BER.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Restricting the supplier's ability to sell directly to end-consumers is assessed under the same principles as restrictions on the supplier's ability to sell to other buyers (see question 43). If the supplier and the buyer are active or potential competitors, restricting the supplier's ability to sell to end-consumers may raise concerns from the perspective of horizontal collusion.

45 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?

We are not aware of guidelines or decisions by the Commission that have dealt with the antitrust assessment of restrictions on suppliers in the context of vertical agreements other than those covered above.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

In general, the parties to an agreement that contains vertical restraints are asked to notify the Commission of such agreement if it does not benefit from the BER or the safe harbour of the de minimis rule.

The content of the request for individual exemption is regulated in detail in a Decree on the Content of the Request to Receive an Individual Exemption, which entered into effect on 31 December 2009. The

information to be provided in the request is relatively detailed and includes information on the undertakings involved, their representatives and related companies, an explanation of the agreement and the agreement itself, an estimate of the relevant market and the respective market shares (including the main competitors and their market shares). Also, the request must include the expected effects of the agreement on consumers, a reasoned explanation of each restriction and the degree of distortion of competition on the relevant market resulting from the agreement, as well as all available studies, analyses and other reports prepared for the undertakings involved which relate to the competitive conditions on the relevant market.

It is important to note that the CPL does not provide for a formal exemption from the imposition of fines once a notification is submitted; in other words, the filing does not provide undertakings with immunity from a possible fine imposed by the Commission if the relevant agreement is implemented before an exemption is granted and later found to infringe Serbian competition law.

As to the timeline, the CPL requires the Commission to reach a decision within 60 days following the filing of the request. The decision of the Commission will set out the conditions and the duration of the exemption (which can differ on a case-by-case basis). If the Commission finds that a notified agreement contains vertical restraints for which an exemption cannot be granted, it may require the parties to amend the agreement within a certain period of time. Although the CPL does not require a reasoned decision on the individual exemption to be published at the end of the procedure, the Commission has in the past published the operative part of some decisions. In 2012 the Commission started to publish a non-confidential version of the entire reasoned decision.

Authority guidance

47 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?

Besides the filing procedure, the Commission has in the past regularly been open to provide (non-binding) informal guidance in antitrust matters either through consultations with the parties involved or by issuing opinions on the interpretation of the CPL. Since 2011 the Commission has, however, been less willing to provide informal guidance and to issue formal opinions in response to anonymous or hypothetical inquiries.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Under the CPL, private parties can complain to the Commission about allegedly unlawful vertical restraints. The CPL does not determine the formal requirements of such complaint. However, the CPL provides that the Commission must inform the party filing the complaint about the outcome of the complaint within 15 days following its receipt thereof. In 2013, the Commission received a total of 11 complaints related to vertical restraints, one of which resulted in the opening of an investigation.

Enforcement

49 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?

According to a report on the activities of the Commission, in 2006, the Commission had only four cases involving restrictive agreements. Only one of those cases involved a vertical agreement. This reflects that the Commission has only been set up very recently. For reasons of comparison only, it should be noted, however, that during the same period the Commission dealt with 19 cases relating to an abuse of a dominant position and 56 merger control notifications.

In 2007, the Commission dealt with eight cases involving restrictive agreements. The majority of these cases involved a vertical restraint. Again, for reasons of comparison, during 2007 the Commission dealt with 13 cases relating to the abuse of dominance and 125 merger control notifications.

In 2008, the Commission dealt with 20 cases involving restrictive agreements (10 of which related to an individual exemption). During the same period, the Commission dealt with two cases relating to the abuse of dominance and 137 merger control notifications.

In 2009, the Commission dealt with 23 cases involving restrictive agreements (seven of which related to an individual exemption). During the same period, the Commission dealt with 19 cases relating to the abuse of dominance and 116 merger control notifications.

In addition, the end of 2009 was marked by a chain of leniency applications filed with the Commission by numerous undertakings in order to avoid fines for agreeing upon various types of vertical restraints in the supermarket (and related) sectors. To date, the Commission has initiated only three investigative proceedings in response to these applications, one of which resulted in fines of approximately €4.2 million and €2.4 million to the two undertakings involved.

In 2010, the Commission dealt with 14 cases involving restrictive agreements (five of which related to an individual exemption). During the same period, the Commission dealt with six cases relating to the abuse of dominance and 67 merger control notifications.

In 2011, the Commission dealt with 22 cases involving restrictive agreements (14 of which related to an individual exemption). During the same period, the Commission dealt with four cases relating to the abuse of dominance and 114 merger control notifications.

In 2012, the Commission dealt with 26 cases involving restrictive agreements (15 of which related to an individual exemption). During the same period, the Commission dealt with nine cases relating to the abuse of dominance and 105 merger control notifications.

In 2013, the Commission dealt with 11 cases involving restrictive agreements and with 13 individual exemption cases. During the same period, the Commission dealt with six cases relating to the abuse of dominance and 106 merger control notifications.

At the time of writing, the statistics for 2014 were not yet available.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Agreements or provisions of agreements containing a prohibited vertical restraint are null and void, and as such, are unenforceable.

Publicly available information on the issue of severability is scarce. However, it appears to follow from the Commission's practice that it would only find the provisions containing a prohibited vertical restraint to be null and void (rather than the entire agreement).

51 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 Commission may impose fines of up to 10 per cent of an undertaking's annual turnover generated in the territory of Serbia in the preceding financial year. In July 2010, the Serbian government adopted the Regulation on the Level and Method for the Setting of Fines which lays down the criteria relevant for the setting of fines.

In January 2011, the Commission for the first time made use of its power to impose fines. This fine concerned the sector of purchasing raw milk in Serbia and amounted to approximately €3 million. The case, however, did not concern vertical restraints but rather an abuse of dominance. Later in 2011, the Commission imposed fines of approximately €4.2 million and €2.4 million on two undertakings in the supermarket sector for resale price maintenance. Furthermore, also in 2011, a fine of approximately €1.2 million was imposed on the Veterinary Chamber of Serbia for fixing the minimum prices of veterinary services down the supply chain.

This trend continued in 2012, with repeated fines in the supermarket sector (again for resale price maintenance) and with fines against various undertakings in the pharmaceutical sector (a total of 12 pharmaceutical manufacturers and wholesalers were fined for agreeing on several types of vertical restraints, with fines varying from €52,000 to €3.9 million). Also in 2012, the Administrative Court, which is competent to review the Commission's decisions, overturned the 2011 fining decisions concerning the supermarket sector, for substantive and procedural reasons.

The Commission may also order certain behavioural and structural measures in order to re-establish the status that existed before the infringement occurred.

Furthermore, the Commission may impose preliminary measures in order to prevent the occurrence of irrevocable damage (eg, the Commission may order that infringing activities are ceased or that certain measures directed at avoidance of damage are taken) and procedural penalties varying from €500 to €5,000 per day (where the undertakings involved do not cooperate).

As noted in question 49, vertical agreements have not been the focus of the Commission's activities in the Commission's first years of existence. As a general trend, it appears that the Commission has moved away from simply assessing merger control cases to enforcing competition law in a broader spectrum of fields.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The Commission has the power to carry out a wide range of investigations it deems necessary for the protection of competition. Such powers vary from the power to request information from the undertakings concerned to the power to conduct searches (dawn raids) on the undertakings' premises.

The CPL generally sets out an obligation for third parties in possession of information or documents that are relevant for proceedings regarding an infringement of competition law to provide such information or documents upon the request of the Commission. The CPL does not specify, however, if this obligation extends to undertakings domiciled outside Serbia.

Private enforcement

53 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 enforcement is in principle possible under Serbian law. Actions for damages can be brought before general civil courts by all those entities or persons that have suffered damages due to anti-competitive behaviour.

The CPL does not tackle the question of private enforcement in detail. The CPL only provides that the Commission's decision finding an infringement does not in and of itself suggest that damage has occurred, but that this fact must be established separately by the court.

However, Serbian courts generally still have little experience with unlawful behaviour under antitrust law. Furthermore, civil proceedings may take several years before reaching the enforcement stage.

Update and trends

As regards the Commission's enforcement priorities in 2014, the Commission continued to tend to focus more on abuse of dominance cases than on cases regarding restrictive agreements including vertical restraints.

From a procedural perspective, it is noteworthy that the Commission made use, for the first time, of the possibility (introduced into the CPL in 2013) to stay investigative proceedings following commitments being offered by the undertaking concerned and to market test these commitments. Although the particular case concerned an alleged abuse of dominance in the telecommunications sector, this new commitment procedure may also be applied in cases concerning vertical restraints.

In its 2013 activity report, the Commission expressed concerns in relation to the recently amended rules of the Serbian Trademark Law which introduced the principle of national exhaustion of trademark rights (replacing the principle of international exhaustion), which grants the holder of trademark rights the possibility (from a trademark law perspective) to restrict parallel imports under certain conditions. The Commission emphasised that it will closely monitor the application of these new trademark law rules and the effects they may have on the Serbian competitive environment. It also held that it would continue to assess restrictions of parallel imports on the basis of the principles developed under EU competition law.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

In Serbia, vertical restraints infringing the CPL may benefit from the application of the Serbian leniency programme.

Under the Regulation on the Conditions for Immunity from Fines, an undertaking will qualify for immunity from fines if:

- it is the first to submit information and evidence to the Commission which is considered sufficient to initiate antitrust proceedings;
- the undertaking genuinely cooperates with the Commission;
- it did not coerce other undertakings to participate in the infringement; and
- it is not considered a leader or organiser of the restrictive agreement.

WOLF THEISS

Guenter Bauer **guenter.bauer@wolftheiss.com**
Maja Stankovic **maja.stankovic@wolftheiss.com**

PC Ušce, Bulevar Mihajla Pupina 6
11000 Belgrade
Serbia

Tel: +381 11 3302 900
Fax: +381 11 3302 925
www.wolftheiss.com

Singapore

Kala Anandarajah, Dominique Lombardi and Tanya Tang
Rajah & Tann Singapore LLP

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

Singapore's general antitrust law in relation to vertical restraints is contained in the Competition Act (Cap 50B) (the Act). The main provisions regulating vertical restraints in Singapore are the prohibitions against:

- anti-competitive agreements (section 34 of the Act): agreements between undertakings, decisions by associations of undertakings or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited (the section 34 prohibition); and
- abuse of dominance (section 47 of the Act): any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in any market in Singapore is prohibited (the section 47 prohibition).

However, by virtue of an exclusion under the Third Schedule of the Act, the section 34 prohibition does not apply to vertical agreements, other than such vertical agreement as the Minister for Trade and Industry (the Minister) may, by order, specify.

In this regard, a 'vertical agreement' is defined in the Act as any agreement entered into between two or more undertakings each of which operates, for the purposes of the agreement, 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. It includes provisions contained in such agreements that relate to the assignment of the buyer or use by the buyer of intellectual property rights (IPRs), provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

To date, the Minister has not specified any vertical agreements for which the section 34 prohibition shall apply.

Vertical restraints are also subject to the section 47 prohibition. This means that vertical restraints involving dominant undertakings may be prohibited for being an abuse of dominance, where such vertical restraints harm, or are likely to harm, competition.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The concept of vertical restraint is not defined in the Act. However, Guidelines issued by the Competition Commission of Singapore (CCS) provide examples of vertical restraints that could potentially breach the Act. Vertical restraints that could amount to an infringement of the section 34 prohibition include:

- restrictions on the carrying out of independent R&D on any party to an IPR licensing agreement for the manufacture of products; and
- technology pools – where a manufacturer and a retailer agree to assemble a package of technology, which is composed predominantly of substitute technologies, for licensing purposes.

Vertical restraints are also subject to the section 47 prohibition. Such vertical restraints can either be imposed unilaterally by the dominant firm or made by agreement. Examples of vertical restraints that could potentially be considered under the section 47 prohibition, as provided in the Section 47 Guidelines, include:

- exclusive purchasing requirement or quantity forcing by a dominant manufacturer with a retailer;
- tying, where the manufacturer makes the purchase of one product (the tying product) conditional on the purchase of a second product (the tied product);
- full-line forcing, where the retailer is, in order to obtain one product in the manufacturer's range, required to stock all the products in that range; and
- English clauses, where a dominant manufacturer requires that its retailers give it the opportunity to match any price offered by a rival.

However, the Section 47 Guidelines note that vertical restraints can take many forms and that it is the effect of the vertical restraint on competition, rather than its form, that will determine whether or not it is abusive.

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?

The objective of the Act is primarily economic, as it seeks to protect competition in Singapore. The CCS, which was established by the Act and is responsible for enforcing the Act, has the following non-exhaustive functions and duties:

- maintaining and enhancing efficient market conduct;
- eliminating or controlling practices having an adverse effect on competition in Singapore;
- promoting and sustaining competition in markets in Singapore; and
- promoting a strong competitive culture and environment throughout the economy in Singapore.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The CCS is a statutory body established under Part II of the Act and is responsible for enforcing the Act, including prohibitions on anti-competitive vertical restraints. It is empowered to investigate infringements of such prohibitions by requiring the production of documents and information, entering any premises without a warrant, and entering and searching premises with a warrant. Obstruction to a CCS investigation may result in criminal liability.

Certain sectors are regulated by the respective sectoral regulator and have their own sectoral codes, regulations or laws that cover antitrust matters within that sector that are enforced by the sectoral regulator. For example, the telecommunications sector is regulated by the Infocomm Development Authority of Singapore (IDA), whereas the media sector is regulated by the Media Development Authority (MDA).

The Third Schedule of the Act excludes the CCS from having jurisdiction over any competition-related agreement or conduct to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter. As such, there will not be multiple responsible authorities involved in the same antitrust matter. The CCS Guidelines on the Major Provisions also provide that the CCS will engage with the relevant sectoral regulator on cross-sectoral competition cases, and determine which regulator is best placed to handle the case, in accordance with the legal powers bestowed upon the respective regulators.

The CCS is an independent body that operates independently from its parent ministry, the Ministry of Trade and Industry. However, as mentioned in question 1, the Minister has a role in enforcing prohibitions on anti-competitive vertical restraints to the extent that he may specify, by order, vertical agreements to which the section 34 prohibition will apply.

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?

The Act applies to vertical restraints that are likely to affect competition within Singapore. As such, a vertical restraint in an agreement with the primary object of assigning or licensing IPRs may be prohibited under the section 34 prohibition, if it has the object or effect of appreciably adversely affecting competition in Singapore. In addition, a vertical restraint may be prohibited under the section 47 prohibition if it involves a dominant undertaking and harms, or is likely to harm, competition in any market in Singapore.

To date, the Act has not been applied extraterritorially or in a pure internet context in relation to vertical restraints.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Act does not apply to any activity carried on by, agreement entered into by, or conduct on the part of the government, any statutory body, or any person acting on behalf of the government or that statutory body in relation to that activity, agreement or conduct.

However, the Act may still be applicable to a vertical restraint (eg, an exclusivity clause) in an agreement between a statutory body and a private party, where such restraint is imposed upon, and not by, the statutory body. This was decided by the CCS in its decision on 4 June 2010 regarding the abuse of dominance by SISTIC.com Pte Ltd (SISTIC) (CCS 600/008/07).

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.

As mentioned in question 4, certain sectors are excluded from the jurisdiction of the Act as they are regulated by their own sectoral competition frameworks. These sectors include:

- the telecommunications sector, which is regulated by the IDA under the Telecom Competition Code 2012;
- the electricity and gas sectors, which are regulated by the Energy Market Authority under the Electricity Act and the Gas Act;
- the media sector, which is regulated by the MDA under the Media Market Conduct Code; and
- the postal services market, which is regulated by the IDA under the Postal Competition Code 2008.

Unlike the Act, which specifically excludes vertical restraints from the section 34 prohibition, some of these sectoral competition frameworks (eg, the Telecom Competition Code and the Postal Competition Code) cover vertical restraints under their respective prohibitions against anti-competitive agreements. In other words, under such sectoral competition law, vertical agreements that have as their object or effect the prevention, restriction or distortion of competition in that market in Singapore (eg, resale price maintenance) may be prohibited.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

As mentioned in question 1, the Act contains a general exception for agreements containing vertical restraints where the vertical agreement does not involve any dominant undertakings.

However, where the agreement has the primary object of licensing or assigning IPRs for the manufacture of products, it may be subject to the section 34 prohibition. In this regard, the IPR Guidelines provide that the CCS will generally not consider such an agreement as having an appreciable adverse effect on competition if the market share of each of the parties to the agreement does not exceed 35 per cent.

In addition, where the vertical agreement involves dominant undertakings, it may be subject to the section 47 prohibition. In this regard, the Section 47 Guidelines provide that the CCS will consider a market share above 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. However, factors other than market share may be considered in determining whether an undertaking is dominant and dominance could potentially be established at a lower market share.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

There is no definition of 'agreement' under the Act. However, the CCS's Section 34 Guidelines offer some guidance.

The Guidelines state that 'agreement' has 'a wide meaning and includes both legally enforceable and nonenforceable agreements, whether written or oral. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.'

In addition, the Act does provide a definition of 'vertical agreement', as mentioned in question 1.

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?

No formal written agreement is necessary to engage the Act in relation to vertical restraints.

To the extent that the section 34 prohibition applies to vertical restraints, an agreement, as noted in question 9, 'has a wide meaning and includes both legally enforceable and nonenforceable agreements, whether written or oral....'

To engage the section 47 prohibition in relation to vertical restraints, it is also not necessary for there to be a formal written agreement between parties. The section 47 prohibition also applies if the vertical restraint is imposed unilaterally by the dominant firm and not by agreement.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

To the extent that the section 34 prohibition applies to vertical restraints, the vertical restraints rules would not apply to agreements between a parent company and a related company that are considered to be a single undertaking (ie, entities that form a single economic unit). In particular, an agreement between a parent and its subsidiary company, or between two companies that are under the control of a third company, will not be regarded as agreements between undertakings and therefore not subject

to the section 34 prohibition, if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence.

Some of the factors that may be considered in assessing whether a subsidiary is independent of or forms part of the same economic unit with its parent (ie, is a 'related company'), include:

- the parent's shareholding in the subsidiary;
- whether or not the parent has control of the board of directors of the subsidiary; and
- whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.

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?

The Act and the CCS's Section 34 Guidelines do not specifically mention agent–principal agreements and the effect that sales-based commission payments may have on the economic independence of the parties.

The general principle is that the section 34 prohibition does not apply to agreements where there is effectively only one undertaking, that is, where the agreement is between entities which form a single economic unit. In this regard, the CCS affirmed in its clearance of Qantas Airways and Orangestar Investment Holdings' cooperation agreement that a principal and an agent may form a single economic entity, and agreements between them would then not be subject to the section 34 prohibition. Whether an agent and principal would be considered as one undertaking by the CCS depends on the factual circumstances of the case.

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?

Not applicable. See question 12.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

As mentioned in question 2, the section 34 prohibition does not apply to vertical agreements, which includes IPR provisions contained in agreements, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products. For example, the exclusion from the section 34 prohibition covers a franchise agreement where the franchisor sells the franchisee's products for resale, and the agreement contains provisions where IPRs will be licensed to the franchisee in order for it to market the products, as this falls within the definition of a vertical agreement.

However, agreements with IPR provisions that do not fall within the definition of a vertical agreement will not be excluded from the section 34 prohibition. This would include agreements that have as their primary object the assignment or the licensing of IPRs. Such agreements may hence be examined by the CCS for potential infringement of the section 34 prohibition.

In assessing the anti-competitive effect of such agreements under the section 34 prohibition, the CCS will take the following factors into consideration:

- whether the agreement is made between competing or non-competing undertakings;
- whether the market share of any one of the parties to the agreement exceeds 35 per cent;
- whether the agreement and any licensing restraints restrict actual or potential competition that would have existed in their absence; and
- whether the agreement may, on balance, have a net economic benefit.

In relation to the section 47 prohibition, vertical agreements containing provisions granting IPRs are not treated differently from vertical agreement without such provisions. In general, vertical agreements may only be subject to the section 47 prohibition where a dominant undertaking is involved, whether or not these vertical agreements contain provisions granting IPRs.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

As mentioned in question 1, the main provisions regulating vertical restraints in Singapore under the Act are the section 34 prohibition and the section 47 prohibition. As such, different analytical frameworks would apply when assessing vertical restraints under the respective provisions to the extent that they apply.

Under the section 34 prohibition, vertical restraints are prima facie excluded. However, to the extent that the section 34 prohibition applies, it will have to be determined whether the vertical restraint has as its object or effect the prevention, restriction or distortion of competition within Singapore. If the vertical restraint is subject to the section 34 prohibition and found to have as its object or effect the prevention, restriction or distortion of competition within Singapore, it may still be excluded under the Third Schedule of the Act on the grounds that it has a net economic benefit. An agreement may be considered to have a net economic benefit if it contributes to improving production or distribution or promoting technical or economic progress and it does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives or afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Where the vertical restraint involves a dominant undertaking, it may be subject to the section 47 prohibition. There is a two-step test to assess whether the section 47 prohibition applies:

- whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere; and
- if it is, whether it is abusing that dominant position in a market in Singapore.

As mentioned in question 8, the Section 47 Guidelines provide that the CCS will consider a market share above 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. However, factors other than market share may be considered in determining whether an undertaking is dominant and dominance could potentially be established at a lower market share.

If it has been established that the vertical restraint involves a dominant undertaking, the next step is to consider whether the vertical restraint has the effect or likely effect of harming competition in Singapore.

In this regard, there is no vertical restraint that is considered per se unlawful. Instead, vertical restraints will be analysed for their effects on competition in Singapore. As provided in the CCS Section 47 Guidelines, whether vertical restraints such as exclusive purchasing agreements (or vertical restraints with similar effect) will amount to an abuse will depend on the facts and circumstances of each case. One factor in the assessment of the competition effects would be the proportion of the market that is subject to the vertical restraint.

Under the section 47 prohibition, the CCS will also consider any benefits generated by the vertical restraint (such as the promotion of efficiencies, non-price competition and investment and innovation). However, it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.

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 may be relevant for the purposes of assessing whether the vertical restraint is subject to the section 47 prohibition in terms of whether the vertical restraint involves a dominant undertaking as well as the likely effect of the vertical restraint on competition in Singapore.

Supplier market shares may also be relevant in assessing whether a vertical restraint in an agreement is subject to the section 34 prohibition, if the agreement is for the primary object of assigning or licensing IPRs for the manufacture of products. According to the IPR Guidelines, such agreement may be considered as having an appreciable adverse effect on competition in Singapore if the market share of the supplier exceeds 35 per cent.

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?

Buyer market shares may be relevant for the purposes of assessing whether the vertical restraint is subject to the section 47 prohibition in terms of whether the vertical restraint involves a dominant undertaking as well as the likely effect of the vertical restraint on competition in Singapore.

Buyer market shares may also be relevant in assessing whether a vertical restraint in an agreement is subject to the section 34 prohibition, if the agreement is for the primary object of assigning or licensing IPRs for the manufacture of products. According to the IPR Guidelines, such agreement may be considered as having an appreciable adverse effect on competition in Singapore if the market share of the buyer exceeds 35 per cent.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

As mentioned, vertical agreements are excluded from the section 34 prohibition other than such vertical agreement as the Minister may, by order, specify. Insofar as no such order has been issued by the Minister, companies that are not dominant may consider that their vertical restraints will not be found to infringe the Act.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Given that vertical restraints are prima facie excluded from the section 34 prohibition, there are generally no restrictions against suggested, fixed, minimum and maximum resale prices (or measures with equivalent effect), pricing relativity agreements or minimum advertised price policies as possible forms of price-fixing agreements.

Under the section 47 prohibition, possible pricing-related abuses include predatory pricing, price discrimination or margin squeeze. The Section 47 Guidelines in relation to vertical restraints do not make any reference to any restrictions against suggested, fixed, minimum and maximum resale prices (or measures with equivalent effect), pricing relativity agreements or minimum advertised price policies.

There has been no enforcement activity in relation to the setting of fixed or minimum resale prices in Singapore.

Given the above, questions 20 to 22, 23 and 26 are not applicable to Singapore.

Note: As vertical restraints are prima facie excluded from the section 34 prohibition, we have provided our responses to questions 19 to 45 from the perspective of the section 47 prohibition where applicable.

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'?

Not applicable. See question 19.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Not applicable. See question 19.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Not applicable. See question 19.

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.

Not applicable. See question 19.

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.

There is no specific guidance or decisions from the CCS on this.

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.

There is no specific guidance or decisions from the CCS on this.

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.

Not applicable. See question 19.

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.

Where this restraint is imposed by a dominant supplier, it could be considered an abuse of dominance under the section 47 prohibition, depending on the effect on competition.

The Section 47 Guidelines state that where a dominant manufacturer requires that its retailers give it the opportunity to match any price offered by a rival, this might harm competition among the manufacturers as it reduces rivals' incentives to compete on price. However, there may be no effect on competition if only a small proportion of the retail market is subject to this restraint.

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?

There is no specific guidance or decisions from the CCS on this.

29 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?

There is no specific guidance or decisions from the CCS on this.

30 How is restricting the uses to which a buyer puts the contract products assessed?

There is no specific guidance or decisions from the CCS on this.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

There is no specific guidance or decisions from the CCS on this.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There is no specific guidance or decisions from the CCS on this.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Where this restraint is imposed by a dominant supplier, it could be considered a refusal to supply (since the supplier is limiting supply to approved members of a distribution of sale network), which constitutes an abuse of

dominance under the section 47 prohibition, depending on the effect on competition.

In this regard, the Section 47 Guidelines state that undertakings generally have the freedom to decide whom they will deal or not deal with. Therefore, a refusal to supply, even by a dominant undertaking, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant undertaking may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified.

34 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?

Selective distribution systems are more likely to be lawful under the section 47 prohibition where there are objective justifications to limit the supply of the product to certain approved members of a distribution or sales network and restrict the members of such network from selling to entities other than approved network members or end customers.

35 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There is no specific guidance or decisions from the CCS on this.

36 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?

There has been no decision taken by the CCS on this.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Based on the principle under the Section 47 Guidelines that the CCS will consider the effect of the conduct on the market and that any vertical restraints subject to the section 47 prohibition are more likely to have an effect on competition if a large proportion of the market is subject to this restraint, the CCS is likely to take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

There is no specific guidance or decisions from the CCS on this.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Where this restraint is imposed by a dominant supplier, it could be considered an exclusive purchasing requirement, which amounts to an abuse of dominance under the section 47 prohibition. Whether such restraint will amount to an abuse will depend on the facts and circumstances of each case. The likely concern is that such vertical restraint may foreclose alternative sources of the product from the market and therefore harm (or be likely to harm) competition.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There is no specific guidance or decisions from the CCS on this.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Where this restraint is imposed by a dominant supplier, it could be considered an exclusive purchasing requirement, which may amount to an abuse of dominance under the section 47 prohibition. Whether such restraint will amount to an abuse will depend on the facts and circumstances of each case. The likely concern is that such vertical restraint may foreclose competing suppliers from the market and therefore harm (or be likely to harm) competition.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Where this restraint is imposed by a dominant supplier, it could be considered a form of quantity forcing or full-line forcing, which may amount to an abuse of dominance under the section 47 prohibition. Whether such restraint will amount to an abuse will depend on the facts and circumstances of each case. The likely concern is that such vertical restraint may foreclose competing suppliers from the market and therefore harm (or is likely to harm) competition.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

Where this restraint is imposed by a dominant buyer, it could be considered a form of exclusive arrangement, which may amount to an abuse of dominance under the section 47 prohibition. Whether such restraint will amount to an abuse will depend on the facts and circumstances of each case. The likely concern is that such vertical restraint may foreclose competing buyers from the market and therefore harm (or be likely to harm) competition.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

There is no specific guidance or decisions from the CCS on this.

45 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?

No.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

An undertaking may notify their agreement to the CCS and apply for guidance, or a decision, as to whether an agreement has infringed either the section 34 prohibition or the section 47 prohibition under the Act. Once an agreement has been notified to the CCS, no penalty shall be imposed in respect of any infringement of any section 34 prohibition by the agreement from the date on which the notification was given to such date as may be specified in a notice given by the CCS following its determination of the notification. This interim immunity from penalty is not available for notifications in respect of any potential infringement of the section 47 prohibition.

However, a notification should only be made where the agreement raises real concerns of possible infringement of the Act. As vertical agreements are generally excluded from the ambit of the section 34 prohibition, notifications to the CCS in respect of a potential infringement of the section 34 prohibition by vertical agreements are generally not necessary. However, it may still be advisable to notify an agreement containing vertical restraints to the CCS where its primary object is the assignment or licensing of IPRs for the manufacture of products (under the section 34 prohibition), or where it involves a dominant undertaking (under the section 47 prohibition).

The time taken by the CCS to provide its guidance or decision will vary depending on the nature and the complexity of the application.

When the CCS comes to a decision that the section 34 or the section 47 prohibitions have not been infringed, it shall take no further action in relation to the prohibition with respect to the agreement, unless:

- it has reasonable grounds to believe that there has been a material change of circumstances since it gave its decision; or
- it has reasonable grounds to suspect that the information on which it based its decision was incomplete, false or misleading in a material particular.

When the CCS has given guidance that an agreement is unlikely to infringe the section 34 or section 47 prohibitions, it shall take no further action in relation to the prohibition with respect to the agreement, unless:

- it has reasonable grounds to believe that there has been a material change of circumstances since it gave its decision;
- it has reasonable grounds to suspect that the information on which it based its decision was incomplete, false or misleading in a material particular;
- one of the parties to the agreement applies to it for a decision with respect to the agreement; or
- a complaint about the agreement has been made to it by a person who is not a party to the agreement.

If it decides that the section 34 or section 47 prohibitions have not been infringed by an agreement, the CCS will not impose any penalty in respect thereof.

The difference between an application for guidance and an application for a decision is that the former is usually treated confidentially, while the latter is made public once it is made. The filing fee for applying for a decision is also higher than that for a guidance application.

Authority guidance

47 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?

See question 46.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Any party can lodge a confidential complaint to the CCS if they believe there has been an infringement of the Act. However, as vertical agreements are generally excluded from the section 34 prohibition, complaints in respect of such vertical agreements would typically not be pursued by the CCS. Nevertheless, where the vertical restraint involves a dominant undertaking, the CCS may investigate the complaint for a possible infringement of the section 47 prohibition.

While there is no formal procedure for making a complaint to the CCS, the complainant may do so through a variety of means, including submitting a complaint via the CCS's online complaint form. Complainants will need to provide the following information:

- information about the parties involved;
- a brief description of the infringing activity being complained of; and
- any other relevant information and supporting documents.

The CCS will acknowledge the complaint within three working days. The CCS may then decide to launch formal investigations if there are reasonable grounds to suspect that there has been an infringement of the Act. The complainant will be kept informed of the outcome.

Enforcement

49 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?

The CCS has not directly enforced the Act in relation to vertical restraints under the section 34 prohibition against anti-competitive agreements, as vertical agreements are generally excluded from the section 34 prohibition.

However, the CCS may apply the section 47 prohibition to vertical restraints involving a dominant undertaking, if such vertical restraint amounts to an abuse of dominance. The CCS has done so on one occasion in 2010, where it fined SISTIC, a ticketing service provider, for abusing its dominant position via a series of exclusive vertical agreements with both key venues and event promoters in Singapore (CCS 600/008/07). The CCS directed SISTIC to remove the exclusivity clauses in the relevant agreements, and imposed a financial penalty of S$989,000. This financial penalty was later reduced on appeal to S$769,000 by the Competition Appeal Board.

Update and trends

There has been no decision or development in the area of vertical restraints in Singapore within the last 12 months.

There are no changes to the legislation or other measures expected in the near future that will have an impact on this area.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Under the Act, any provision of any agreement that is prohibited under the section 34 prohibition shall be void to the extent that it is infringing. As such, only the offending provision of the agreement is unlawful. The agreement as a whole will only be void where that provision is not severable from the remaining terms of the agreement.

However, if a vertical agreement involving a dominant undertaking is found to have infringed the section 47 prohibition, it is not automatically void under the Act. Instead, the CCS may direct the relevant parties to modify or cease the infringing conduct, and this may include requiring the parties to modify the offending provisions in the infringing vertical agreement.

51 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?

Where there has been an infringement of the section 34 prohibition or section 47 prohibition by an undertaking, the CCS has the power to impose penalties directly. The CCS is empowered to impose the following penalties and directions:

- financial penalties, if it is satisfied that the infringing undertaking had done so intentionally or negligently. The financial penalty imposed by the CCS shall not exceed 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years;
- require the parties to the infringing agreement to modify or terminate the agreement;
- require any party to the infringing agreement to enter such legally enforceable agreements to prevent or lessen its anti-competitive effects;
- require any party to the infringing agreement to dispose of its operations, assets or shares; and
- require any party to the infringing agreement to provide a performance bond, guarantee or security on such terms and conditions to be determined by the CCS.

As mentioned in question 49, there has only been one case in Singapore where the CCS found an infringement of the Act arising from a vertical restraint. In that case, the CCS directed SISTIC to modify the exclusive agreements by removing clauses requiring SISTIC's contractual partners to use its services exclusively. In addition, a financial penalty of S$989,000 was imposed, which was later reduced to S$769,000 by the Competition Appeal Board.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The CCS may conduct an investigation if there are reasonable grounds for it to suspect an infringement of Act, including an infringement of the section 34 prohibition or the section 47 prohibition. As part of its investigation, the CCS has powers to:

- require the production of specified documents or specified information relating to any matter relevant to the investigation;
- enter premises without a warrant; and
- enter and search premises with a warrant.

In exercising its powers of investigation, the CCS is not limited to approaching the undertakings suspected of infringement and their officers, past or present. It may also require the production of documents or information

from third parties such as complainants, suppliers, customers and competitors, even if such parties are domiciled outside Singapore.

Private enforcement

53 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?

A party who has suffered any loss or damage directly as a result of an infringement of the Act, including an infringement of the section 34 prohibition or the section 47 prohibition, has a right of private action in civil proceedings against the infringing undertaking. However, for the avoidance of doubt, a party to such an infringing agreement will not have this right of private action.

Pursuant to this private action, the court may grant the plaintiff relief by way of injunction or declaration, damages, or both. In general, under Singapore law, the successful party in a civil case is also entitled to recover a portion of its legal costs.

However, the right of private action may only be exercised after the CCS has determined that an undertaking has infringed the Act, including the section 34 prohibition or the section 47 prohibition, and after the appeal process has been exhausted.

There is also a two-year limit for the taking of such private actions from the time the CCS made the decision or, if the decision is appealed, from the determination of the appeal.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

RAJAH & TANN ASIA

LAWYERS WHO KNOW ASIA

Kala Anandarajah **kala.anandarajah@rajahtann.com**
Dominique Lombardi (Foreign Lawyer) **dominique.lombardi@rajahtann.com**
Tanya Tang (Principal Economist) **tanya.tang@rajahtann.com**

9 Battery Road #25-01
Straits Trading Building
Singapore 049910

Tel: +65 6535 3600
Fax: +65 6225 9630
www.rajahtannasia.com

Spain

Manuel Contreras and Fernando Reina
Herbert Smith Freehills LLP

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The legal sources setting out the antitrust law applicable to vertical restraints in Spain are Law 15/2007 of 3 July 2007 for the Defence of Competition (the LDC), Royal Decree 261/2008 of 22 February 2008 approving the Defence of Competition Regulation (the RDC) and Law 3/2013 of 4 June 2013 creating the National Markets and Competition Commission (Law 3/2003) (jointly, the Spanish antitrust laws).

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 following is a non-exhaustive list of vertical restraints:

- resale price maintenance (ie, requiring the purchaser to observe a fixed or minimum resale price);
- single branding (ie, requiring distributors to sell mainly or exclusively products of a given brand);
- exclusive distribution customer allocation (ie, appointing a single distributor to resell the supplier goods or services in a particular territory);
- selective distribution (ie, appointing distributors on the basis of quantitative or qualitative selection criteria and requiring them not to sell to other distributors not belonging to the authorised distribution network);
- exclusive supply (ie, requiring the supplier to distribute its products to only one purchaser);
- tying (ie, forcing the supplier to make the sale of a certain product conditional on the purchase of another distinct product);
- initial payments (ie, requiring the supplier to pay fixed fees to distributors to get access to their distribution network and remunerate services provided to suppliers); and
- category management (ie, entrusting the distributor with the marketing of a category of products, including not only the supplier's products, but also the products of its competitors).

The concept of vertical restraint is not defined in the Spanish antitrust laws.

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?

The only objective pursued by the law on vertical restraints is the protection of competition.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The National Markets and Competition Commission (CNMC) is responsible for enforcing prohibitions on anti-competitive vertical restraints that affect competition at a supra-regional level or affect the national market as a whole.

Regional competition authorities also have the power to enforce prohibitions on anti-competitive vertical restraints if their effects are limited to their respective regions.

Governments and ministers have no role in the enforcement of prohibitions on anti-competitive vertical restraints.

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?

A vertical restraint may be subject to the Spanish antitrust laws if it has or may have effects in all or parts of Spain.

To our knowledge, the Spanish antitrust laws have not been applied extraterritorially in any vertical restraints case. They have not been applied in a pure internet context either.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The activities of public entities (including the conclusion of agreements containing vertical restraints) are subject to the Spanish antitrust laws if they do not constitute the adequate exercise of an administrative power (see decision of 6 October 2011 in case S/0167/09, *Productores de Uva y Vinos de Jerez*).

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.

Particular laws apply to the assessment of vertical restraints in the petrol sector in Spain. In February 2013 the Spanish government passed Royal Decree-Law 4/2013 on Measures to Support Entrepreneurs and to Promote Growth and Employment (the Royal Decree-Law). This legislation included a number of measures aimed at fostering competition in the retail petrol sector.

In particular, exclusivity supply agreements in place between petrol companies and service stations are now limited to a maximum of one year (annually extendable for a maximum of three years). Additionally, petrol companies and distributors can no longer recommend the retail price to service stations in their supply agreements.

Finally, existing operators with a market share exceeding 30 per cent are banned from entering into new exclusive supply agreements with service stations in the Spanish provinces where this threshold is exceeded.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The following vertical restraints are exempted from the prohibition of anti-competitive agreements:

- vertical restraints between actual or potential competitors whose combined market share does not exceed 10 per cent in any of the affected relevant markets; and
- vertical restraints between parties that are neither actual nor potential competitors, if neither one of them has a market share of more than 15 per cent in any of the affected relevant markets.

When competition is restricted by the cumulative effect of parallel agreements, these market share limits are lowered to 5 per cent. A cumulative effect will not be found to exist if less than 30 per cent of the relevant market is covered by parallel networks of agreements.

Vertical restraints are not exempted under the above rules if they have as their object certain 'hard-core' restrictions similar to those listed in the Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community (2001/C 368/07).

In any event, the following agreements (to the extent that they contain a vertical or other restraint) are not considered to be of minor importance:

- agreements that include holders or beneficiaries of exclusive rights; and
- agreements involving companies present in relevant markets in which more than 50 per cent of the market is covered by parallel networks of vertical agreements having similar effects.

Finally, the CNMC may declare that article 1.1 LDC does not apply to agreements which, although not meeting the above criteria for being considered de minimis, are not of sufficient importance to significantly restrict competition in light of their economic and legal context.

The 'legal exemption'

Vertical restraints are exempted from the prohibition on anti-competitive agreements if they result from the application of a law other than the LDC.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

No.

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?

A formal written agreement is not necessary. An informal or unwritten understanding is sufficient to trigger the application of the Spanish antitrust laws.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Vertical restraints between related companies are not caught by the LDC.

In this context, 'related companies' means companies that do not behave independently of one another on the market, such as when one company controls the other or where both companies are ultimately controlled by the same company or individual. It is presumed that a 100 per cent shareholding by a parent company in a subsidiary means that both companies are related companies.

Below a 100 per cent shareholding, whether or not two companies are related will depend on the particular circumstances of each case.

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?

Agency agreements are not caught by the LDC if the agent does not bear the commercial and financial risks related to the sale and purchase of the contract goods or services.

However, agency agreements containing single-branding provisions and post-term non-compete obligations may infringe the LDC if they lead to or contribute to a cumulative foreclosure effect. Agency agreements may also fall within the scope of the LDC where a number of principals coordinate their activities by using the same agent.

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?

The CNMC has not published any guidance but there is a significant body of precedents dealing with agency agreements, particularly in the petrol retail sector (see decision of 30 May 2001 in case 493/00, *Cepsa*; decision of 21 October 2002 in case 527/01, *Repsol Butano*; decision of 13 January 1997 in case R 172/96, *BP Oil España*; and decision of 11 July 2001 in case 490/00, *Repsol*).

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

The safe harbour described in question 18 is not available for agreements relating to the licensing or assignment of intellectual property rights if those intellectual rights provisions constitute the primary object of the agreement.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Article 1.1 LDC prohibits vertical agreements between two or more undertakings, which have the object or effect of restricting competition in all or part of Spain.

A vertical restraint is caught by article 1.1 LDC if, according to a contrast body of CNMC precedents, it is 'capable of restricting competition'.

Certain vertical restraints (such as resale price maintenance or 'passive' sales restrictions) are considered unlawful per se (ie, 'capable of restricting competition on its own merits') under article 1.1 LDC. However, although unlikely in practice, they may benefit from the exemption of article 1.3 LDC (see below).

Vertical restraints other than those that are unlawful per se fall foul of article 1.1 LDC if they have an anti-competitive object or effect (ie, if it is proven that they are at least 'capable of restricting competition'), but may also be exempted pursuant to article 1.3 LDC.

Pursuant to article 1.3 LDC, an agreement falling within the scope of article 1.1 LDC may be exempted from the prohibition if it has countervailing competitive benefits or efficiencies. The article 1.3 criteria for the exemption are almost identical to those of article 101(3) of the Treaty on the Functioning of the European Union (TFEU), namely:

- the agreement must generate efficiency gains by contributing to improving production or distribution, or to promoting technical or economic progress;
- consumers must obtain a fair share of these efficiency gains;
- the agreement must not impose on the undertakings concerned any vertical restraints that are not indispensable to the attainment of these efficiency benefits; and
- the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Additionally, article 1.4 LDC exempts agreements falling within the scope of article 1.1 LDC if they meet the criteria of any EU block exemption regulation (as regards vertical restraints, this is Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices (the Vertical Block Exemption)), even if the agreement does not affect trade between EU member states.

Analytical framework for a case-by-case analysis of vertical restraints

The starting point of analysis is whether the vertical restraint constitutes a hard-core restriction (such as price fixing or market sharing). If it does, article 1.1 LDC applies and the criteria of article 1.3 LDC are unlikely to be met. If it does not, an assessment should be made of the market shares of the buyer and supplier in the markets in which they sell and purchase the contract goods or services. The following conditions then apply:

- if the market shares are below the limits of the de minimis exemption (see question 8), the agreement falls outside the prohibition of article 1.1 LDC;
- above the de minimis limit, the agreement may infringe article 1.1 LDC, and one must analyse whether the agreement or any particular vertical restraint contained therein meets the exemption criteria of the Vertical Block Exemption; and
- if the vertical restraint cannot benefit from the exemption of the Vertical Block Exemption, then one must analyse whether it meets the criteria of article 1.3 LDC.

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?

If the supplier's market share exceeds 30 per cent on the market where it supplies the contract goods or services, the agreement does not benefit from the safe harbour provided in the Vertical Block Exemption.

The market shares of other suppliers are not relevant for the application of the Vertical Block Exemption. However, outside of the scope of the Vertical Block Exemption, they may be relevant for an individual analysis under article 1.3 LDC. For example, in the case of exclusive distribution agreements, it is necessary to assess whether there are alternative viable suppliers to compensate for the reduction of intra-brand competition caused by the agreement.

The Spanish antitrust laws do not explicitly empower the CNMC to declare that the block exemption of article 1.4 LDC (which block exempts agreements that meet the exemption criteria of the Vertical Block Exemption) does not apply.

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?

If the buyer's market share exceeds 30 per cent on the market where it purchases the contract goods or services, the agreement does not benefit from the safe harbour provided in the Vertical Block Exemption.

The market shares of other buyers are not relevant for the application of the Vertical Block Exemption. However, outside the scope of the Vertical Block Exemption, they may be relevant for an individual analysis under article 1.3 LDC. For example, in the case of exclusive distribution agreements, it is necessary to assess whether there are alternative viable buyers to compensate for the reduction of intra-brand competition caused by the agreement.

The Spanish antitrust laws do not explicitly empower the CNMC to declare that the block exemption of article 1.4 LDC (which block exempts agreements that meet the exemption criteria of the Vertical Block Exemption) does not apply.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

As mentioned in question 15, article 1.4 LDC allows application of the Vertical Block Exemption to vertical restraints that only affect trade in Spain. The safe harbour of the Vertical Block Exemption is based on the requirement that the market share of both the buyer and supplier does not exceed 30 per cent on any of the markets where they respectively sell and purchase the contract goods or services.

The safe harbour is not available for hard-core restrictions including price fixing and resale price maintenance, but the parties may plead an efficiency defence pursuant to article 1.3 LDC.

Additionally, the safe harbour is not available for certain types of expressly non-exempted restrictions, such as non-compete provisions if their duration exceeds five years; contrary to hard-core restraints, however, the rest of the agreement may still benefit from the exemption.

The said safe harbour is not available for agreements relating to the licensing or assignment of IPRs if those IPRs constitute the primary object of the agreement.

The safe harbour is also limited in the case of vertical agreements involving competing undertakings or retailer buying groups.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

The CNMC considers that fixed resale prices constitute a per se infringement of the LDC (see decision of 29 February 2008 in case 647/08, *Distribuciones Damm*). In a few exceptional cases, however, the CNMC has excluded instances of resale price maintenance from the LDC prohibition under the de minimis rules, owing to the very low market share of the supplier and to the existence of an atomised market with no parallel networks of similar restraints (see decision of 3 December 2009 in case 0105/08, *El Corral de las Flamencas*, decision of 17 December 2010 in case S/0257/10, *Natura Bissé Internacional*, and decision of 17 July 2013 in case S/0417/12).

The prohibition on fixed resale prices extends to any indirect means of fixing them such as establishing the margin that dealers must offer to their respective agents in the context of motorbike distribution contracts (decision of 11 January 2012, case S/0154/09, *Montesa Honda*). The prohibition is also applicable to arrangements that fix the maximum discount levels (see decision of 5 October 2006 in case 599/06, *Maquinaria agropecuaria*), or that support resale price maintenance strategies like, inter alia, monitoring the discounts applied by distributors (see decision of 19 October 2004 in case 619/04, *Técnicas Ganaderas*).

Minimum resale prices have also been considered to infringe article 1 LDC (see decision of 2 November 2004 in case 578/04, *EKO-AMA Mondáriz*).

As regards recommended resale prices, the CNMC has stated that simply suggesting a resale price with no additional instrument working as a reference price is not prohibited under Spanish antitrust law (see decision of 3 November 2008 in case 2765/07, *Animales de compañía*). However, the CNMC has considered that recommended resale prices may function, in specific contexts, as fixed resale prices.

For instance, in *Repsol/Cepsa/BP*, the CNMC fined three petrol companies for notifying recommended and maximum resale prices to petrol stations but that were, in practice, applied as fixed retail prices. The CNMC relied on, inter alia, the following indicia:

- high compliance (in more than 80 per cent of the cases) with the suggested or maximum retail prices;
- reduction of incentives to apply discounts by reducing the retailers' margins; and
- the IT system communicating the suggested resale prices hampered in practice the ability of petrol stations to deviate from the suggested resale prices (see decision of 30 July 2009 in case 652/07, *Repsol/Cepsa/BP*).

Finally, maximum resale prices are in principle compliant with the Spanish antitrust laws (see decision of 30 November 1998 in case 389/96, *Cervezas Mahou*).

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 CNMC pointed out in one case that price maintenance obligations may be acceptable in certain circumstances, for instance, for specific promotions or campaigns (see the *Cervezas Mahou* case). However, it should be noted that this statement was an obiter dictum and is therefore not binding on the CNMC.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In *Suzuki-Honda* (decision of 19 January 2012, case S/0280/10), the CNMC considered that the restriction of inter-brand competition resulting from an exchange of confidential information between competitors (Suzuki and Honda) was reinforced by the existence of further restrictions on competition taking place at intra-brand level, namely:

- parallel networks of quantitative selective distribution agreements (between Honda and its dealers and Suzuki and its dealers); and
- additional restrictions identified in certain local markets in Spain, such as resale price maintenance agreements (between the manufacturers and their respective dealers) and agreements between each brand's dealers fixing the margin of their respective commercial agents.

In *Devir Iberia* (decision of 18 October 2012, case S/0309/10), the CNMC fined five retailers of 'magic cards' for agreeing their resale price, with the participation of the manufacturers of the playing cards.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In a decision concerning resale price maintenance, the CNMC accepted that, considering the criteria set out in the Vertical Guidelines, those participating in an infringement by object may claim the existence of efficiencies complying with the requirement of article 1.3 LDC (similar to 101(3) TFEU). The CNMC further indicated that it is for the parties to prove that all of these requirements are met, namely: the nature of such efficiencies; the causal link between the efficiencies and the behaviour considered; the lack of alternative means to achieve such efficiencies in a less restrictive way; and the transfer to consumers of an equitable part of those efficiencies.

Nevertheless, the CNMC dismissed the parties' efficiency defence for lack of evidence (see decision of 27 March 2012 in case S/0237/10, *Motocicletas*).

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.

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

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.

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

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.

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

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.

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

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.

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

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?

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

29 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?

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

30 How is restricting the uses to which a buyer puts the contract products assessed?

The CNMC analyses these issues in accordance with the criteria of the Vertical Block Exemption and the Vertical Guidelines.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

In *Intersport* (decision of 20 July 2004, case A 258/99), the CNMC required the amendment of one clause that prohibited the members of a sui generis franchise network from marketing their products via the internet using the Intersport brand.

The final drafting of the clause, accepted by the CNMC, allowed each member of the franchise to keep their own website (regardless of the existence of a main corporate website), insofar as the franchise was informed and the design criteria fixed by the coordination body of the franchise were respected to ensure product quality standards.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

No.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Selective distribution agreements are assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines.

There is no specific requirement for the selection criteria to be published, but the CNMC has consistently held that the requirements to join the system must be proportionate and non-discriminatory.

34 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?

The CNMC has traditionally considered that a selective distribution system is restrictive of competition when it is not justified by the nature of the product or its technical complexity (see decision of 14 October 1997 in case 380/96, *Perfumería*).

On the other hand, selective distribution systems are likely to be exempted as regards branded goods and those requiring specialised post-sale services.

In general, case law has considered that selective distribution systems are appropriate for products such as cosmetics (see decision of 23 April 2001 in case A 281/00, *Distribución Selectiva Azzaro*), watches (see decision of 19 September 2002 in case A 316/2002, *Distribución selectiva Breguet*), jewellery (see decision of 6 March 2000 in case A 273/99, *Distribución Selectiva Carolina Herrera*) and luxury fashion (see decision of 12 July 1999 in case A 260/99, *Contrato tipo Cosmeparf*).

35 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?

Restrictions on internet sales have not been assessed by the CNMC in connection with selective distribution systems.

36 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 *Relojes Longines* (decision of 21 February 2000, case 379/99), the CNMC considered that watch manufacturer Swatch was entitled not to extend its existing distribution contract with the claimant, who failed to comply with the qualitative conditions of image, employee training and post-sale services required to join the system.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes, in accordance with the Vertical Block Exemption and the Vertical Guidelines.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

There are no decisions in this regard. Guidance may be found in the Vertical Block Exemption and the Vertical Guidelines.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

This is assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

This issue has not been addressed by the CNMC.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

This restriction is assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

This restriction is assessed in accordance with the Vertical Block Exemption and the Vertical Guidelines.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

This issue has not been addressed by the CNMC.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

This issue has not been addressed by the CNMC.

45 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?

No.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no such formal procedure. The parties to the agreement must themselves assess whether it is prohibited pursuant to article 1.1. LDC and whether it may be exempted pursuant to article 1.3.

Authority guidance

47 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?

There is no formal procedure for obtaining guidance from the CNMC.

As regards the courts, they have the power to apply articles 1.1 and 1.3 LDC. However, under Spanish procedural rules, a court may refuse to rule on a claim filed by a claimant exclusively seeking to obtain a declaration by the court that an agreement is not prohibited by article 1.1 LDC or that it benefits from the exemption of article 1.3.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Any private party (be it one of the parties to an agreement or a third party) may file a complaint regarding an alleged unlawful vertical restraint. The complaint must be filed with the Directorate for Investigation of the CNMC or with a regional competition authority.

The complaint should include the contact details of the complainant, the facts triggering the unlawful conduct (and, as the case may be, evidence of the unlawful conduct), together with the definition and structure of the relevant market. Annex I of the RDC contains a complaint form. The complainant may only participate as an interested party in the formal investigation that may potentially follow if it is able to show a legitimate interest in the case.

Upon receipt of the complaint, the Directorate for Investigation may start a preliminary inquiry to assess if there are sufficient indicia to open an infringement procedure.

If an infringement procedure is initiated, the CNMC has 18 months to decide on the case. The procedure is divided into two phases (investigation and resolution), which take place before two different bodies of the CNMC. In its decision, the CNMC may declare the existence of an infringement and impose fines. Its decision may be appealed before the courts. In certain cases, the investigation may be closed without fines if the parties submit appropriate commitments.

Enforcement

49 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?

Vertical restraints cases do not represent a significant part of the enforcement activity of the CNMC. In 2012, of 59 decisions (including both agreements and abuse of dominance cases), only seven dealt with vertical restraints. Four of those seven decisions affected the distribution of cars and motorcycles. Resale price maintenance and competition in post-sale and repair services were the most recurrent practices in these seven cases.

Update and trends

In the past 12 months the CNMC has continued the trend of settling vertical agreements that restrict competition without imposing a fine provided that the alleged offenders voluntarily submit a number of commitments to restore effective competition in the market.

For instance, in its decision of 12 June 2014 in case S/0457/13, *General Motors España SLU*, the CNMC accepted the commitments proposed by General Motors in the Spanish motor distribution sector. These consisted of restricting the application of the minimum purchase obligation to spare parts in respect of which General Motor's estimated share did not exceed 30 per cent.

Additionally, in its decision of 4 December 2014 in case S/DC/502/14, *Orona/Excelsior*, the CNMC accepted the commitments proposed by two lift manufacturers. These consisted of an obligation on the manufacturers to provide original spare parts to maintenance companies and resellers on the same conditions of price, delivery and all other parameters. Additionally, the manufacturers agreed to keep resellers and maintenance companies informed of any changes to the supply of these products and to request information only on the technical aspects of the component part, excluding any information as to the location of the lift or final client.

However, the CNMC is prepared to fine companies that fail to comply with the commitments previously established with the CNMC in the context of vertical agreement investigations. For instance, in its decision of 17 July 2014 in case SNC/0031/13, *Cercasa*, the CNMC fined Canary Island brewing company Cercasa with €50,000 for failing to comply with the obligations imposed under a previous resolution that required Cercasa to remove minimum purchase obligations from its distribution contracts.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Article 1.2 LDC provides that all agreements and practices contrary to article 1.1 LDC are void.

The nullity of the illegal agreement may be declared by the courts (not the CNMC).

A doctrine of severance exists in Spanish civil law that allows only the infringing provision being declared void, provided that the rest of the agreement may survive without that provision. This will depend on the facts of the case. The Supreme Court has, for instance, declared that it is not possible to sever an infringing provision where the agreement itself provides that such provision is an essential element of the agreement, and where it is impossible in practice to make adjustments or modifications which would require the mutual agreement of the parties (see judgment of the Supreme Court of 30 June 2009 in case 315/2004).

51 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 CNMC may impose penalties for any infringement of the LDC.

Vertical restraints are categorised as a serious infringement of the LDC that can be sanctioned with a fine of up to 5 per cent of the turnover of the infringing party in the business year preceding the imposition of the fine. If the turnover cannot be determined, the infringing parties may be exposed to a fine ranging from €500,001 to €10 million.

In addition, the CNMC may impose behavioural or structural remedies on the infringing party, although it has not yet done so in practice.

The CNMC imposed a fine totalling €1,457,459 on Suzuki and five of its authorised dealers in Spain for agreeing minimum resale prices for Suzuki motorbikes (see decision of 27 March 2012 in case S/0237/10, *Motocicletas*).

This case seems to consolidate a trend in the CNMC's approach to fines on anti-competitive vertical agreements.

In the past, the CNMC was inclined to fine the supplier only, leaving the buyer unharmed. This is because it was considered that, although both were parties to the illegal agreement, responsibility for the infringement fell on the party with a higher bargaining power, usually the supplier (see decision of 31 May 2005 in case 579/04, *Asturcolchón/Tempur*). Yet in the *Aceites 2* case, the CNMC fined both the supplier and the buyer on the basis that both parties had obtained an unlawful benefit from the agreement, and both parties had countervailing bargaining power (see decision of 21 June 2007 in case 612/06, *Aceites 2*).

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Broadly speaking, the authorities responsible for enforcing the prohibition of vertical restraints are entitled to:

- conduct inspections at the undertaking's premises;
- require the production of, examine, copy or even seize documents relevant to the investigation;
- require explanations of relevant documents or practices;
- address information requests; and
- take steps to prevent interference with the investigation, for example, sealing filing cabinets or rooms.

Manuel Contreras **manuel.contreras@hsf.com**
Fernando Reina **fernando.reina@hsf.com**

Velázquez 63
280091 Madrid
Spain

Tel: +34 91 423 4000
Fax: +34 91 423 4001
www.herbertsmithfreehills.com

We are unaware of any information request sent to suppliers domiciled outside Spain but the effects principle governing the Spanish antitrust laws (namely, the practice is caught by Spanish antitrust law if it affects all or part of the national market) arguably entitles the authorities to do so.

Private enforcement

53 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?

The courts have the authority to declare the existence of an infringement of article 1.1 of the LDC as well as to declare an agreement exempt from that prohibition pursuant to article 1.3.

In principle, only the parties to the vertical agreement are entitled to seek declaratory judgments or injunctions and bring damages claims (but, theoretically, third parties could seek damages if they consider that they have suffered a loss as a result of the anti-competitive agreements, or even seek an erga omnes declaration of nullity of the agreement, even in the absence of damages). These forms of order must be sought from the commercial courts, except where the party is simply seeking damages from a previously declared infringement (follow-on actions), in which case it must do so before the ordinary civil courts. Third parties are not entitled to do so, except for consumer associations which have standing in respect of the rights of their members, of the association itself and of the general interests of consumers.

The remedies available are those typical of any other civil claim, ranging from cease-and-desist orders to the award of damages.

Assuming that a private enforcement action goes through all the possible appeals up to the Supreme Court, a final judgment may be rendered after several years. For example, in the *Sugar* case (a follow-on damages claim for damages arising from a sugar cartel), the claim was filed in 2007 and, after several appeals, the Supreme Court decided on the case in 2012 (judgment of the Supreme Court of 8 June 2012, case 2163/2009).

As regards costs, the party that has its case dismissed by the court must pay both parties' costs unless the overall case presents ambiguity as regards the facts or the interpretation of the law.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

Switzerland

Franz Hoffet, Marcel Dietrich, Gerald Brei and Alain Girard

Homburger

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The relevant legislation in Switzerland is the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act, CartA). In addition, the Swiss Competition Commission (ComCo) issued a new notice regarding the competition law treatment of vertical agreements of 28 June 2010, which entered into force on 1 August 2010 (Verticals Notice, VN), replacing a previous notice of 2 July 2007. Legal sources in the area of antitrust law are available on the ComCo's website (www.weko.admin.ch) in the official languages of German, French and Italian; some of them are also available in an unofficial English translation (without legal force).

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?

CartA, article 5, distinguishes three types of unlawful agreements in terms of the intensity of the restraint of competition:

- agreements that do not significantly affect competition are lawful;
- agreements that significantly affect competition are lawful if they can be justified on grounds of economic efficiency and unlawful if they cannot be so justified; and
- agreements that eliminate effective competition are unlawful.

CartA, article 5(4) defines two types of vertical agreements presumed to lead to the elimination of effective competition. Accordingly, agreements between undertakings on different market levels regarding minimum or fixed prices as well as clauses in distribution agreements regarding the allocation of territories, provided distributors from other territories are prohibited from sales into these territories, are presumed to eliminate effective competition. The rules in CartA, article 5(4) are widely held to declare unlawful prohibitions of passive sales into exclusive territories (ie, absolute territorial protection).

The concept of vertical restraints itself is defined in the Verticals Notice, article 1. Vertical agreements include binding or non-binding agreements and concerted practices between two or more enterprises at different levels of the market which concern the commercial terms on which the relevant enterprises may purchase, sell or distribute goods or services.

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?

The main objective pursued by the law on vertical restraints is the protection of competition. However, there also is a Notice of 19 December 2005 regarding agreements with limited market effects meant to provide a safe harbour for small and medium-sized enterprises (SME Notice). The Verticals Notice takes precedence over the SME Notice (VN, article 9(2)).

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

In Switzerland, only federal administrative bodies have the power to implement the CartA, namely, the ComCo and its Secretariat. The main administrative body enforcing the CartA is the ComCo. It is independent of the federal government (CartA, article 19(1)). The ComCo is the sole administrative body with power to issue decisions prohibiting anti-competitive vertical restraints and to impose fines (CartA, article 53(1)). Decisions of the ComCo can be appealed to the Federal Administrative Court and to the Swiss Federal Court consecutively.

The Secretariat of the ComCo conducts investigations and preliminary investigations and prepares the ComCo's decisions (CartA, article 23(1)). The Secretariat has the power to open investigations with the consent of a member of the ComCo's presiding body (CartA, article 27(1)) and to perform preliminary investigations (CartA, article 26).

In addition, every civil court can decide about the legality of anti-competitive vertical restraints if parties raise this issue in a civil litigation.

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?

The Swiss antitrust law applies to vertical restraints whose effects are felt in Switzerland, even if they originate in another country (CartA, article 2(2)).

In a decision dated 11 June 2011, the ComCo fined two companies active in Switzerland for obstacles to online sales. The ComCo concluded that these distributors must be allowed to use the internet to sell products. This was the first precedent regarding vertical restraints where the law has been applied in a pure internet context. The ComCo confirmed its policy stance in a settlement dated 30 June 2014 with the undertaking Jura. Thus prohibitions of online sales are considered restrictions of passive selling by the ComCo.

At the end of 2012, the ComCo opened an investigation into several online hotel reservation companies. The ComCo has to examine, inter alia, 'best price' clauses. The investigation is (still) ongoing.

In November 2009, the ComCo fined two companies, one of which has its headquarters in Austria, thus applying the law extraterritorially. The ComCo considered that restrictions of passive sales in a licence agreement infringed CartA, article 5(4). In this decision regarding the prohibition of parallel imports of toothpaste, the ComCo held that the presumption of an elimination of effective competition by an agreement on absolute territorial protection applies not only in distribution agreements (as the wording of CartA, article 5(4) would seem to imply), but also if such a clause is contained in a licence agreement. In December 2013, the Federal Administrative Court confirmed this decision. The decision has not yet become final and binding and is under appeal by both companies.

In May 2012, the ComCo fined BMW AG, with headquarters in Munich, 156 million Swiss francs for impeding parallel imports into Switzerland. According to the decision, a clause in BMW Group's contracts

with authorised dealers in the EEA prohibits them from selling BMW and Mini vehicles to customers outside the EEA (to which Switzerland does not belong). The investigation was opened in autumn 2010 after the ComCo received various complaints by Swiss customers who had tried unsuccessfully to purchase a BMW or Mini vehicle from a dealer outside Switzerland. The decision is under appeal.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Swiss antitrust law equally applies to vertical restraints in agreements concluded by public or state-owned entities (CartA, article 2(1)). However, to the extent that particular provisions establish an official market or price system or that provisions entrust certain enterprises with the performance of public-interest tasks, by granting them special rights, such provisions take precedence over the provisions of the CartA (CartA, article 3(1)).

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.

In the motor vehicle sector, there is a special Notice on the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade of 21 October 2002, as well as explanatory comments of the ComCo thereto, which were amended in the summer of 2010. This notice takes precedence over the Verticals Notice (VN, section 9(1)).

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

There are no general exceptions from antitrust law for certain types of vertical restraints as such (regarding the general applicability of antitrust law in the area of intellectual property rights, see question 14).

However, the ComCo regards vertical agreements other than those explicitly listed in the Verticals Notice, sections 10(1) and 12 usually as non-significant restrictions of competition, provided the market share of all the enterprises involved does not exceed a threshold of 15 per cent on any of the relevant markets (VN, section 13(1)). As mentioned in question 3, the Verticals Notice takes precedence over the SME Notice, which generally applies to agreements with limited market effects (VN, section 9(2)).

Furthermore, statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of CartA. Such statutory provisions include in particular provisions that establish an official market or price system; and provisions that grant special rights to specific undertakings to enable them to fulfil public duties (CartA, article 3(1)). In December 2013, the Federal Administrative Court approved the appeals lodged by the manufacturers of pharmaceutical products against a fining decision of ComCo on the basis that the CartA does not apply owing to regulatory and factual impediments to price competition concerning the sale of the products at stake (Viagra, Levitra, Cialis). This decision has been appealed to the Federal Supreme Court by the Swiss Federal Department of Economic Affairs, Education and Research (EAER). The proceeding is ongoing.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The term 'agreement' is defined by CartA, article 4(1). It comprises binding or non-binding agreements and concerted practices between enterprises of the same or different levels of the market, the purpose or effect of which is to restrain competition.

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?

Agreements affecting competition are defined as binding or non-binding agreements and concerted practices between undertakings that have as their object or effect a restraint of competition (CartA, article 4(1)). A formal written agreement is not required; an informal or unwritten tacit understanding is sufficient to engage the relevant rules. However, it is necessary that parties knowingly and wilfully cooperate; that is, a 'meeting of minds' must be established. In return, mere parallel conduct is not sufficient.

In a November 2009 decision, the ComCo held that non-binding public price recommendations for specific non-reimbursable pharmaceutical products (Viagra, Levitra, Cialis) to constitute vertical price-fixing in accordance with CartA, article 5(4). The ComCo relied especially on the price adherence ratio of the reseller to establish the existence of an agreement. The decision was set aside on appeal by the Federal Administrative Court on other material grounds and without examination of this question (see question 8). It remains unclear whether relying on such critera is lawful in considering a vertical agreement according to CartA provisos (see question 19).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Antitrust law applies to agreements between a parent and a related company as long as the related company does not belong to the same group. If a parent company effectively controls its affiliated companies, for example, by the majority of capital or of voting shares, the whole group as such is regarded as one independent economic entity. The CartA does not apply to group-internal relationships (group privilege).

The ComCo adopted a restrictive interpretation of the concept of group privilege in its decision concerning French-language books. It considered in this case that a contractual clause between a parent and a related company that incorporated an obligation for the parent company to impede other non-related companies in selling the books concerned in Switzerland, a territory for which the Swiss-related company had the exclusivity, is not embraced by the group privilege. The decision is under appeal.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In Swiss antitrust law, there are no special provisions regarding agency agreements. In its decision concerning French-language books the Swiss authorities applied similar principles as in EU competition law. Accordingly, the essential point about the position of the agent is that it does not bear any commercial or financial risk itself; no property passes to it under the agreement; and it does not directly share in the profits (or losses) of its principal's business. Contract-specific risks (ie, risks that are directly related to the contract concluded by the agent on behalf of the principal) take central stage. Based on the fact that the distributor had to bear the del credere risk, the ComCo considered that the agreement at stake was not an agency agreement in the *French-language books* case.

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?

As mentioned (see question 12), there are no special provisions or judicial precedents regarding agency agreements in Swiss antitrust law. According to the *French-language books* case it seems likely that the Swiss authorities would apply similar principles as in EU competition law as to what constitutes an agent–principal relationship for these purposes and conduct the assessment of such agreements in a similar framework.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Swiss antitrust law does not apply to effects on competition that result exclusively from laws governing intellectual property (CartA, article 3(2) first sentence). However, this exception does not apply to import

restrictions based on IPRs (CartA, article 3(2), second sentence). The exact scope of this provision is unclear, and there are no precedents on its application yet. In a landmark case prior to the enactment of CartA, article 3(2) second sentence, the Federal Supreme Court had held in 1999 that antitrust law – in particular the prohibition of abuse of a dominant position – may apply to a ban on parallel imports despite the principle of national exhaustion under patent law (as it was in force then). Section 8(4) of the Verticals Notice explicitly states that the notice does not apply to vertical agreements containing provisions which relate to the assignment or use of IPRs, provided that those provisions constitute the primary object of such agreements and provided that they are not directly related to the use, sale or resale of goods or services by the buyer or its customers.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In Switzerland, two types of vertical restraints are presumed to eliminate effective competition and may be punished with fines: agreements on fixed or minimum resale prices and agreements in distribution contracts on absolute territorial protection. These types of restrictions (see CartA, article 5(4); VN, section 10(1)) are unlawful, unless the presumption of an elimination of competition can be rebutted and, if they significantly affect competition, they can be justified on grounds of economic efficiency. Parties participating in these two types of restrictions may be sanctioned with fines if the presumption of an elimination cannot be rebutted and, in the practice of the ComCo (which has not been confirmed by the Federal Supreme Court) if the presumption of an elimination of competition can be rebutted, but the vertical restriction significantly affects competition and cannot be justified on grounds of economic efficiency.

Other vertical agreements that significantly affect competition in the market for certain goods or services are unlawful, unless they can be justified on grounds of economic efficiency (CartA, article 5(1)). Consequently, there is no rule-of-reason analysis to be undertaken but rather an efficiency test. According to CartA, article 5(2), an agreement is deemed to be justified on grounds of economic efficiency if:

- it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- such agreement will not in any way allow the enterprises concerned to eliminate effective competition.

The list of criteria for the efficiency test in CartA, article 5(2) is exhaustive. Further justification grounds such as general political considerations, cultural aspects or public health cannot be taken into consideration within the framework of article 5(2). According to CartA, article 8, agreements affecting competition whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.

The conditions under which vertical agreements affecting competition are generally deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications (CartA, article 6(1)), for example, for agreements on research and development or on specialisation.

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?

According to the Verticals Notice, the competition authorities do take market shares, market structures and other economic factors into consideration. Vertical agreements are normally not problematic if no party to the agreements holds more than 15 per cent market share in one of the affected markets. This threshold is not applicable to vertical agreements presumed to eliminate effective competition and to certain types of agreements enumerated in Verticals Notice, section 12 (VN, section 13(1); see also questions 2, 8 and 18). The threshold is lowered to 5 per cent in case of cumulative foreclosure effects of several parallel agreements. The Verticals Notice further provides that agreements are, as a general rule, justified on grounds of economic efficiency without further investigation if the market share of each of the parties to the agreement in the relevant markets is not higher than 30 per cent. Again, this rule is not applicable to certain types of agreements enumerated in the Verticals Notice, section 12. Further, it is not applicable if the agreement has a cumulative effect together with other agreements on the same market (VN, section 16(2); see also question 18).

Whether certain types of agreements or restriction are widely used by suppliers is not a decisive criterion for assessing their legality. For example, the ComCo has held public price recommendation for three specific non-reimbursable pharmaceutical products to constitute an unlawful agreement on fixed prices, although public price recommendations are used widely across the industry.

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?

A buyer market share of 30 per cent was newly introduced in the Verticals Notice in 2010 (under the previous notice of 2 July 2007, only the supplier's market share was taken into account). A buyer market share of more than 30 per cent means that agreements are not generally considered to be justified on grounds of economic efficiency without further investigation, but that an individual assessment is required (see question 16). The market positions of other buyers is not relevant as such under the Verticals Notice, but may be taken into account in the individual assessment. The conduct of other buyers is relevant inasmuch as cumulative effects of agreements on the same market are taken into account (VN, section 16(2); see also questions 16 and 18). Whether certain types of agreements or restrictions are widely agreed to by buyers is not a decisive criterion for assessing their legality. No such decisions have so far been published by the ComCo.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Verticals Notice is meant to provide certainty to companies, but concentrates rather on the illegality than on the legality of vertical restraints under specific conditions. Like its EU counterpart, the Verticals Notice contains some sort of 'safe harbour' provision. However, the term 'safe harbour' is misleading in that the Verticals Notice expressly states that the benefit of the 'safe harbour' is only granted 'as a general rule' rather than without exception, thus depriving the 'safe harbour' of its primary role of granting certainty to the companies relying on it. Also, the provision is drafted so narrowly as to exclude from its scope the vast majority of vertical agreements that affect competition.

Formally, the 'safe harbour' works as follows: agreements containing no blacklisted practices are, generally, considered to be 'too insignificant to affect competition' (and therefore legal) if the market shares of the parties to the agreement are below 15 per cent (VN, section 13(1)) unless a cumulative effect in the market resulting from several parallel vertical agreements can be observed, in which case these market share thresholds drop to 5 per cent (VN, section 13(2)). However, if the market share of the supplier as well as the buyer does not exceed 30 per cent, as a general rule any vertical agreement is deemed to be 'justified', namely legal (VN, section 16(2)), provided that it does not contain any blacklisted practices. The latter include, inter alia, the direct or indirect setting of minimum or fixed prices for resale, the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade or non-compete obligations the duration of which is indefinite or exceeds five years (see the list in VN, section 12, including exceptions).

Section 16 of the Verticals Notice sets out the framework for assessing the justification of a restriction according to CartA, article 5(2). This may particularly be the case if an agreement enhances economic efficiency (for example, through a more efficient system of distribution in terms of product upgrading or improvements in manufacturing processes, or by lowering distribution costs) and the restriction of competition is necessary in order to achieve this goal.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Restricting the buyer's ability to determine its resale price by fixed or minimum prices is presumed to eliminate effective competition under Swiss antitrust law and is unlawful and can be sanctioned by imposing a fine in case of a first time infringement, unless the presumption can be rebutted (see question 15). In return, the supplier's imposing a maximum sale price or recommending a sale price will generally be permissible, provided that they do not amount to a fixed or minimum sale price as a result of pressure of, or incentives offered by, any of the parties. However, the ComCo held public price recommendations for specific non-reimbursable pharmaceutical products to be unlawful, although no pressure or incentives were established (decision currently under appeal).

In 2011, the ComCo's Secretariat, in two preliminary investigations, had the chance to assess public resale price recommendations. In a preliminary investigation of the market for hearing aids, the Secretariat came to the conclusion that there were indications for an agreement on price maintenance because a considerable number of the retailers adhered to the recommendations. In the second preliminary investigation, concerning Festool, the Secretariat held that, as a general rule, the level of adherence in itself does not necessarily suffice to establish an agreement on resale price maintenance. In general, other elements would be necessary for such a qualification. Hence, it still remains unclear whether price recommendations that are adhered to unilaterally by retailers can constitute an agreement on resale prices in Switzerland (see question 10).

In 2012, the ComCo imposed a fine of 470,000 Swiss francs for retail price maintenance agreements in relation to alpine sports products. According to the authority, the supplier Altimum imposed minimum resale prices on its products' retailers, eliminating competition for its goods among sports equipment stores. The decision is under appeal.

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 ComCo has not considered such cases in its published decisions yet. The Verticals Notice sets out a list of grounds of economic efficiency that may in particular be claimed as justification (VN, section 16(4)), which includes protection for a limited duration of investments aimed at opening up new geographical or products markets and ensuring the uniformity and quality of the contractual products (VN, section 16(4)(a) and (b)). However, in its decision regarding public price recommendations for non-reimbursable pharmaceutical products (see questions 16 and 19), the ComCo considered these grounds of economic efficiency not to be relevant in the context of fixing of resale prices (by way of public price recommendations). In another decision regarding an agreement on resale price maintenance for gardening scissors, the ComCo held that market entry with new products could constitute a ground of economic efficiency pursuant to the predecessor provision of the Verticals Notice, section 16(4)(a), which was not applicable in the case at hand, however.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In decisions regarding industry-wide agreements on the prices for sheet music and on book prices, the ComCo held that a bundle of vertical restraints on resale prices would amount to a horizontal agreement on prices. In its decision which held the public price recommendations for specific non-reimbursable pharmaceutical products to constitute an agreement on fixed prices (see questions 16 and 19), the ComCo also investigated horizontal collusion between the manufacturers of these products, but held that such collusion could not be corroborated; potential collusion among the buyers (i.e., pharmacies and self-dispensing doctors) was not addressed in the decision. In its decision regarding French-language books, the ComCo went through resale price maintenance considerations when it analysed whether the presumption of illegality could be rebutted. After defining the market and assessing intra-brand and inter-brand competition, it tested the position of the commercial partners (ie, the resellers and the editors) to assess whether their conduct had a disciplinary effect. The ComCo relied on resale price maintenance considerations to conclude that the conduct of the commercial partners had no disciplinary effect.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In its decision which held the public price recommendations for specific non-reimbursable pharmaceutical products to constitute an agreement on fixed prices (see questions 16 and 19), the ComCo addressed several potential efficiencies, in particular avoidance of the hold-up problem, the free-rider problem and the double marginalisation problem (see VN, section 16(4)(c), (d) and (e)). None of these efficiencies was recognised in the decision in question.

In its decision regarding an agreement on resale price maintenance for gardening scissors (see question 20), the ComCo very briefly considered market entry with new products and avoidance of free-riding as potential efficiencies (predecessor provisions of VN, section 16(4)(a) and (d)), but recognised neither of these efficiencies in the decision in question.

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.

As a general rule, agreements to fix retail prices are presumed to eliminate effective competition under Swiss antitrust law. Such vertical price-fixing is considered unlawful and can be sanctioned by imposing a fine. Buyers must in any case remain free to determine their own retail prices. There are presently no special provisions or judicial precedents concerning 'pricing relativity' in Swiss antitrust law.

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.

There are currently neither special provisions nor precedents regarding the assessment of most-favoured-customer clauses at the wholesale level (see question 25).

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.

The ComCo is at present investigating one case regarding most-favoured-nation clauses in the online environment (see question 5 concerning internet hotel booking platforms).

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.

So far ComCo has not addressed minimum advertised price policy (MAPP) and/or internet minimum advertised price (IMAP) issues. According to the conception of article 5 CartA, it seems that MAPP/IMAP clauses would not fall under the presumptions of elimination of effective competition set out in article 5(3) and (4) CartA and would therefore require a case-by-case analysis, in which the alleged anti-competitive effects could be justified on grounds of economic efficiency.

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.

There are currently no judicial precedents regarding buyer-side most-favoured supplier clauses.

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?

A supplier may restrict active sales, but not passive sales, by the buyer of its products into the exclusive territory reserved to the supplier or granted by

the supplier to another buyer, provided that passive sales are still possible without restriction (VN, section 12(2)(b)(i)) (ie, provided that the supplier or buyer remains able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted) (see question 5 concerning BMW). A supplier can require a buyer to ensure that its customer does not make onward sales outside of the territory allocated to the buyer.

29 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?

A supplier may restrict active sales by the buyer of its products to a customer group exclusively reserved to the supplier or granted by the supplier to another buyer, provided that passive sales are still possible without restriction (VN, section 12(2)(b)(i)) (ie, provided that the supplier or buyer remains able to fulfil unsolicited orders from individual customers and that distribution through the customers of the buyer is likewise not restricted).

Members of a selective distribution system must not be restricted from actively or passively selling to end-consumers (VN, section 12(2)(c)). Suppliers must not be restricted either from selling components or spare parts to end-consumers or repair workshops (VN, section 12(2)(e)).

30 How is restricting the uses to which a buyer puts the contract products assessed?

A supplier may restrict the buyer's ability to sell components supplied for the purposes of incorporation to customers who would use them to manufacture rival products, namely the same type of products as those produced by the supplier (VN, section 12(2)(b)(iv)).

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

In 2010 the ComCo opened a formal investigation relating to the restriction of online sales (in the area of white goods) based on the definition of 'passive sales' in the Verticals Notice. Internet sales are considered to be 'passive sales', which may not be restricted (see questions 2 and 29), except where sales efforts are specifically targeted at customers outside of an allocated territory (VN, section 3). In its decision of July 2011, the ComCo approved the amicable settlement. Further, it came to the conclusion that it is unlawful as a matter of principle to prohibit sales via online shops. Based on the ComCo's decision, online sales can be lawfully restricted only in very specific circumstances. According to the decision, the supplier may further require that the distributor who operates online distribution have at least one point of sale. It is also legal to require that the online dealer indicate the identity and the address of this point of sale. In the *Jura* case the COMCO confirmed this stance. However, it is unclear based on the published decisions if this includes all legal restrictions for online sales or whether additional restrictions could also be legally imposed.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

There is no guidance yet with respect to distinguishing between different types of internet sales channels.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Restrictions on multi-brand distribution targeting brands of particular competing suppliers are deemed significant restrictions of competition (VN, section 12(2)(h)). Further, restrictions on cross-supply between authorised dealers within a selective distribution system, also when dealers at different levels of the market are involved, are deemed significant restrictions of competition (VN, section 12(2)(d)). Similarly, the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade is also regarded as a significant restriction of competition (VN, section 12(2)(c)). But authorised dealers within a selective distribution system may be restricted in their freedom to resell the relevant goods or services to unauthorised dealers (VN, section 12(2)(b)(iii)). There is no explicit requirement that the criteria for selection must be published or that their application in a specific case can be challenged. This may, however, be helpful in showing that one of the criteria for a qualitative selective distribution system is fulfilled, namely the choice of resellers based on objective criteria of a qualitative nature that are laid down uniformly and applied in a non-discriminatory manner (see question 34).

34 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?

The Verticals Notice stipulates three general conditions for the admissibility of qualitative selective distribution systems (VN, section 14):

- the nature of the product must necessitate a selective distribution to preserve its quality and ensure its proper use;
- resellers must be chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly and applied in a non-discriminatory manner; and
- these criteria must not go beyond what is necessary.

A selective distribution system that fulfils these conditions does not, in principle, significantly restrict competition and is permissible. This is, however, subject to the provisos of the Verticals Notice, section 12 (see question 33).

Special rules are applicable to the motor vehicle trade (see Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade, question 7).

35 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?

Restrictions on active or passive sales by retailers who are members of a selective distribution system to end-consumers are regarded as significant restrictions of competition (VN, section 12(2)(c)). Likewise, the restriction of cross-supply between authorised dealers is deemed to be a significant restriction of competition (VN, section 12(2)(d)). Both need to be justified on grounds of economic efficiency. Qualitative standards for selling via the internet should be admissible if they do not go beyond what is necessary. Further, restrictions should be allowed that are directed at preventing authorised dealers from reselling to unauthorised dealers. However, up to now there has not been any decision regarding the restriction to sell via the internet, and the Verticals Notice does not specifically address the problem, apart from the general statement that internet sales are considered to be passive sales, except where sales efforts are specifically targeted to customers outside of an allocated territory (VN, section 3; see question 31).

36 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?

No such decisions have been published by the ComCo so far.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes, cumulative effects are taken into account. If several similar parallel distribution systems cover more than 30 per cent of the market, the market share threshold for significant restrictions of competition is lowered from 15 per cent to 5 per cent (see question 16).

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

In November 2011, the ComCo held that Nikon unlawfully impeded parallel imports into Switzerland, and fined the company 12.5 million Swiss francs. According to the decision, Nikon's dealer contracts contained clauses that implicitly or explicitly prohibited parallel imports into Switzerland. Nikon's distribution contracts with its resellers in the EEA provided for an obligation on the resellers not to sell Nikon's products outside the EEA (to which Switzerland does not belong). The decision is under appeal.

Further, in May 2012, the ComCo fined BMW AG 156 million Swiss francs for impeding parallel imports into Switzerland. According to the decision, a clause in BMW Group's contracts with authorised dealers in the

EEA prohibits them from selling BMW and Mini vehicles to customers outside the EEA (to which Switzerland does not belong). The investigation was opened in autumn 2010 after the ComCo received various complaints by Swiss customers who had tried unsuccessfully to purchase a BMW or Mini vehicle from a dealer outside Switzerland. The decision is under appeal.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Any direct or indirect obligation of a buyer to purchase from the supplier or from another company designated by the supplier more than 80 per cent of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market is regarded as a non-compete obligation (VN, section 6). Such non-compete obligations that are agreed to for more than five years (which includes agreements concluded for an indefinite period of time or containing a 'rollover' mechanism for automatic renewal) or for more than one year after termination of the vertical agreement are generally deemed to be significant restrictions of competition.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restrictions on a buyer's ability to sell non-competing products do not constitute a significant restriction of competition by their object under the Verticals Notice (VN, section 12 e contrario) and must be assessed on a case-by-case basis. In a qualitative selective distribution system, such restrictions must not go beyond what is necessary (see question 34).

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Restrictions of the members of a selective distribution system not to sell different brands are possible, as long as the restriction is not targeted at the brands of particular competing suppliers (VN, section 12(2)(h)). In case of non-selective distribution agreements, restricting the buyer's ability to stock competing products is admissible subject to certain limitations regarding non-compete obligations (see question 39).

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

An obligation of the buyer to purchase from the supplier more than 80 per cent of its requirements of the contract products, based on the value of its total purchases in the previous calendar year, is regarded as a non-compete provision (see question 39). There is no specific provision on requiring a buyer to purchase a full range of the supplier's products, which must be assessed on a case-by-case basis. In a qualitative selective distribution system, such a restriction must not go beyond what is necessary (see question 34).

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

If the market share does not exceed 30 per cent on the relevant market, the buyer may restrict the supplier not to supply the contract products to other buyers. Beyond the 30 per cent market share threshold, an individual assessment has to be undertaken whether or not the restriction can be justified on economic efficiency grounds (VN, section 16 (3)).

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

If the market share does not exceed 30 per cent on the relevant market, the buyer may restrict the supplier not to sell the contract products directly to end-consumers. Beyond the 30 per cent market share threshold, an individual assessment has to be undertaken whether or not the restriction can be justified on economic efficiency grounds (VN, section 16 (3)).

Members of a selective distribution system must not be restricted from actively or passively selling to end-consumers (VN, section 12(2)(c)). Suppliers must not be restricted either from selling components or spare parts to end-consumers or repair workshops (VN, section 12(2)(e)).

45 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?

No.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Agreements (whether vertical or horizontal) can be notified to the ComCo before the respective restriction of competition takes effect (CartA, article 49a(3)). Such a notification seems advisable if the agreements in question entail a considerable investment, for example, the introduction of a new distribution system.

By notification of vertical restrictions of competition prior to their taking effect, the notifying company does not run the risk of being fined pending a reaction of the ComCo to the notification (see CartA, article 49a(3)(a)). If the ComCo does not respond within five months of the notification, the notifying company may not be fined for the notified restrictions of competition (which may theoretically still be held to be unlawful at a later state). Conversely, if the company is informed by the ComCo of the opening of a procedure under CartA articles 26 to 30 within those five months, and if it then continues the restriction of competition, a fine can be imposed for the future.

In general, no reasoned decision will be published at the end of the formal notification procedure if no procedure under CartA, articles 26 to 30 is opened. However, there might be a press release of the competition authorities.

Authority guidance

47 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?

Besides the notification possibility and the ensuing opposition proceedings (see question 46), companies may seek guidance from the Secretariat. According to CartA, article 23(2), the duties of the Secretariat include advising companies on matters relating to the application of the law. However, officials of the Secretariat have indicated in public speeches that the Secretariat is reluctant to further provide guidance, allegedly due to shortage of staff. In addition, guidance by the Secretariat will not always result in a clear answer, and it does not bind the ComCo and hence does not eliminate the risk of a fine.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties can explicitly complain to the ComCo. According to CartA, article 26(1), the Secretariat may conduct preliminary investigations at the request of enterprises concerned. If there are signs of an unlawful restraint of competition, the Secretariat will open an investigation with the consent of a member of the ComCo's presiding body (CartA, article 27(1)). In return, if there are no such signs, the Secretariat will close the preliminary investigation without any further consequence. The approximate time period for such a preliminary investigation may be considerable and extend over a couple of years.

If alleged vertical restraints have effects solely on the relationship between private undertakings, do not have a significant impact on the market and thereby do not involve public interests, the Secretariat may refer the complaining party to private enforcement before a civil court (see question 53).

Enforcement

49 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?

Swiss antitrust law is often applied to vertical restraints, as Swiss authorities are particularly concerned about the allegedly higher prices in Switzerland compared to neighbouring countries. However, the number of decisions does not match the number of (preliminary) investigations the Secretariat conducts. In 2002, the Swiss authorities reported some 120 cases regarding vertical agreements. Based on 76 cases that had been closed by the time the annual report for 2003 was published, not one unlawful vertical agreement had been found. Either the CartA was not applicable, or there were no competition problems, or, in some cases, there was an amicable settlement. From 2004 to 2012, the Swiss authorities conducted 71, 90, 80, 46, 39, 39, 42, 61 and 55 (preliminary) investigations in a given year. The figures for 2013 have not yet been published. Based on the published statistics, one cannot allocate these cases to specific types of restraints, but a considerable share have concerned vertical restraints. In 2009, the ComCo issued the first three decisions in which fines were imposed in cases of vertical restraint. The ComCo issued no decision in this area in 2010, one decision in 2011, two decisions in 2012 and one decision in 2013 (see question 51 and 'Update and trends').

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

A contract containing prohibited vertical restraints (a restriction eliminating effective competition or a restriction substantially affecting competition that cannot be justified) is null and void based on Swiss civil law (Code of Obligations, article 20(1)). According to the principle of severability (which is set forth in the Code of Obligations, article 20(2)), if the defect only affects particular parts of the contract, then only those parts shall be null and void, unless it is to be presumed that the contract would not have been concluded without the defective parts.

51 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 ComCo is empowered to impose penalties itself (CartA, articles 18(3) and 53). The Secretariat, in return, conducts the investigations and makes proposals to the ComCo (CartA, article 23(1)). The ComCo may impose a fine of up to 10 per cent of the respective companies' turnover in Switzerland in the previous three business years (CartA, article 49a(1)). The amount of the sanction is dependent on the duration and severity of the unlawful behaviour. A remedy may consist in reaching an amicable settlement, which will be decided by the ComCo on a proposal from the Secretariat (CartA, article 30(1)). As far as remedies are concerned, the authorities are particularly interested in removing any obstacles to parallel imports and in scrutinising price recommendations having – allegedly – the effect of fixed prices. The Verticals Notice explicitly treats price recommendations with suspicion from the outset.

In 2009, the ComCo issued the first three decisions in which fines were imposed in cases of vertical restraints:

- fines of 55,000 Swiss francs in total were imposed for an agreement on resale price maintenance with respect to gardening scissors (this decision was based on a leniency application and an amicable settlement and was thus not appealed);
- fines of 5.7 million Swiss francs in total were imposed for public price recommendations regarding specific non-reimbursable pharmaceutical products. The Federal Administrative Court approved the appeals. This decision has been appealed (see 'Update and trends'); and
- fines of 4.81 million Swiss francs were imposed for an agreement prohibiting parallel imports of toothpaste. The Federal Administrative Court approved the decision of the ComCo. The decision is under appeal (see 'Update and trends').

In 2010, the ComCo issued no decision in which a fine was imposed in cases of vertical restraints. In 2011, the ComCo issued one decision (Nikon) in which a fine was imposed in cases of vertical restraints, where fines of 12.5 million Swiss francs in total were imposed for an agreement prohibiting parallel imports in the area of photographic cameras (this decision was appealed to the Federal Administrative Court). In 2012, the ComCo fined BMW 156 million Swiss francs for impeding direct and parallel imports into Switzerland (the decision is under appeal) and imposed a fine of 470,000 Swiss francs for retail price maintenance agreements in relation to alpine sports products (the decision is under appeal). The ComCo imposed fines for vertical restraints concerning the exclusive supply terms for French-language books in 2013. This decision has been appealed to the Federal Administrative Court. In the *Jura* case no fine was imposed, since the vertical restrictions at stake did not fall under the presumption of elimination of competition set in article 5(3) and (4) CartA (see 'Update and trends').

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Parties to vertical agreements are required to provide the competition authorities with all relevant information and to produce all necessary documents (CartA, article 40). The competition authorities may also hear third parties as witnesses and require the parties to the investigation to make statements (CartA, article 42(1)). The competition authorities may order searches and seize documents (hard-copy and digital) (CartA, article 42(2)). In this context all documents and electronic databases located at the undertaking's premises as well as at the houses of managers can be searched and seized, including documents that might be protected by legal privilege in other jurisdictions, with the exception of 'defence correspondence' – correspondence with an external lawyer related to an ongoing investigation.

Homburger

Franz Hoffet **franz.hoffet@homburger.ch**
Marcel Dietrich **marcel.dietrich@homburger.ch**
Gerald Brei **gerald.brei@homburger.ch**
Alain Girard **alain.girard@homburger.ch**

Prime Tower
Hardstrasse 201
8005 Zurich
Switzerland

Tel: +41 43 222 1000
Fax: +41 43 222 1500
www.homburger.ch

Update and trends

On 30 June 2014, the Competition Commission (ComCo) settled a case with Jura, a producer of coffee machines regarding online sales. This case constitutes the sole decision regarding vertical agreements in 2014. In the settlement, Jura committed that all selected distributors will be allowed to use the internet to sell products. This outcome is in line with a prior amicable settlement of July 2011 in which the ComCo came to the conclusion that, as a matter of principle, it is unlawful to prohibit sales via online shops. Based on the published decisions it remains unclear whether this includes all legal restrictions of online sales or whether some restrictions could also be legally imposed.

On 1 December 2014, a bilateral cooperation agreement on competition matters between the European Union and the Swiss Confederation came into force (Cooperation Agreement). The Cooperation Agreement will significantly enhance the way in which the European Commission and the ComCo work together in relation to their enforcement activities (eg, mergers, abuse of dominance cases, antitrust and cartels). Prior to the Cooperation Agreement, the European Commission and the ComCo were confined to informal means of cooperation unless the companies concerned had granted waivers of confidentiality with regard to information exchanges. The Cooperation Agreement explicitly allows the European Commission and the ComCo to exchange information obtained during investigations without the need to obtain consent from the parties. The new framework comprises three core features: mutual notifications, coordination of enforcement activities (eg, the timing of dawn raids) and exchange of information. The new possibility to exchange information is important in advising clients. Where the European Commission and the ComCo are investigating the 'same or related conduct or transaction', they both can (upon request) transmit evidence obtained during their investigations to each other. This includes evidence collected during dawn raids in response to information requests and as provided in oral statements. The European Commission and the ComCo are not allowed to transmit information obtained under their respective leniency and settlement procedures. For the exchange of such information express written consent from the party concerned is required. The Cooperation Agreement provides some limitations on each authority's ability to share information (eg, in imposing that the receiving authority can only use the information for a pre-defined purpose in relation to an investigation or proceeding into the same or related conduct). Numerous questions remain unanswered, however, notably regarding the scope of application and the level of protection, including legal remedies.

After a legislative process lasting a number of years, the review of the Cartel Act has been fully rejected by Parliament on 17 September 2014. Therefore, no change of the substantial provisions of the CartA and, in particular, no institutional reform is likely to happen in the near future.

The competition authorities also demand information from suppliers domiciled outside Switzerland. Until recently, owing to a lack of international treaties in the area of competition law (with the notable exception of the area of civil aviation, where a bilateral agreement between Switzerland and the European Union exists), such requests may not have been enforceable. On 1 December 2014, a bilateral cooperation agreement on competition matters between the European Union and the Swiss Confederation came into force (Cooperation Agreement). The Cooperation Agreement now provides for a framework to exchange information (see 'Update and trends').

Private enforcement

53 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 enforcement is possible under Swiss antitrust law. The right to sue, however, is limited to a person impeded by an unlawful restraint of competition from entering or competing in a market. Such a person may request removal or cessation of the obstacle (eg, conclusion of contracts at market terms), damages and reparations, and the remittance of illicitly earned profits (CartA, articles 12(1), 13). Up to now, private enforcement has not been used very frequently. This is mainly due to the high burden of proof and the substantial cost risk, since court costs and the other party's legal costs must usually be borne by the losing party in the proceedings. In a 2008 report on the evaluation of the effectiveness of the CartA, measures for strengthening private enforcement were recommended. In a consultation proposal published in 2010 for an amendment of the CartA, the Swiss government suggested implementing only one of these proposals, with respect to the statute of limitations.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

It is the stated aim of the ComCo to bring Swiss provisions on competition law in line with the EU competition provisions in the area of vertical restraints (VN, recital VI), Important adaptations and an approximation to the legal situation in the European Union are made in the new Verticals Notice for the assessment of price recommendations (VN, section 15) as well as with respect to the importance of inter-brand competition (VN, section 11). In addition, the introduction of the additional (buyer) market share threshold in EU competition law has also been reflected in Swiss law. However, actual harmonisation with EU competition law has not yet been fully achieved.

Turkey

Bora İkiler and Ali Kağan Uçar
Moroğlu Arseven

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The primary legislation that sets out the antitrust law applicable to vertical restraints is Law No. 4054 on Protection of Competition (Law No. 4054). Vertical restraints that violate competition laws are regulated under article 4 (which is closely modelled on article 101 of the Treaty on the Functioning of the European Union (TFEU)) of Law No. 4054.

Furthermore, there are a number of secondary legislation that, together with article 4 of Law No. 4054, form the backbone of the antitrust laws applicable to vertical restraints. Turkish secondary legislations are closely modelled localised versions of relevant EU legislation. These include:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2);
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements;
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and
- the Block Exemption Communiqué No. 2013/2 on Specialisation Agreements.

Similarly, the Turkish Competition Authority (the Authority) has issued guidelines that clarify the specifics of each piece of relevant secondary legislation.

English versions of the aforementioned legislations can be found on the website of the Authority at www.rekabet.gov.tr.

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?

As per article 2 of Communiqué No. 2002/2, vertical agreements are defined as agreements concluded between two or more undertakings operating at different levels of the production or distribution chain for purchase, sale or resale of particular goods or services.

Although Communiqué No. 2002/2 does not provide an exhaustive list of vertical restraints that raise competition law sensitivities, the most frequently encountered examples of vertical restraints are pricing-related restrictions, single branding, exclusive dealing, exclusive customer allocation, and selective distribution.

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?

The main objective of the law on vertical restraints is the protection of competition, which can be considered economic. On the other hand, the preamble to Law No. 4054 emphasises that the protection of the competition also serves social interests such as consumer protection. In addition, the 'Method of Analysis' section of the Guidelines on Vertical Restraints (the Guidelines) indicates that the economic benefits must be considered not only in terms of the benefit of the contract parties, but also for consumers at large.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The responsible authority for enforcing prohibitions on anti-competitive vertical restraints is the Turkish Competition Authority, which is an independent regulatory authority with administrative and financial autonomy. The decision-making body within the Authority is the Turkish Competition Board (the Board). The Authority is independent in fulfilling its duties. No organ, authority or person may influence the final decision of the Board. Legal actions against the final decisions of the Board are brought before the administrative judicial bodies.

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?

Turkey is an 'effects doctrine' jurisdiction. Vertical restraints will be subject to Turkish antitrust laws to the extent that they prevent, distort or restrict competition in the relevant markets in Turkey and thus affect the goods and services markets within the territory of the Republic of Turkey. In this regard, Turkey allows extraterritorial jurisdiction in competition law-related cases. For instance, in its *Coal Import* decision dated 25 July 2006 numbered 06-55/712-202, the Board stated that acts by undertakings operating outside of Turkey will be considered within the scope of Law No. 4054 to the extent that these actions affect the Turkish markets.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Law No. 4054 is applicable to undertakings and association of undertakings. It defines an undertaking as an economic unit, which can either be a natural or a legal person, that acts independently in the markets to produce, market and sell goods or services. Thus Law No. 4054 does not make any distinction between public and private entities in the application of antitrust law. In this regard, as long as public entities that are party to any agreements that include vertical restraints satisfy the criteria for being an undertaking for competition law purposes, they will be subject to the same scrutiny as private entities.

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.

In addition to Law No. 4054 and Communiqué No. 2002/2 (see question 1), there are communiqués that specifically regulate research and development agreements, and technology transfer agreements, as well as the motor vehicle and insurance sectors.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

There are no de minimis exceptions or any other general exceptions from the application of article 4 of Law No. 4054 for certain types of agreements under Turkish competition law.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Primary legislation does not provide a definition of 'agreement' for antitrust law purposes. That said, as per paragraph 6 of the Guidelines on the General Principles of Exemption (the Exemption Guidelines), any and all kinds of understanding, whether oral or written, are considered as an agreement. The precedents of the Board also confirm this viewpoint.

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?

As also stated in question 9 above, it is not necessary for there to be a formal written agreement in order to engage the antitrust law in relation to vertical restraints. Any kind of informal or unwritten understanding would suffice to attract antitrust scrutiny. In its *Linde Gaz* decision dated 29 August 2013 numbered 13-49/710-297, the Board emphasised that even though there may be no written agreement that regulates the conduct that is being investigated by the Board, the conduct itself will be considered sufficient to form a vertical agreement as a result of the de facto effects on the market.

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Although there is no explicit definition of 'related company' in Turkish antitrust law, companies within the same chain of control are considered as a single economic unit and thus a single undertaking. Therefore, agreements between a parent company and a related company and agreements between related companies of the same parent company would fall outside the scope of application of antitrust law and thus also outside vertical restraints rules.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In principle, article 4 of Law No. 4054 will not apply to an agreement between a 'principal' and its 'genuine agent' as long as the agreement relates to contracts negotiated or concluded by the genuine agent on behalf of its principal.

The decisive factor for whether there is a genuine principal–agent relation is the commercial or financial risk borne by the agent in relation to the activities for which it has been appointed. If an agent bears any commercial or financial risk for the contracts negotiated or concluded on behalf of its principal, this relationship would be subject to antitrust scrutiny and antitrust law on vertical restraints would apply to such relationship.

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?

According to the Guidelines, if an agent does not bear any commercial or financial risk in the contract that it has concluded or negotiated on behalf of its principal, the relationship between the agent and the principal is outside the scope of article 4 of Law No. 4054. In such a case, the purchase or sales activity of the agent is considered an activity of the principal and thus antitrust rules do not apply to such relationship.

Risk, the decisive factor in triggering antitrust scrutiny, is assessed on a case-by-case basis, but the Guidelines provide a non-exhaustive list of the types of risk that would require the application of antitrust rules:

- the agent contributing to the costs associated with the purchase or sale of goods or services, including transportation costs;
- requiring the agent to directly or indirectly contribute to sales-building activities;
- the agent bearing risks such as financing the contract goods kept in stock, or the cost of lost goods, and the inability of the agent to return unsold goods to the client;
- requiring the agent to provide after-sales service, repair or guarantee services;
- requiring the agent to make investments that may be necessary to be able to operate in the market in question, and which may solely be used in this market;
- the agent being liable with regard to third parties for the losses caused by the product sold; and
- the agent bearing responsibility other than its inability to receive its commission resulting from the failure of customers to fulfil the conditions of the contract.

The Guidelines or the precedents of the Board do not deal specifically with what constitutes an agent–principal relationship in the online sector.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Vertical agreements containing provisions that relate to the assignment to the buyer or use by the buyer of IPRs, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers, would benefit from the protection of Communiqué No. 2002/2, as long as they comply with Communiqué No. 2002/2. That said, if assignment of IPRs is the primary object of the vertical agreement, the agreement would be outwith the scope of the block exemption safe harbour.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The analytical framework of the Authority is very similar to the framework of the European Commission (EC). Agreements and concerted practices are illegal and prohibited if they have as their object or effect (or likely effect) the prevention, distortion, or restriction of competition, either directly or indirectly, in a particular market for goods or services.

Restrictive agreements would fall outside the scope of article 4 of Law No. 4054 if they benefit from a block exemption or an individual exemption (or both).

Details on block exemption are dealt with in question 18 below.

There are four cumulative conditions for individual exemptions and all of them need to be met for an individual exemption to be granted. Accordingly, the agreement should:

(i) contribute to new developments and improvement or technical or economic progress in the production or distribution of goods and in providing services; and
(ii) allow consumers to benefit from such progress and improvement;

and should not:

(iii) eliminate competition in a substantial part of the relevant market; and
(iv) impose a restraint on competition that is more than essential for the attainment of the objectives set out in (i) and (ii).

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?

The legality of individual restraint does not directly relate to the market shares of the suppliers. There is no presumption of legality or illegality for individual vertical restraints depending on the supplier's market share being above or below any particular thresholds. That said, in individual exemption analysis, the risk of the foreclosure of the market, market positions and the conduct of other suppliers are taken into account. In other words, the legality of individual restraints is examined in light of the relevant market structure.

Furthermore, the Board considers the market shares of suppliers when assessing whether their vertical agreements should benefit from the block exemption.

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?

According to article 2 of Communiqué No. 2002/2, for those vertical agreements involving exclusive supply obligation, the block exemption applies also on condition that the market share of the buyer in the relevant market in which it purchases the goods and services that are the subject of the vertical agreement does not exceed 40 per cent.

In the *Eczacıbaşı Baxter* decision, dated 20 August 2014, numbered 14-29/592-258, the Board examines the market share of the buyer as well as the market share of the supplier. Accordingly, the Board decided that an agreement containing exclusive supply obligations cannot benefit from the block exemption since the market shares of both parties exceed the thresholds.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Communiqué No. 2002/2 provides a safe harbour for certain agreements containing vertical restraints. Agreements that fulfil the requirements of Communiqué No. 2002/2 would be exempt from the application of article 4 of Law No. 4054.

First, the relevant agreement has to be a vertical agreement for the purposes of Communiqué No. 2002/2 (ie, the parties operate at different levels of the production or distribution chain). Agreements among competitors (ie, actual or potential market players of the same product market) cannot benefit from the block exemption.

As stated above (see questions 8, 15, 16 and 17), block exemption will be applicable to the vertical agreements of suppliers of whom the market share in the relevant market (ie, the market for the contracted goods or services) does not exceed 40 per cent. In agreements that concern a relation in which a supplier appoints just one buyer in Turkey, the buyer's market share would also be relevant and it should not exceed 40 per cent.

Even if the market share of the supplier (or as the case may be, both the supplier and the buyer) does not exceed 40 per cent, the vertical agreement must not contain the following elements:

- fixing of minimum resale prices;
- restrictions on customers to whom, or the territories into which, a buyer can sell the contract goods;
- members of a selective distribution system supplying each other or end-users; and
- component suppliers selling components as spare parts to the buyer's finished product.

Further, non-compete obligations imposed on buyers that exceed five years, and post-term non-compete obligations that exceed one year, or obligations imposed on the members of the selective distribution system not to sell the branded products of designated competing providers are outwith the scope of the safe harbour provided by Communiqué No. 2002/2.

It should be noted that a vertical agreement that does not qualify for a block exemption could still be individually exempted from the application of article 4 of Law No. 4054 if it fulfils the criteria for individual exemptions under article 5 of Law No. 4054 (akin to article 101(3) of the TFEU).

Furthermore, the Authority reserves the right to withdraw the exemption if there is a change of circumstances under which the exemption has been granted.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

In the Exemption Guidelines, restricting a buyer's ability to determine its resale price is considered among the object restrictions. According to the Exemption Guidelines, if there is an object violation there is no need to look into the effects of the conduct in question. In this regard, resale price maintenance is considered as one of the hard-core competition restrictions.

Communiqué No. 2002/2 also makes this point clear by explicitly stating that agreements that prevent buyers from determining their own sale prices would not benefit from the exemption granted by Communiqué No. 2002/2. That said, suppliers are at liberty to set maximum resale prices or recommend resale prices from which the buyers can deviate without any deterrent factor (provided these do not become fixed or minimum selling prices).

Indirect means of resale price maintenance (eg, fixing the maximum level of discounts or the profit margins of the buyers, providing extra discounts to the buyer on condition that it conforms to the recommended prices and threatening the buyer with delaying, suspending deliveries or terminating the agreement for non-conformity with the recommended prices) would also be outside the scope of block exemption safe harbour.

That being said, when the decisions of the Board are analysed, the Board is sending mixed signals in looking for the effects of object violations (eg, resale price maintenance). In this regard, the decisions of the Board are not consistent and there are also decisions in which the effects of object violations were not looked into.

In the *Dogati* decision, dated 22 October 2014 and numbered 14-42/764-340, which was related to resale price maintenance in a franchise agreement, the Board discussed the effects of such restraints in detail. For instance, the Board analysed the structure of the fast food market and underlined that there is a vast number of competitors. However, the Board stated that the actual competitors of the franchisees are not the other franchisees of the same franchisor. The actual competitors are considered as the other undertakings operating in the fast-food sector. The Board also emphasised the positive effects of the restraints, on the consumers and the prestige of the trademark. Accordingly, the Board allowed such resale price maintenance due to the aforementioned reasonable justifications.

On the other hand, in its *Samsung* decision dated 23 June 2011 and numbered 11-39/838-262, the Board did not go into the details of the effects of the resale price maintenance, and without engaging in any effects analysis, concluded an outright infringement based on the fact that the supplier had intervened in the pricing behaviour of its distributors.

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'?

There is no precedent or guideline on this issue.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

The Guidelines prohibit both direct and indirect means of resale price maintenance. Furthermore, the Guidelines provide various examples that are most frequently used by undertakings in order to monitor and control the resale prices of their distributors.

Moreover, the Guidelines state that direct or indirect means of resale price maintenance would be more effective when coupled with monitoring schemes. For example, an obligation that may be imposed on all buyers about reporting buyers that apply different resale prices would considerably facilitate the control, by the supplier, of prices applied in the market.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Although the Guidelines do not address the efficiencies of the resale price maintenance, the Board, in its decisions, discusses the efficiencies that can arguably arise out of such restrictions. However, the Board does not specifically address the efficiencies. It rather mentions that these efficiencies may be raised and be considered by the Board to the extent that the market conditions allow.

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.

Considering that there is no guidance or decision of the Board concluding that price relativity clauses would outright violate article 4 of Law No. 4054, such clauses should benefit from the block exemption safe harbour provided that the other criteria for the application of Communiqué No. 2002/2 are met. That said, the effects of price relativity clauses need to be assessed on a case-by-case basis before conclusively deciding on whether such clauses violate antitrust law.

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.

Considering that there is no guidance or decision of the Board concluding that most-favoured-customer clauses at a wholesale level would outright violate article 4 of Law No. 4054, such clauses should benefit from the block exemption safe harbour, provided that the other criteria for the application of Communiqué No. 2002/2 are met.

That said, as indicated in the *Arcelik/Sony* decision of the Board, dated 8 December 2010 and numbered 10-76/1572-605, depending on the specific circumstances surrounding the case at hand most-favoured-nation (MFN) clauses might have anti-competitive effects. The Board indicated that such clauses may give rise to competitive concerns in markets where the level of competition is low and where the parties to such agreements have significant market power. That said, after considering the limited scope of the MFN clause in the case at hand, and the characteristics of the relevant market and the features of the products, the Board concluded that the MFN clause did not violate antitrust law.

Thus effects of MFNs need to be assessed on a case-by-case basis.

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.

There is no decision of the Authority that specifically deals with vertical agreements containing MFN clauses for the online environment.

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.

Advertisements are considered as one of the most important tools of demand creation, and thus sales, for undertakings. Considering the aforementioned approach of the Authority, although there is no guidance or precedent, intervening with the buyer's advertisement policy and determining the minimum advertised price could be considered an indirect method of resale price maintenance. Therefore, such restriction could be deemed a violation of antitrust law.

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.

The Authority does not make any distinction between the most-favoured-customer clauses applied to suppliers and those applied to the buyers. Therefore, the explanations under questions 23 and 24 are also applicable here.

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?

Under the Exemption Guidelines, restrictions on the regions in which the buyer may sell the contracted goods are considered among the object restrictions. According to the Exemption Guidelines, if there is an object violation there is no need to look into the effects of the conduct in question. In this regard, territorial restrictions are considered hard-core competition restrictions.

Communiqué No. 2002/2 provides an exception to the aforementioned general rule. Accordingly, if the restrictions concern only active sales (ie, restrictions on passive sales would fall outside the scope of the block exemption) into exclusive territories allocated to another buyer (or to the supplier itself), provided that the other requirements of Communiqué No. 2002/2 are satisfied, such territorial restrictions would still fall under the protection of the block exemption. In this regard, sales as a result of active demand creation activities are considered active sales whereas meeting unsolicited orders of the customers are considered passive sales.

For agreements that satisfy the requirements of the foregoing given exception but do not qualify for block exemption (due to failure to satisfy the other requirements under Communiqué No. 2002/2) theoretically individual exemption would still be applicable if the relevant conditions for individual exemption were met.

29 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 are also considered object restrictions. Therefore, the main rule and its exception mentioned under question 28 above are also applicable to restrictions on the customers to whom a buyer may resell contract products.

Apart from the aforementioned exception, when customer restrictions are concerned, Communiqué No. 2002/2 provides for three more exceptions to the general rule:

- restrictions on wholesalers preventing them from selling directly to end-users;
- restrictions on members of selective distribution systems preventing them from selling to unauthorised distributors; and
- restrictions on buyers preventing them from selling components – that are supplied for the purposes of incorporation – to customers who intending to use them to manufacture the same type of products as those produced by the supplier.

Vertical agreements containing restrictions on the above given issues would also benefit from the protection of the block exemption.

30 How is restricting the uses to which a buyer puts the contract products assessed?

There has not been any decision given by the Authority on the restriction of such uses. Most probably, such prevention would be considered outside the scope of the block exemption since this kind of restriction is not mentioned in the exceptional circumstances mentioned under questions 28 to 29 above. Thus, if it does not fulfil the criteria for an individual exemption, it would be a restriction of competition under article 4 of Law No. 4054.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

According to the Guidelines, sales made through the internet are generally passive sales; therefore, restricting these sales are prohibited. However, sending e-mails to the customers in the exclusive territory or to groups of customers of another buyer is considered a method of active sales as long as such a request is not solicited by the customers in question.

In the *Yatsan* decision, dated 23 September 2010 and numbered 10-60/1251-469, although the supplier argued that the aim of its restriction regarding internet sales was to protect its brand image, the Board indicated that internet sales are mostly considered as passive sales, and that outright restrictions regarding internet sales of the buyer cannot benefit from the block exemption under Communiqué No. 2002/2.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

Neither the Guidelines nor any decision has dealt specifically with the differential treatment of different types of internet sales channel.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Establishing selective distribution systems is allowed by the Turkish competition law regime subject to fulfilment of certain conditions. Accordingly, Communiqué No. 2002/2 sets out the relevant criteria for selective distribution system to benefit from the block exemption safe harbour. Under Communiqué No. 2002/2 a selective distribution system will benefit from the block exemption if there is no:

- resale price fixing;
- restriction on active or passive sales to end-users; and
- restriction on members of the system to prevent them from supplying the contracted goods from each other.

According to Communiqué No. 2002/2, the criteria must be designated, but the suppliers are not required to publish them.

34 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?

Under the Guidelines, to establish a selective distribution system, the contract products should necessitate such system in order to preserve their quality or to ensure their proper use.

35 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?

Although a complete restriction on internet sales is prohibited since they are considered as passive sales, the Authority may allow such restrictions if there are objective and reasonable justifications. The Authority follows the conduct of the EC on internet sales prohibitions (mentioned in the *Yatsan* decision). The Authority states that some quality standards with regard to internet sales by resellers can be justified. The Board does not allow internet sales restrictions in the *Yatsan* decision; since these restrictions were not considered reasonable, the Board refers to EC decisions and indicates that suppliers may also require approved distributors to maintain a bricks-and-mortar store in order to be able to conduct online sales.

36 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?

This issue has not been dealt with in any decision of the Authority.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes. The Guidelines mention cumulative restrictive effects of multiple selective distribution systems. It is stated that the cumulative restrictive effects may prevent accessibility to the market. Accordingly, the Board takes into account the market shares of the competitors when analysing cumulative restrictive effects.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The Guidelines permit the combination of selective distribution systems with other restrictions such as non-compete or exclusive restrictions provided that these additional restrictions are not hard-core restrictions, the relevant market share thresholds (ie, 40 per cent) are not exceeded, and (iii) resale to the authorised distributors and end-users are not restricted. The aforementioned agreements benefit from the block exemption under Communiqué No. 2002/2.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Primary or secondary legislation does not explicitly deal with 'exclusive purchasing' arrangements. That said, if such an arrangement is combined with other restrictions it may raise competition concerns regarding market partitioning. Moreover, if market shares of both the supplier and the buyer are below 40 per cent, the restriction would fall under the block exemption safe harbour.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The Board has not dealt with this issue yet, but it is likely that such restriction be considered as a hard-core restriction and be outside the scope of the block exemption. Therefore, the justifications and related efficiencies of such restriction must clearly be argued to the Board in order to qualify for an individual exemption.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Non-compete obligations in vertical agreements would fall under the restriction of article 4 of Law No. 4054 unless they satisfy the requirements of Communiqué No. 2002/2 or they are individually exempted.

Under Communiqué No. 2002/2, non-compete obligations that do not exceed five years in duration and post-term non-compete obligations that do not exceed one year following termination of the contract may benefit from safe harbour protection (if the contract satisfies the other conditions of the block exemption). Non-compete obligations that are tacitly renewable beyond a period of five years would also fall outside the scope of the block exemption. For non-compete clauses outside the scope of the block exemption, it is still possible to be individually exempted from the application of article 4 of Law No. 4054. The individual exemption analysis for such non-compete clauses would depend on the market positions of the parties (together with the market position of competitors), the extent and duration of the clause, the level of trade, barriers to entry and the level of countervailing buyer power.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Any obligation imposed on the buyer to purchase more than 80 per cent (based on the purchases of the buyer in the previous calendar year) of its purchases of the contracted goods or services from the supplier or from any other source to be designated by the supplier is considered a non-compete obligation. Thus, such obligation would be subject to the same assessment as that provided in question 41 above.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

Although Communiqué No. 2002/2 does not explicitly deal with the restrictions imposed on suppliers, it allows for an exclusive supply relation (a supplier agreeing to supply only one buyer in Turkey) as long as the market share of both the supplier and the buyer is below 40 per cent. Considering that the potential anti-competitive effects of such restrictions would be similar to those of non-compete obligations for a term shorter than five years, exclusive supply relations would be within the scope of Communiqué No. 2002/2.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Although the Guidelines do not give wide coverage to the restrictions imposed on suppliers, it is stated that 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.

45 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?

No.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Currently, the undertakings are not required to notify vertical restraints, and therefore there is no penalty imposed by the Board in the event that the undertakings do not notify their agreements containing vertical restraints.

Undertakings are at liberty to conduct their own self-assessment regarding their agreements containing vertical restraints. If the self-assessment reveals that the vertical restraints fulfil the requirements of exemption (block or individual), there is no need to notify the Board.

If the self-assessment of the undertakings does not reveal concrete results, the Guideline for Voluntary Notification provides the necessary guidance regarding the notifications of vertical restraints to the Board for exemption.

The individual exemption notification takes place using the notification form attached to the Guideline for Voluntary Notification. There is no statutory review period but in practice it takes approximately three to six months for the Board to decide on individual exemptions. After its review the Board would:

- conclude that the agreement falls within the scope of the block exemption safe harbour;
- grant an individual exemption;
- grant a conditional exemption (ie, an exemption conditioned on fulfilment of certain conditions); or
- grant a negative clearance.

Reasoned decisions of the Board are published on the official website of the Authority.

Authority guidance

47 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?

Apart from the procedure explained under question 46 above, there is no other procedure to obtain guidance from the Board or a declaratory judgment from a court.

Update and trends

Under the Turkish competition law regime, there is no de minimis safe harbour for the application of Article 4 of Law No. 4054. An amendment proposal, pending before Parliament, introduces a mechanism that provides a safe harbour for such agreements, concerted practices and decisions of associations of undertakings that would technically fall under the restrictions of Article 4, but are considered to be outside the scope of such restrictions due to either their limited or insignificant effects in the market, or the relatively weak economic and financial positions of its parties.

The amendment indicates that the substantial and procedural issues surrounding the application of the de minimis safe harbour will be regulated by the secondary legislation that will be issued by the Turkish Competition Board. Whether the Board will follow in the footsteps of its EU counterpart and adopt an identical de minimis communiqué remains to be seen.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

The Board can launch an investigation into alleged unlawful vertical restraints ex officio or as a result of a complaint. The Board is at liberty to reject the complaint if it does not deem it serious. If the Board finds the complaint serious, however, it should conduct a preliminary investigation. The preliminary investigation is conducted by a team of case handlers appointed by the Board. After submission of the case team's preliminary report to the Board, it should decide within 10 days whether to launch a formal investigation.

If the case proceeds to an investigation, the process must be completed within six months, which can be extended, once only, for another period of up to six months.

The investigation process involves a written phase (consisting of three written defences) and an oral phase (consisting of an oral hearing). After the completion of the written phase the Board may decide to have an oral hearing ex officio or upon request by the undertakings concerned. After the oral hearing the Board must render its final decision within 15 calendar days.

Enforcement

49 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?

Decisions of the Board regarding vertical agreements constitute a significant portion of its jurisprudence. Between January 2014 and June 2014 (ie, the most recent statistics at the date of publication), The Board have decided on 28 files concerning such restraints, constituting 12 per cent of its 229 total decisions.

MOROĞLU ARSEVEN

Bora İkiler **bikiler@morogluarseven.com**
Ali Kağan Uçar **kucar@morogluarseven.com**

Odakule Kat:12
İstiklal Caddesi No:142
34430 Beyoğlu
Istanbul
Turkey

Tel: +90 212 377 47 00
Fax: +90 212 377 47 99
www.morogluarseven.com

The Board's decisions tend to focus on agreements containing territorial restrictions and resale price restrictions.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

If the Board concludes that a contract contains prohibited vertical restraints, depending on the severability of the relevant clauses either the agreement itself or only the relevant clauses containing the vertical restraints (to the extent that they are severable from the rest of the agreement) are deemed null and void, and administrative monetary fines may be imposed on the undertakings concerned.

51 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 Board is directly authorised to impose penalties without requiring an approval from another entity.

If there is a violation of article 4 of Law No. 4054, the Board is entitled to impose administrative monetary fines on the undertakings concerned up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.

For vertical restraints, however, the Board does not always impose administrative monetary fines but closes the investigation at the preliminary investigation phase by issuing decisions conditioned on structural or behavioural remedies. In these decisions, however, if the undertaking concerned does not comply with the relevant remedies there should be a full-blown investigation about the conduct in question, which might lead to an administrative monetary fine.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Dawn raids and formal requests for information are the available investigatory tools to the Board to gather information in enforcing antitrust rules.

In carrying out its duties, the Board may request any information it deems necessary from all public institutions and organisations, undertakings and association of undertakings. Unless such requests are not complied with, administrative monetary fines can be imposed on relevant undertakings.

In addition, the case handlers appointed by the Board may perform dawn raids, in which they examine the books and records of the relevant undertakings together with any and all paperwork and documents, and request written or oral statements.

Private enforcement

53 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?

Under Law No. 4054, anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements in violation of Law No. 4054, or abuses its dominant position in a particular market for goods or services, is obliged to compensate injured third parties for any damages. Injured parties (including the parties to the agreement or third parties, or both) are entitled to litigate compensation claims arising from violations of Law No. 4054 in the civil courts and request treble damages. The duration of any civil lawsuit would depend on the complexity of the case.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

Ukraine

Igor Svechkar and Oleksandr Voznyuk
Asters

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main legal source is the Law of Ukraine on Protection of Economic Competition of 2001 (the Competition Law), available in English at www.globalcompetitionforum.org/regions/europe/Ukraine/LEGISLATION.pdf (this version is not the latest one). Other sources applicable to antitrust aspects of vertical restraints include:

- the Law of Ukraine on the Antimonopoly Committee of Ukraine of 1993;
- the Resolution of the Antimonopoly Committee of Ukraine (the AMC) on the Procedure for Filing Applications with the AMC for Obtaining its Approval of the Concerted Practices of the Undertakings of 2002 (the Authorisation Regulation);
- the Resolution of the AMC on the Standard Requirements to Concerted Practices of the Undertakings for their General Exemption from the Requirement to Obtain Prior AMC Clearance of 2002 (the General Exemption Regulation); and
- the Law of Ukraine on the State Regulation on Technology Transfer Activities of 2006 (the Technology Transfer Law).

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 Competition Law generally prohibits any agreements, decisions of associations, as well as any other concerted behaviour (including acts and failure to act) of the undertakings that resulted or may result in the prevention, elimination or restriction of competition (anti-competitive concerted practices).

Further, the General Exemption Regulation defines the concept of 'vertical concerted practices'. These are any agreements or other concerted practices entered into between the undertakings, decisions of associations, incorporation of an undertaking (or association) aiming at or resulting in coordination of competitive behaviour (of the parent undertakings or of those and the incorporated entity) or entry into the association as a member in the situation where the participants to such concerted practices do not and cannot compete under the actual conditions in the same product market, having at least potentially the purchase-and-sale relations in the relevant product market(s).

Therefore, vertical restraints are those that may relate to the described vertical concerted practices. The Competition Law and the Technology Transfer Law contain non-exhaustive lists of prohibited concerted practices (which may contain vertical restraints), including:

- fixing of prices or other conditions of purchase or sale of goods;
- limitation of production, markets, technological development or investment, as well as assuming control thereof;
- dividing markets or sources of supply according to territory, type of goods, sale or purchase volumes, or classes of sellers, purchasers or consumers or otherwise;
- ousting of other undertakings, buyers, sellers from the market or limitation of their access into (or exit from) the market;
- application of dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- substantial limitation of competitiveness of other undertakings on the market without objectively justifiable reasons; and
- export limitations (in case of technology transfer).

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?

The objective is predominantly economic: protection of competition and consumer welfare. In addition, other objectives may overwhelm the economic purpose of protection of competition (exempted individually under the Authorisation Regulation), such as promotion of technical and technological development, improvement of the production and distribution processes, development and application of uniform standards, and so on.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The AMC, as a state authority with special status, is responsible for the protection of economic competition. The AMC and its regional divisions (which are involved in supervision of compliance as well as investigation of violations of competition laws on the regional product markets) form the system of the AMC bodies responsible for ensuring compliance with the competition laws and, in particular, enforcement of prohibitions on anti-competitive vertical restraints.

Also, prohibitions on anti-competitive vertical restraints may be enforced through litigation. Yet the question of which of the administrative and commercial courts have jurisdiction over cases regarding violations of competition laws is debatable.

The Cabinet of Ministers of Ukraine (the Cabinet) is not directly involved in the enforcement of prohibitions on anti-competitive vertical restraints. However, it may authorise certain concerted practices that were prohibited by the AMC if the practices have an overwhelming positive effect on competition. When deciding on a case the Cabinet may involve any relevant governmental authorities (industry-specific ministries, national agencies, etc) as well as independent experts.

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?

The Competition Law applies to relations that have or may have an impact on economic competition in Ukraine irrespective of the parties' domicile, place of conclusion of an agreement, and so on. This provision can be reasonably interpreted as an effects doctrine applicable to concerted practices

in general and vertical restraints in particular. In practice, however, considering that the AMC has exclusive competence to decide on whether certain concerted practices have or may have an impact on economic competition in Ukraine, there is very little room for self-assessment.

There is no public record of extraterritorial application of the Ukrainian competition law regarding vertical restraints; however, the AMC regularly acts extraterritorially on other issues (eg, foreign-to-foreign mergers) and theoretically may do so with respect to vertical restraints that are imposed by non-Ukrainian undertakings and which concern Ukrainian product markets. One should note, however, that extraterritorial enforcement of the AMC decision appears hardly practicable due to a number of legal uncertainties and technical complications associated with cross-border reciprocal recognition of court judgments (through which the AMC decisions are forcibly enforced).

There is also no public record of the Ukrainian competition rules regarding vertical restraints being applied in a pure internet context.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Competition Law and other applicable regulations apply with respect to vertical restraints to both private and public entities irrespective of their legal form and type of ownership if they are 'undertakings' in the meaning of the Competition Law. The Competition Law expressly provides that state bodies, local self-administration authorities, bodies of administrative and economic management and control are considered undertakings for these purposes, including in the context of vertical restraints, in that part of their activities which concerns manufacture, sale and purchase of goods or other commercial activity.

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.

The Competition Law provides for a general exemption of concerted practices involving the transfer of intellectual property rights or the use of intellectual property. Also, the list of prohibited restraints contained in the Technology Transfer Law should be taken into account when considering technology transfer agreements.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The General Exemption Regulation provides for a general exception in the following cases:

- de minimis exemption: where the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is less than 5 per cent; and
- market share-based exemption: applicable to vertical restraints if the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is lower than 20 per cent, but under the General Exemption Regulation 20 per cent exemption cannot apply if (cumulative conditions):
- the aggregate worldwide turnover or assets value of the parties (including their respective groups) exceeded €12 million in the preceding financial year;
- the aggregate worldwide turnover or assets value of at least two undertakings that belong to the parties' groups separately exceeded €1 million in the preceding financial year; and
- the aggregate turnover or assets value in Ukraine of at least one undertaking that belongs to either party's group exceeded €1 million in the preceding financial year.

However, to the best of our knowledge, in the AMC's practice the above value of assets or turnover test does not serve as an appropriate benchmark for assessment of potential competition concerns, because the effects of vertical restraints on competition primarily depend on market positions of the parties, eg, their market shares.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Ukrainian competition law and regulations applicable to vertical restraints do not define 'agreement' and thus, the more general civil law notion should be considered. In particular, the Civil Code of Ukraine of 2003 defines the term 'arrangement or transaction' (which was accepted as a substitute for 'agreement' in the course of the civil law reform) as actions aimed at establishment, alteration or termination of civil rights and obligations. The term 'agreement' is similarly defined in the Methodology on Determination of Control Relationships of 2002.

The AMC may assess agreements in aggregate, in particular in cases where competition is substantially restricted on the whole market or a significant part thereof, or the restriction of competition constitutes a threat to the system of the market economy.

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?

No. The prohibition of anti-competitive practices generally applies to any concerted practices irrespective of their form (eg, formal written agreements, informal oral arrangements, gentlemen's agreements and mutual understandings, as well as other concerted practices).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

The vertical restraints rules apply with respect to undertakings. Pursuant to the Competition Law, when defining composition of an undertaking all controlling and controlled persons or entities of a separate undertaking in question should be included (ie, a group of undertakings is considered an undertaking itself). Thus, prohibition of anti-competitive concerted practices, including anti-competitive vertical restraints, does not apply to agreements concluded between separate undertakings belonging to the same group of undertakings, since they occur within the same undertaking.

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?

There are no particular circumstances (prerequisites) affecting the applicability of general rules to agent–principal agreements.

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?

Not applicable.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

The Ukrainian competition law does not apply to agreements concerning the transfer of IPRs or the rights to use the IP where such agreements contain certain allowed limitations on the economic activities of the transferee, in particular, on the volume of transferred rights, the period and the territory of permitted use of the IP, type of activity, application and the minimal production volume.

However, if the provisions on the transfer of IPRs form a part of a broader agreement, general rules apply to the remaining part of the agreement. If an agreement involves technology transfer it should also be analysed against the list of prohibited restraints contained in the Technology Transfer Law.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

There are no specific guidelines regarding assessment of vertical restraints and the AMC practice on the issue is rather limited. The Competition Law generally prohibits any anti-competitive concerted practices, listing certain prohibited hard-core arrangements or restrictions (unless exempted individually) (see question 2 for the non-exhaustive list).

The analytical framework for assessment of vertical restraints may include the following steps:

- define the product markets concerned and the respective market shares of the parties;
- if the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is less than 5 per cent, a vertical restraint is covered by the de minimis exemption (except for certain hard-core restrictions between competitors);
- if the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is between 5 per cent (inclusive) and 20 per cent (not inclusive), a vertical restraint may be covered by the market share-based exemption (except for certain hard-core restrictions between competitors), provided certain turnover or assets thresholds are met (see question 8);
- define whether the restraint may benefit from a block exemption (see question 18);
- if the vertical restraint is not covered by any applicable general exception or block exemption, the potential impact of the restraint on competition should be comprehensively assessed; and
- if the conclusion is that the restraint is potentially problematic, it may still be exempt from prohibition by obtaining the AMC clearance decision to that effect, if such restraint contributes to rationalisation of production, promotion of technical or economic development, optimisation of export or import processes, development and application of uniform product standards, etc, unless it results in substantial restriction of competition on the market or a significant part thereof.

In exceptional cases, and as a last resort, a vertical restraint may be exempt by a decision of the Cabinet. This will involve illustrating that:

- the relevant efficiencies outweigh the negative impact on competition;
- the restraint is indispensable to the attainment of said efficiencies; and
- the resulting restriction of competition does not constitute a threat to the market economy system.

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?

Market shares will be most relevant when considering whether any general exceptions (see question 8) or block exemptions (see question 18 with respect to product supply and use exemption) apply.

The national antitrust legislation does not provide clear guidance regarding the assessment of the legality of individual vertical restraints. However, in cases of hard-core restrictions it is unlikely that the authority will consider their economic background or whether they may be considered an established practice (eg, non-compete clauses), unless the parties specifically apply for an individual AMC clearance under the Authorisation Regulation claiming that the analysed restraint will carry strong efficiencies (ie, better quality of the products, cost efficiencies, etc (see question 15)). In the latter case, the authority would consider the market position of other suppliers (as well as other market players), the general market structure and the resulting changes of the individual restraint.

In practice, the AMC also tends to rely on EU Commission practice and guidelines on vertical restraints.

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?

The AMC's approach is similar to that outlined in question 16.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Competition Law provides for block exemption of the vertical restraints concerning a product's supply and use and the transfer of IPRs or use of IP.

Products supply and use

The general prohibition does not apply to those restrictions imposed on the other party to the agreement, which limit:

- use of products supplied by the imposing undertaking or use of products of other suppliers;
- purchase of other products from other suppliers or sale of such other products to other undertakings or consumers;
- purchase of products that, owing to their nature or according to custom in trade and other fair business practices, are not related to the subject matter of the relevant agreement (tying); or
- price formation or establishment of other contractual terms and conditions for selling the products supplied by the imposing undertaking to other undertakings or consumers.

This exemption does not apply, however, where such restrictions:

- result in substantial restriction of competition on the market or a significant part thereof, including monopolisation of the relevant markets;
- limit other undertakings' access to the market; or
- result in economically unjustified price increases or product shortages.

In 2012 the AMC published draft Standard Requirements to Concerted Practices on Supply and Use of Products (the Draft Verticals Regulation) in order to clarify the exemption framework. It reflected the relevant criteria for assessment of vertical restraints that were quite similar to the approach in EU competition law and practice. In particular, while generally allowing vertical restraints, the Draft Verticals Regulation viewed resale price maintenance as a hard-core restriction excluded from the scope of the exemption. More specifically, under the Draft Verticals Regulation the exemption did not apply to vertical concerted actions that aimed at or resulted in the restriction of the buyer's ability to determine its sale price. This would not prejudice the ability of the supplier to impose a maximum sale price or recommend a sale price, provided that these could not amount to a fixed or minimum sale price as a result of pressure from or incentives offered by any of the parties (see questions 28, 29, 33, and 37). The Draft Verticals Regulation has not been adopted and the work on this draft has been suspended. However, it may be assumed that in practice the AMC will continue to follow the approaches laid down in the draft in its assessment of vertical restraints.

Transfer of IPRs or use of IP

The general prohibition does not apply to those restrictions imposed on the transferee (licensee) that do not exceed the limits of the legitimate rights of the owner of the IP (for the list of permitted restrictions, see question 14).

The safe harbour exemptions are provided by the General Exemption Regulation (see question 8).

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Generally, anti-competitive concerted actions that set prices or other conditions with respect to the purchase or sale of products are prohibited. Yet this prohibition does not apply to concerted practices restraining supply and use of products that limit the buyer's ability to form prices or establish other contractual terms and conditions with respect to resale of supplied products, unless they:

- result in substantial restriction of competition;
- result in economically unjustified price increases or product shortages; or
- hinder market access for other businesses.

Ukrainian competition law lacks the proper definition of substantial restriction of competition and a great degree of discretion in this respect

is vested with the AMC. However, the market share-based exemption (see question 8) may apply.

The establishment of maximum and recommended resale prices is generally not viewed as resulting in substantial restriction of competition. As regards resale price-fixing and setting minimum resale prices, the Draft Verticals Regulation published in 2012 (see question 18) provided for their prohibition. Although the Draft Verticals Regulation was subsequently withdrawn by the AMC (and is no longer available on the AMC's website), to our knowledge the AMC continues to follow these approaches. As for recent AMC enforcement activity in this respect, it is difficult to comment since there is no public registry of AMC decisions.

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'?

There is no public record of AMC practice on the issue and such arrangements are likely to be analysed under the general rules and exemptions applicable to the establishment of resale prices (see question 19).

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

There is no public record of such analysis, but it is likely that in order to assess the degree of impact on the market and possible foreclosure effects, the AMC may consider other restrictive provisions in combination with resale price maintenance restrictions.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

There are no publicly available AMC decisions or guidelines containing such analysis. The AMC makes an assessment of any efficiencies that may be brought about by a restrictive provision (including resale price maintenance restrictions) in the course of the review of the parties' application for individual exemption under the Authorisation Regulation (for the list of acceptable efficiencies, see question 15). The burden of proof lies on the parties who should argue that the restriction will contribute to certain economic benefits to the public. It is also likely that the AMC will analyse efficiencies employed by the parties during the investigation of an alleged violation of Ukrainian competition law.

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.

There are no publicly available AMC decisions in this respect, but, given that the AMC considers alignment with competitors' prices anti-competitive, it may be assumed that setting retail prices for supplier A's products by reference to supplier B's retail price may be also seen by the AMC as anti-competitive and preventing price competition between suppliers at the retail level.

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 may be assumed that where sufficient competition at the retail level exists, MFNs may benefit end-customers and may be regarded by the AMC as pro-competitive. If, however, MFN clauses are applied to buyers that have strong market positions at the retail level the AMC may find 'wholesale MFNs' as facilitating coordination of competitive behaviour and softening of competition between the retailers, eg, via unjustified price growth. Reportedly, there has been at least one decision of AMC's local office in one Ukrainian city (although this decision is not publicly available), where very similar practices were found to be anti-competitive, but this does not appear indicative of the AMC's position, given that the AMC comes across similar provisions in contracts quite often and has not expressed concerns (at least where no dominant players were involved).

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.

The supplier is free to set prices for its products within an agent–principal arrangement, but competition concerns may arise if the supplier enjoys some degree of market power at the supply level and the agent acts as an independent undertaking at the resale level. Since there is no public record of an AMC decision in this respect it is difficult to give more details on the prospective assessment of 'retail MFNs' by the AMC.

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.

There is no relevant guidance or precedent enforcement practice by the AMC on the minimum advertised price policy (MAPP)/internet minimum advertised price (IMAP) issue (it should be noted, however, that there is no public registry of the authority's decisions). There is an appreciable risk that such restrictions will be treated by the AMC as an indirect resale price maintenance obligation. Thus, it is advisable to get either a positive opinion letter from the authority or individual antitrust clearance before implementing such MAPP or IMAP.

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.

The AMC's assessment is usually similar to that outlined in question 24.

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?

Generally, market sharing on the territoriality principle is considered an anti-competitive concerted practice and, as such, is prohibited. However, the market share-based exemption (see question 8) may apply. According to the former Draft Verticals Regulation, if the combined market share of the parties did not exceed 30 per cent, the following could have been implemented:

- the restriction of active sales to a customer group within the exclusivity system, where such a restriction does not limit sales by the relevant customers; and
- prohibiting a member of a selective distribution system from operating out of an unauthorised place of establishment.

After withdrawal of the Draft Verticals Regulation the AMC has not issued any other official guidelines on assessment of restrictions on 'active' and 'passive' sales. In the absence of explicit provisions in this respect, overall the AMC tends to follow the approaches expressed in the withdrawn draft as well as in EU enforcement practice, except for the 20 per cent combined market share test, which is explicitly provided under the General Exemption Regulation (see question 8).

29 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?

Generally, division of customers or consumers by the territoriality principle or any other type of customer classification is considered an anti-competitive concerted practice and as such, is prohibited. However, 20 per cent market share-based exemption (see question 8) may apply. According to the withdrawn Draft Verticals Regulation (see question 18) the following was to be permissible if the combined market share of the entities concerned did not exceed 30 per cent:

- the restriction of active sales to a customer group within the exclusivity system, where such a restriction does not limit sales by the relevant customers;
- the restriction of sales to end-consumers by a buyer operating at the wholesale level of trade;
- the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and

- the restriction of the buyer's ability to sell components, supplied for the purposes of assembling of goods, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

Since the Draft Verticals Regulation was withdrawn, currently the above restrictions are subject to the 20 per cent combined market share test under the General Exemption Regulation (see question 8).

30 How is restricting the uses to which a buyer puts the contract products assessed?

Restrictions on the use to which a buyer may put the contract products may be caught by the prohibition on putting into agreements additional obligations that are not related to the subject matter of the agreement. However, such restrictions may be allowed under block exemptions:

- unconditionally in agreements concerning the transfer of IPRs or on granting the right to use the IP; and
- in agreements concerning product supply and use, provided such restriction will not:
- result in substantial restriction of competition on the market or its significant part;
- result in monopolisation of the market;
- limit other undertakings access to the market; or
- result in economically unjustified price increases or product shortages (see questions 14 and 18).

Also, the market share-based exemption (see question 8) may apply.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The antitrust aspect of internet advertising and sales is not specifically regulated by Ukrainian competition law. There is also no public record of AMC decisions in relation to restrictions on using the internet for advertising or selling, or antitrust-based litigation resulting in court judgments regarding restrictions on internet sales.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

Ukrainian competition laws and regulations do not address the issues of the differential treatment of different types of internet sales channels. As regards the AMC's practice, there is no publicly available AMC decision analysing such discrimination.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Ukrainian competition law does not specifically address selective distribution systems and there are no clear guidelines in this respect. In 2012 the authority published the Draft Verticals Regulation, which addressed, inter alia, the following restrictions that are used in selective distribution:

- the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and
- prohibiting a member of a selective distribution system from operating out of an unauthorised place of establishment.

At the time of writing the Draft Verticals Regulation had not been adopted and the work on this draft has been suspended. To our knowledge, no other official regulations or guidelines with respect to 'selective' distribution systems have been issued by the AMC.

A specific exception is established in the Technology Transfer Law, which prohibits imposition of an obligation on the transferee to sell the products incorporating the transferred technology to the buyers preselected by the transferor.

34 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?

There is no clear legal guidance on the issue. However, it is likely that selective distribution systems relating to certain types of product requiring specific presentation and protection of brand reputation (eg, luxury products, cars) or treatment and personnel (eg, pharmaceuticals) will be justified.

35 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

There is no legal guidance on the issue.

36 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?

There is no public record of such decisions.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The AMC may consider the market structure as one of the relevant factors for market analysis. Possible cumulative restrictive effects of multiple selective distribution systems may also be taken into account. The Draft Verticals Regulation provides that vertical restraints may have cumulative restrictive effects if selective distribution systems cover more than 50 per cent of the market. Although the draft was not adopted, such approach may still be relevant for the AMC's assessment of selective distribution systems.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

There is no public record of such decisions and there is no official guidance on the issue (it should also be noted that there is no public registry of the authority's decisions).

The Draft Verticals Regulation prohibited the combination of selective distribution with restrictions on the territory, except for permissible restriction from selling to unauthorised distributors or unauthorised points of sale located in the territory of the selective distribution system. Although the draft was withdrawn, it may be assumed that the AMC will still stick to these approaches.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Restriction on the buyer's ability to obtain the supplier's products from alternative sources may come within several categories of prohibited practices (eg, as dividing markets or sources of supply, ousting of other suppliers from the market or limitation of their access to the market, or substantial limitation of competitiveness of the buyer without objectively justifiable reasons), but the market share-based exemption (see question 8) may apply.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restriction on the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' may come within several categories of prohibited practices (eg, as dividing markets according to type of goods, entering into agreements on the condition that the buyer will assume additional obligations that are not related to the subject matter of the agreement, or substantial limitation of competitiveness of the buyer without objectively justifiable reasons).

However, such restriction may be allowed under the 'products supply and use' block exemption, provided such restriction will not result in:

- substantial restriction of competition on the market or a significant part thereof;
- monopolisation of the market;
- limiting other undertakings' access to the market; or
- economically unjustified price increases or product shortages (see question 18).

Also, the market share-based exemption (see question 8) may apply.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Restriction on the buyer's ability to stock products competing with those supplied by the supplier may amount to a non-compete obligation and come within several categories of prohibited practices (eg, ousting of other suppliers from the market or limitation of their access to the market, entering into agreements on the condition that the buyer will assume additional obligations that are not related to the subject matter of the agreement, or substantial limitation of competitiveness of the buyer or such other suppliers without objectively justifiable reasons).

However, such restriction may be allowed under the 'products supply and use' block exemption, provided such restriction will not result in any of the restrictions listed in question 40 above.

Also, the market share-based exemption (see question 8) may apply.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

A requirement that the buyer purchase a certain amount, a minimum percentage of the contract products or a full range of the supplier's products may be termed a non-compete obligation and come within several categories of prohibited practices. As such, it will be assessed similarly to restrictions discussed in question 41.

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

Restricting the supplier's ability to supply to other buyers may be acceptable under the product supply and use exemption (see question 18). However, there are no official guidelines of the AMC or any publicly available enforcement practice in this respect. Under the withdrawn Draft Verticals Regulation (see question 18) such restriction could have been implemented if the combined market share of the parties had not exceeded 30 per cent. Since the draft was not adopted, currently only the 20 per cent combined market share test under the General Exemption Regulation may serve as an appropriate benchmark for assessment of the attendant competition concerns. Importantly, there is no presumption of restriction of competition if the above-mentioned 20 per cent threshold is reached or exceeded. However, such restriction of the supplier is likely to be deemed anti-competitive by the AMC if any of the parties enjoys some degree of market power in any of the markets concerned.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Restricting the supplier's ability to sell directly to end-consumers is not prohibited as such and, for example, can make up part of an exclusive distribution system, which allows a supplier to keep the wholesale and retail level of trade separate. However, the AMC is likely to consider such restriction anti-competitive if any of the parties enjoys some degree of market power in any of the markets concerned.

45 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?

No. Generally speaking, there are no guidelines or public record of the AMC decisions, which would set out the general principles for the antitrust assessment of vertical restraints by the AMC.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

The Competition Law provides for the possibility of individual exemptions: agreements containing vertical restraints that are not covered by a block exemption or the market share-based exemption or otherwise permitted may not be executed, unless individually exempt in accordance with the procedure prescribed by the Authorisation Regulation. A more reasonable interpretation of this prohibition allows execution of an agreement prior to clearance, provided the parties refrain from its implementation until it is authorised by the AMC.

The notified agreement may be exempt if the parties prove its economic efficiencies, such as:

- rationalisation of production, purchase or sales processes;
- promotion of technical, technological or economic development;
- development of small or medium-sized enterprises;
- optimisation of export or import processes;
- development and application of uniform technical terms and product standards; and
- rationalisation of production processes.

However, the AMC authorisation may not be granted if the agreement results in substantial restriction of competition on the market or a significant part thereof.

The parties seeking individual exemption must submit an application for clearance to the AMC. Upon review of the application, which may last for three-and-a-half months (and can be further extended), the AMC takes a reasoned decision to authorise the notified agreement. If the notified agreement raises any competition concerns, the AMC initiates an in-depth investigation (Phase II review). The statutory Phase II review period is limited to three months from the date when all the information requested by the AMC was provided. However, in practice the AMC investigation may take much longer since the AMC may request additional information, in which case a new three-month period would begin from the date on which the requested information was filed with the AMC. In practice, depending on the complexity of the case, the Phase II review period may last up to one year or even more. Within the second phase the AMC may hold hearings of the applicants and interested parties. Following an in-depth investigation, the AMC may authorise, conditionally authorise or prohibit implementation of the notified agreement. The authorisation decision may be issued for an indefinite or definite term (which normally should not exceed five years). Pursuant to the Law on Access to Public Information enacted in 2011, the AMC now has to disclose its decisions (except for the parties' confidential information). No full version of an AMC decision has, however, yet been published. So far, this provision has been implemented by the AMC by publishing short announcements regarding its decisions (including certain information regarding the parties, type and contents of the notified concerted practice) and major investigations.

Exceptionally, prohibited agreement may be exempted by a decision of the Cabinet based on the above efficiencies analysis, unless the restrictions contained therein are not indispensable to the attainment of the above efficiencies or the resulting restriction of competition constitutes a threat to the market economy system.

Authority guidance

47 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?

It is possible to obtain guidance from the AMC. The following procedures are available:

- conclusions in the form of non-binding recommendations on whether the intended actions fall under the general prohibition or may be eligible for an individual exemption (or both); or
- preliminary conclusions of the AMC based on the detailed information regarding the intended action on whether such action may be authorised or prohibited or whether such action requires authorisation of the AMC (or both).

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties may file complaints to the AMC bodies about the alleged violation of the relevant competition laws. The complainants may either be parties to the relevant restrictive agreement or third parties. The filing and investigation procedure is governed by the Rules for Investigation of Antitrust Violations of 1994.

If not rejected on formal grounds, the complaint shall be reviewed by the AMC within 30 calendar days (extendable further by 60 calendar days if additional information is required). Review of the complaint is

finalised by issuance of the resolution to initiate or reject initiation of the investigation of the case. The time of investigation on the substance is not limited.

Enforcement

49 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?

No separate statistics are publicly available with regard to vertical restraints. Based on available general AMC statistics, the vertical restraints proportion is likely to be significantly below 15 per cent.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The Competition Law does not declare agreements containing prohibited vertical restraints void per se. Respective provisions of an agreement and even the entire agreement may be rendered null and void by a court if requested by interested parties based on the AMC's decision establishing the violation of Ukrainian competition law. It is worth noting, however, that recent case law argues that agreements among shareholders aimed at the restriction or elimination of economic competition in the Ukrainian product markets are void. It is not clear whether the courts will extend this approach to cases regarding vertical restraints.

51 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 AMC is entitled to impose fines for violation of Ukrainian competition law, including implementation of prohibited concerted practices, as well as to impose other obligations on the parties (eg, imposing conditions on the authorisation of the restrictive agreement or obliging the parties to terminate the violation). If the fine is not paid voluntarily, the AMC decision may be enforced in court.

No separate AMC statistics regarding fines for implementation of prohibited vertical restraints are available. Theoretically, the maximum possible fine may amount to up to 10 per cent of the group worldwide turnover of the infringing undertaking in the financial year preceding the year in which the fine is imposed.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The AMC has broad investigative powers, including the power to:

- conduct on-site inspections of business premises and transport facilities;
- request expert opinions;
- retain or seize documents, items or information media that may contain evidence;
- engage police, customs and other enforcement authorities; and
- request information or documents from the parties or other undertakings (or both), irrespective of their location.

Failure to provide information at the AMC's request or provision of incorrect or incomplete information, as well as prevention of the AMC's inspections and other evidence-collection activities, is punishable by a fine of up to 1 per cent of the group worldwide turnover of the infringing undertaking in the financial year preceding the year in which the fine is imposed.

Private enforcement

53 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?

An infringing party may be exposed to damages claims by aggrieved third parties (eg, competitors) and theoretically a party to a prohibited agreement is not precluded from recovering damages from the other parties to the agreement.

Persons that sustained damage as a result of an unauthorised or prohibited transaction may seek damages in court. Damages are awarded at twice the amount of the loss. Claims for damages are subject to a general three-year limitation period.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

Asters
attorneys at law

Igor Svechkar **igor.svechkar@asterslaw.com**
Oleksandr Voznyuk **oleksandr.voznyuk@asterslaw.com**

Leonardo Business Centre
19–21 Bohdana Khmelnytskoho Street
01030 Kiev
Ukraine

Tel: +380 44 230 6000
Fax: +380 44 230 6001
www.asterslaw.com

United Kingdom

Stephen Kinsella OBE, Patrick Harrison and Rosanna Connolly
Sidley Austin LLP

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The key legal source on the regulation of vertical restraints in the United Kingdom is the Competition Act 1998 (CA). The relevant elements of the CA follow the structure of article 101 of the Treaty on the Functioning of the European Union (TFEU) (see European Union chapter). Section 2(1) of the CA prohibits agreements between undertakings that may affect trade within the United Kingdom and have as their object or effect, the prevention, restriction or distortion of competition within the United Kingdom (the Chapter I prohibition). Section 2(4) of the CA renders agreements falling within the Chapter I prohibition void. Section 9(1) of the CA in essence provides that the Chapter I prohibition will not apply where the economic benefits of an agreement outweigh its anti-competitive effects. In 2004, the UK's Office of Fair Trading (OFT) adopted guidance on the application of the CA to vertical restraints (UK Vertical Guidelines). Although the competition functions of the OFT and its fellow regulator, the Competition Commission (CC), were transferred to a new agency, the Competition and Markets Authority (CMA), effective 1 April 2014, the CMA still applies the 2004 UK Vertical Guidelines. The CMA may also conduct 'market studies' under section 5 of the Enterprise Act 2002 (Enterprise Act) and may decide to conduct more detailed 'market investigations' where it considers that vertical restraints are prevalent in a market and have the effect of restricting competition. (Where appropriate, references in this chapter to the CMA should be understood as references to the CMA, the OFT and the CC.)

The EU-level rules on vertical restraints (see European Union chapter) are also relevant in the following ways:

- Regulation No. 1/2003 provides that the CMA, the various sectoral regulators (see question 4) and the UK courts must apply article 101 TFEU when the Chapter I prohibition is applied to agreements that may also affect trade between EU member states.
- Section 60 of the CA imposes on the CMA, the various sectoral regulators and the UK courts, an obligation to determine questions arising under the CA 'in relation to competition within the [UK ...] in a manner which is consistent with the treatment of corresponding questions arising in [EU] law in relation to competition within the [EU]'. The effect of section 60 is that, in applying the Chapter I prohibition, the CMA and the UK courts will typically follow the case law of the EU courts on article 101 TFEU. Pursuant to section 60(3), the CMA and the UK courts must also 'have regard to' relevant decisions or statements of the European Commission.
- Section 10(2) of the CA provides for a system of 'parallel exemption' whereby an agreement that would fall within the 'safe harbour' created by an EU block exemption regulation (see European Union chapter) will also be exempt from the Chapter I prohibition.
- When applying section 9(1) of the CA, the UK Vertical Guidelines state that the CMA will also 'have regard to' the European Commission's De Minimis Notice and Vertical Guidelines (EU Vertical Guidelines) (see the European Union chapter).

Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA (the Chapter II prohibition) and potentially article 102 TFEU (which both regulate the conduct of dominant companies), will also be relevant to the antitrust assessment of a given agreement. However, the conduct of dominant companies is considered in *Getting the Deal Through – Dominance* and is therefore not covered here.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The UK Vertical Guidelines cite the definition of vertical agreements given in the European Commission's 1999 Vertical Block Exemption (Regulation 2790/1999). The 1999 definition has been slightly revised in the European Commission's 2010 Vertical Block Exemption and it is to the revised definition that the 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 purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.*

Vertical restraints are restrictions on the competitive behaviour of a party that occur in the context of such vertical agreements. Examples of vertical restraints include exclusive distribution, selective distribution, territorial protection, export restrictions, customer restrictions, resale price-fixing, exclusive purchase obligations and non-compete obligations.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

In large part, the objectives pursued by the law on vertical restraints are economic in nature.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

Effective 1 April 2014, the Competition and Markets Authority (CMA) became the main body responsible for enforcing the Competition Act (CA).

There are also certain sectoral regulators that have concurrent jurisdiction with the CMA in relation to their own particular industry: the Office of Communications (Ofcom); the Gas and Electricity Markets Authority (Ofgem); the Northern Ireland Authority for Energy Regulation (Ofreg NI); the Water Services Regulation Authority (Ofwat); the Office of Rail Regulation (ORR); and the Civil Aviation Authority (CAA). From 1 April 2013, the Financial Conduct Authority (FCA) has had certain powers (albeit short of concurrent jurisdiction) in relation to the financial services sector in the UK. The FCA will gain full concurrent competition powers from 1 April 2015, and the new Payment Services Regulator (PSR) will also have concurrent competition powers in relation to payment systems from 1 April 2015. In general, references in this chapter to the CMA should be taken to include the sectoral regulators in relation to their respective industries. The role of ministers is minimal in the ordinary course, but the

Secretary of State for Business, Innovation and Skills does retain a residual power to intervene where there are exceptional and compelling reasons of public policy. (Equivalent powers are exercised by the Secretary of State for Culture, Media and Sport in relation to the media, broadcasting, digital and telecoms sectors.) By way of example, the secretary of state has made an order excluding the Chapter I prohibition from applying to certain agreements in the defence industry (see Competition Act 1998 (Public Policy Exclusion) Order 2006, SI 2006/605).

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Pursuant to section 2(1) of the CA, the Chapter I prohibition applies where an agreement may have an 'effect on trade' within the United Kingdom. Section 2(3) of the CA adds that the Chapter I prohibition will only apply where the agreement 'is, or is intended to be, implemented in the United Kingdom'. However, it is not clear to what extent, if any, section 2(3) would serve to limit the number of agreements covered by the section 2(1) CA effect on trade test. The CMA's guidance does not explicitly address the interaction of sections 2(1) and 2(3) of the CA but it appears clear that some link to the United Kingdom would be needed. The 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 (see question 8).

Where an agreement also has an effect on trade between EU member states, the CMA and UK courts must apply article 101 TFEU concurrently. In general, the CMA is unlikely to take enforcement action in respect of a vertical restraint unless at least one of the parties has a degree of market power or the restraint forms part of a network of similar restraints having an anti-competitive effect.

The CMA's recent infringement decision against Roma Medical Aids Limited (Roma) and certain of its retailers (*Mobility Scooters I*) gives an example of the application of the jurisdictional test in an online context. The case related to prohibitions of online sales and online price advertising for Roma's mobility scooters. The jurisdictional test was deemed satisfied in this case because the products were sold throughout the UK. The evidence presented to the CMA also indicated that there were no material cross-border retail sales of mobility scooters, meaning that the CMA considered that it had no grounds for action under article 101 TFEU.

The CMA's recent *Hotel Online Booking* investigation provides a further example of jurisdiction being asserted in an online setting. The CMA closed its investigation after receiving commitments from the parties that addressed the CMA's competition concerns. Although the CMA did not reach a conclusion on jurisdiction in the case, the commitments decision indicates that the relevant agreements affected prices offered to consumers located in the UK and beyond.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Chapter I prohibition applies to 'undertakings'. The term 'undertaking' can cover any kind of entity, regardless of its legal status or the way in which it is financed, provided such entity is engaged in an 'economic activity' when carrying out the activity in question. Thus, public entities may qualify as undertakings when carrying out certain of their more commercial functions, but will not be classed as undertakings – and so will be exempt from the Chapter I prohibition – when fulfilling their public tasks.

The CMA's December 2011 guide on the application of the CA to public bodies clarifies that public bodies are subject to the CA when they are engaged in a supply of goods or services where that supply is of a 'commercial' nature, which, according to the CMA, is likely to be the case where the supply is in competition with private sector providers.

As regards the purchasing practices of public bodies, the judgment of the UK's Competition Appeal Tribunal (CAT) in *Bettercare II* conflicts with subsequent judgments by the EU courts in *Fenin v Commission*. In *Fenin*, the EU courts focused on the use to which the purchased products are put, while the CAT in the *Bettercare II* judgment considered that the key issue was not the ultimate use of the products but whether the purchaser was in a position to generate the effects on competition that the competition rules seek to prevent. The CMA's guide on the application of the CA to public bodies explains that 'in determining whether a public body is acting as an undertaking in relation to such purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought'. This is an indication that the CMA will follow the approach of the Court of Justice of the European Union (CJEU) in *Fenin* in future cases (ie, it is likely to find that a public body purchasing products to use as part of its social function would not be an 'undertaking' for the purposes of the CA).

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Yes. Under section 10(1) of the CA, an agreement affecting trade between EU member states but exempt from the article 101(1) TFEU prohibition by virtue of an EU regulation must be considered by any UK court and by the 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 fall within the European Commission's Motor Vehicle Block Exemption (see European Union chapter) will be exempt from the Chapter I prohibition (see, for example, the CMA press release of 24 January 2006, in relation to a complaint made against the motor manufacturer TVR Engineering Ltd).

With effect from 1 February 2012, the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998, which applied to suppliers of specified domestic electrical goods (making it unlawful for such suppliers to recommend or suggest retail prices for specified goods, and unlawful for a supplier to make an agreement that restricted a buyer's ability to determine the prices at which he advertised or sold), was lifted.

Other industry-specific block exemption regulations exist but none are targeted specifically at vertical restraints.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The Chapter I prohibition will only apply to a vertical restraint that has an 'appreciable' effect on competition within the United Kingdom. Paragraph 2.18 of the 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 (see European Union Chapter), which provides that, in the absence of certain hard-core restrictions such as price-fixing or clauses granting absolute territorial protection, and in the absence of parallel networks of similar agreements, the Commission will not consider that vertical agreements have an 'appreciable' effect on competition provided market shares of the parties' corporate groups do not exceed 15 per cent for the products in question.

There are also a number of Competition Act (Public Policy Exemption) Orders (including those enacted in 2006, 2007, 2008 and 2012) exempting from the Chapter I prohibition certain agreements in the defence sector and certain agreements regarding the distribution of fuel in the event of a fuel supply disruption.

In addition, while not constituting a full exemption from the application of the Chapter I prohibition, parties to 'small agreements' will be exempt from administrative fines under section 39 of the CA (for example, no fines were imposed in the recent *Mobility Scooters I* and *Mobility Scooters II* cases – see questions 26 and 31). Note, however, that price-fixing agreements are excluded from the scope of the 'small agreements' exemption under section 39(1)(b) of the CA.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The EU courts have clarified that, in order for a restriction to be reviewed under article 101 TFEU, there must be a 'concurrence of wills' among the two parties to conclude the relevant restriction (*Bayer v Commission*). The

UK's Court of Appeal expressly adopted the EU courts' 'concurrence of wills' language in *Argos Ltd* and *Littlewoods Ltd v OFT* and *JJB Sports plc v OFT*.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

It is not necessary for there to be a formal written agreement. Rather, a 'concurrence of wills' (see question 9) will suffice. The EU Vertical Guidelines provide guidance (to which the CMA will have regard) on when, in the absence of an explicit agreement expressing a 'concurrence of wills', explicit or tacit acquiescence of one party in the other's unilateral policy may amount to an 'agreement' between undertakings for the purpose of article 101 (see European Union chapter).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Paragraph 2.6 of the CMA's Guidelines on Agreements and Concerted Practices states that the Chapter I prohibition will not apply:

> *to agreements where there is only one undertaking: that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.*

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In general, the Chapter I prohibition will not apply to any agreement between a 'principal' and its 'genuine agent' insofar as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, the concept of 'genuine agency' is narrowly defined (see also question 13). In addition, the EU Vertical Guidelines (to which the 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 (or, in the United Kingdom, the Chapter I prohibition) may apply if the arrangement leads to exclusion of the principal's competitors from the market for the products in question. Further, the EU Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1) (or, in the United Kingdom, the Chapter I prohibition). Collusion could be facilitated where 'a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.'

It should also be noted that where agency agreements are concluded, agents in the United Kingdom may benefit from significant protection under the Commercial Agents (Council Directive) Regulations 1993.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

For the purposes of applying the Chapter I prohibition, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal. The exact degree of risk that an agent can take without the Chapter I prohibition being deemed applicable to its relationship with a principal will largely be a question of fact. However, the EU Vertical Guidelines (to which the 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 and the Chapter I prohibition.

In a 2002 case involving a complaint alleging resale price maintenance by Vodafone Ltd in relation to pre-pay mobile phone vouchers, the Director General of Telecommunications found that the agreements in question were not genuine agency agreements because, inter alia, the risk of loss or damage was borne by the buyers.

What constitutes genuine agency is a particularly difficult question in the online environment. In January 2011, the CMA's predecessor, the OFT, opened an investigation under the CA into agency agreements for the sale of e-books. The OFT closed its investigation in December 2011 as the European Commission had initiated formal proceedings of its own in relation to alleged anti-competitive practices in the sale of e-books (see the European Union chapter and the discussion of the e-books case therein).

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Paragraphs 3.12 to 3.16 of the UK Vertical Guidelines reflect the provisions of the Vertical Block Exemption, providing that agreements which have as their 'centre of gravity' the licensing of IPRs will fall outside the Vertical Block Exemption. The relevant considerations go beyond the scope of this publication and include the application of the European Commission's Technology Transfer Block Exemption. The Vertical Block Exemption and the Commission's Vertical Guidelines will apply to agreements granting IPRs only where such grants are not the 'primary object' of the agreement, and provided that the IPRs relate to the use, sale or resale of the contract products by the buyer or its customers.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The Chapter I prohibition may apply to vertical restraints (as defined in question 2) provided they are not:

- certain agreements covered by a Competition Act (Public Policy Exemption) Order (see question 8);
- concluded by public entities carrying out non-economic activities (see question 6);
- genuine agency arrangements (in most cases – see questions 12 and 13); or
- concluded among related companies (see question 11).

If none of the above exceptions applies, then an agreement containing a vertical restraint may be reviewed under the Chapter I prohibition. The analytical framework in the United Kingdom is as follows.

First, does the vertical agreement contain a hard-core restraint? According to the UK Vertical Guidelines, hard-core vertical restraints are those listed in the Vertical Block Exemption, namely:

- the fixing of minimum resale prices;
- certain types of restriction on the customers to whom, or the territory into which, a buyer can sell the contract goods;
- restrictions on members of a selective distribution system supplying each other or end-users; and
- restrictions on component suppliers selling components as spare parts to the buyer's finished product.

The EU Vertical Guidelines also explain that certain restrictions on online selling can qualify as hard-core restraints (see, for an example in the United Kingdom, the discussion of the *Mobility Scooters I* case, at question 31, below).

Where an agreement contains a hard-core restraint it:

- will not benefit from the exemption created by the European Commission's De Minimis Notice (to which the OFT and the UK courts will have regard when considering vertical restraints);
- will not benefit from the safe harbour under the Vertical Block Exemption (which is legally binding on the OFT and the UK courts); and
- is highly unlikely to satisfy the conditions for exemption under section 9 of the CA.

Second, does the agreement have an 'appreciable' effect on competition within the United Kingdom? Where an agreement contains a hard-core restraint, it is likely that it will be deemed to have an appreciable effect on competition within the United Kingdom. Where an agreement does not contain a hard-core restraint, however, the 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 (see question 8), 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 Vertical Block Exemption (see question 18) (or another applicable block exemption) which, by virtue of section 10 of the CA, creates a safe harbour from the Chapter I prohibition? If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a safe harbour. This safe harbour will be binding on the 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 Vertical Block Exemption (or any other applicable safe harbour), it is necessary to conduct an 'individual assessment' of the agreement in order to determine whether the conditions for an exemption under section 9 of the CA are satisfied.

The UK Vertical Guidelines set out a number factors that will be taken into account in assessing, first, whether a vertical agreement falls within the Chapter I prohibition and, second, whether an agreement satisfies the requirements for exemption under section 9. This latter question is determined by reference to the following factors:

- whether the agreement will lead to efficiencies through the improvement of production or distribution or promoting technical or economic progress;
- whether the efficiencies accruing as a result of the agreement accrue to consumers, rather than to the parties themselves;
- whether the restrictions being imposed are necessary to achieve the efficiency in question; and
- whether the restriction affords the parties the possibility of eliminating competition in respect of a substantial part of the products in question (ie, the same as article 101(3) TFEU (see the European Union chapter)).

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier market shares will be relevant to consideration of whether a restraint creates an appreciable restriction on competition and whether a restraint might fall within the safe harbours created by the De Minimis Notice or the Vertical Block Exemption. The UK Vertical Guidelines state that: 'vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements.'

The 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. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that supplier's competitors. If the vertical restraints imposed by the supplier and its competitors have the cumulative effect of foreclosing market access, any vertical restraints that contribute significantly to that foreclosure may be found to infringe the Chapter I prohibition or article 101. In the 2008 judgment in *Calor Gas Ltd v Express Fuels (Scotland) Ltd & Anor* in the Scottish Court of Sessions, the court rendered unenforceable vertical restraints agreed between Calor Gas and two of its buyers (whereby the buyers agreed to purchase and sell only Calor cylinder liquefied petroleum gas for five years and not to handle the cylinders after termination) in part because Calor Gas had a network of similar restraints that served to foreclose the distribution market.

Under the Enterprise Act, the 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, for example, 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). In addition, 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 (see question 25).

In 2012, the OFT decided to focus its Hotel Online Booking investigation on a small number of major companies, but in doing so noted that 'the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry.' In its decision accepting commitments in order to close the investigation, the OFT indicated that while it had 'not investigated the extent to which similar discounting restrictions are replicated in the market, the OFT understands that the alleged practices are potentially widespread in vertical distribution arrangements in the industry. In principle, a market in which discounting restrictions are prevalent is likely to be characterised by significant limits to price competition and barriers to entry.'

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

Arguably the most significant amendment to the assessment of vertical restraints arising out of the European Commission's 2010 review of its Vertical Block Exemption and the EU Vertical Guidelines was the introduction of a new requirement that, in order for an agreement to benefit from the safe harbour provided for under the Vertical Block Exemption, neither the supplier nor the buyer can have a market share in excess of 30 per cent.

The previous version of the Vertical Block Exemption stated that the buyer's market share was relevant only insofar as concerns arrangements pursuant to which a supplier appointed a sole buyer as distributor for the entire European Union. Such arrangements were relatively rare in practice, meaning that buyer market share was seldom determinative of the application of the Vertical Block Exemption. Now, however, buyer market share must be assessed each time the application of the Vertical Block Exemption is under consideration. One consequence of the imposition of the additional requirement regarding buyer market share is that a significant number of agreements that had previously benefited from safe harbour protection under the old Vertical Block Exemption will now need to be assessed outside the context of the Vertical Block Exemption and under the more general provisions of the EU and UK Vertical Guidelines. This may be particularly relevant in the United Kingdom where markets are often reasonably concentrated at the buyer (or retail) level.

As noted in question 16 in relation to supplier market shares, the 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. In addition, the assessment of a given vertical restraint can vary depending on the vertical restraints concluded by that buyer's competitors. If the vertical restraints imposed by the buyer and its competitors have the cumulative effect of excluding others from the market, then any vertical restraints that contribute significantly to that exclusion may be found to infringe article 101.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Under the system of parallel exemption created by section 10 of the CA, agreements that would fall within the safe harbour created by the Vertical Block Exemption (see European Union chapter) if they had an effect on trade between EU member states will also be exempt from the Chapter I prohibition. Where an agreement satisfies the conditions of the Vertical Block Exemption, the safe harbour means that neither the CMA nor the UK courts can determine that the agreement infringes article 101, or the Chapter I prohibition, unless a prior decision (having only prospective effect) is taken by the CMA or the European Commission to 'withdraw' the benefit of the Vertical Block Exemption from the agreement (see European Union chapter).

The explanatory recitals to the new version of the Vertical Block Exemption (adopted in 2010) also clarify that, provided the relevant market share thresholds are not exceeded, vertical agreements can (in the absence of hard-core restrictions) be presumed to lead to an improvement in production or distribution and to allow consumers a fair share of the resulting benefits.

The adjustment of the Vertical Block Exemption's safe harbour such that it applies only where neither buyer nor supplier market shares exceed 30 per cent may have significant consequences in the United Kingdom in light of the relatively high levels of concentration in the retail and distribution sectors.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

The CMA considers that the setting of fixed or minimum resale prices constitutes a hard-core restriction of competition. As such, it will almost always infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and is generally considered unlikely to qualify for exemption under section 9 of the CA. Indeed in the CMA's March 2014 update of its investigation procedures guidance, the CMA restates that, for the purposes of its leniency programme, price-fixing in relation to which leniency from fines can be sought includes resale price maintenance.

Communicating maximum or recommended resale prices from which the distributor is permitted to deviate without penalty tends to be permissible. However, the CMA is likely to view such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion.

The fixing of resale prices often led to enforcement action by the OFT. In November 2002, the OFT fined Hasbro £9 million (reduced to £4.95 million for leniency) for the imposition of minimum resale prices.

There have also been a number of OFT cases that have combined examination of vertical restraints with examination of allegations of horizontal collusion. In 2013, the OFT issued infringement decisions against Mercedes-Benz and five of its commercial vehicle dealers in relation to the distribution of Mercedes-Benz commercial vehicles. The OFT noted that the 'nature of the infringements vary but all contain at least some element of market sharing, price coordination or the exchange of commercially sensitive information'. Other examples include the 2003 *Replica Football Kits* case, where the OFT identified an element of horizontal collusion among buyers, and the 2011 *Dairy Products* decision, where the OFT considered that the supermarkets had engaged in indirect exchanges of strategic information via dairy producers (see question 21).

More recently, the OFT decided to close its Hotel Online Booking investigation without reaching a final decision because it had received commitments from the parties that addressed the OFT's concerns. Nonetheless, the OFT's provisional view was that the agreements under which each online travel agent (OTA) agreed to offer hotel accommodation at the Intercontinental Park Lane Hotel (ILPL) at a 'day-to-day room rate set and/or communicated by ILPL and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission' were likely to limit competition on room rates between OTAs, and between OTAs and ILPL. The OFT agreed to close its investigation when the parties agreed to modify their behaviour according to principles that would allow OTAs and hotels to offer discounts to headline room rates that were funded by accepting reductions in their commission revenue or margin.

In June 2014, the CMA closed an investigation that had been started in 2012 by the OFT. In the course of such investigation, the OFT had alleged that a manufacturer of sports bras, together with three major department stores, had engaged in resale price maintenance. The CMA found there to be no grounds for further action.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

The OFT, considered a number of cases in which suppliers attempted to oblige retailers to inform them of any intended price discounts prior to the imposition of such discounts.

The OFT also considered issues specific to resale price maintenance at the launch of a new brand or product. When John Bruce (UK) Limited introduced into the UK market its MEI brand of automatic slack adjusters (safety devices fitted to the braking system of trucks, trailers and buses) to compete with the then market leader, Haldex, it asked distributors to keep retail prices for MEI slack adjusters around 20 to 25 per cent lower than those for Haldex (and stated that deviation from the agreed pricing policy was not allowed and that special deals needed to be controlled 'through marketing so John [Bruce] can be [kept] in the loop on the reasons for the request and whether he wants to agree to it'). John Bruce argued that its conduct could not breach competition law since it was developing competition where none existed. However, in its 2002 decision, the OFT found that John Bruce had infringed the Chapter I prohibition and a fine of 3 per cent of John Bruce's relevant turnover was imposed.

The EU Vertical Guidelines now contain reference to the possibility of resale price maintenance being permissible in certain circumstances, for example where such restrictions are of a limited duration and relate to the launch of a new product or a short-term low-price campaign. It seems possible, therefore, that the *John Bruce* case might be subject to a different assessment were it to be considered under the provisions of the 2010 EU Vertical Guidelines.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

A number of the higher profile resale price maintenance cases brought by the OFT, have involved additional elements.

In 2003, the OFT identified an element of horizontal collusion among buyers in the *Replica Football Kits* case. Also in 2003, the OFT adopted a decision concerning Lladró Comercial SA's agreements (see question 37), which not only obliged buyers to inform Lladró of any proposed discount prices but also imposed restrictions on buyer advertising.

In 2011, the OFT fined four supermarkets and five dairy processors a total of £49.51 million for co-coordinating increases in the retail prices of milk and cheese (as explained in the OFT's press release 'the coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors – A-B-C information exchanges'). Further, the agreements investigated in the context of the OFT's recent *Hotel Online Booking* case were found to contain retail rate most-favoured-nation (MFN) clauses (see question 24) in addition to agreements not to discount. The commitments accepted by the European Commission in the *e-books* case (which started with the OFT in the UK) also suggest a possible link between resale price restrictions and most-favoured-customer clauses (see the European Union chapter and question 13).

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Yes. In its 2014 decision to accept commitments in order to close its *Hotel Online Booking* investigation without reaching a final decision, the OFT, acknowledged that, in the specific factual context of that case, there were efficiencies in enabling hotels to have control over the headline rate for their hotel rooms, and so to restrict discounting by online travel agents.

However, the OFT gave such arguments less credence in its decision of 8 November 2004 in *UOP Limited/UKae Limited/Thermoseal Supplies Ltd/Double Quick Supplyline Ltd/Double Glazing Supplies Ltd*, a case involving an arrangement to fix the minimum resale price for desiccant (used in double-glazing). In that case, the parties raised arguments regarding the claimed efficiencies of resale price maintenance but the OFT stated that it was 'extremely hard, if not impossible' to see how the fixing of prices for UOP's desiccant would contribute to an improvement in the production of goods, or allow consumers a fair share of the resulting benefit, because consumers were deprived of discounts and obliged to pay higher prices.

In the 2002 *John Bruce* case (see question 20), the supplier argued that its price restriction was pro-competitive because it facilitated competition against the incumbent market leader; nevertheless, the OFT found that the agreements fell within the Chapter I prohibition. However, the starting amount of the fine was set at a comparatively low level because the OFT took into account the following special circumstances:

> *[that] John Bruce had successfully introduced a new product into a market which other suppliers of automatic slack adjusters had found difficult to penetrate, increasing inter-brand competition; that John Bruce was a small new entrant competing in a market where one supplier (Haldex) had a very large share; and that purchasers of automatic*

slack adjusters benefited because the prices of MEI slack adjusters were some 25 per cent below that of the leading product in the market.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

Any agreement amounting to resale price maintenance will almost always be deemed to infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will generally be considered unlikely to qualify for exemption under section 9 of the CA. In 2010, the OFT, fined ten retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets. The arrangements in question were alleged to involve setting the retail price for one supplier's brand of cigarettes by reference to the price for another supplier's competing brand of cigarettes. The CAT quashed the OFT's decision in relation to the five retailers and one manufacturer who had appealed the findings to the CAT after hearing evidence from multiple witnesses whose evidence did not support the OFT's findings of fact. The CAT did not reach a decision on whether the agreements or restraints as the OFT had understood them would have infringed the Chapter I prohibition.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

It is not clear whether a most-favoured-customer or an MFN restriction at the wholesale level – in isolation – will constitute a restriction infringing the Chapter I prohibition. In the event that such a restriction were deemed to infringe the Chapter I prohibition, it should nonetheless fall within the safe harbour created by the Vertical Block Exemption, provided the other criteria for its application are met.

The parties involved in the *Hotel Online Booking* investigation (see question 19) had agreed to MFN clauses. As 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.

Although the OFT had not taken any formal decisions in this area, recent cases indicate that a retail MFN clause such as that described could potentially constitute a restriction of competition falling within the Chapter I prohibition or article 101 prohibition.

In 2013, the OFT closed its investigation into Amazon's price parity policy (which restricted sellers from offering lower prices on other online sales channels (including their own websites)) following Amazon's decision to end this policy in the EU. The OFT was concerned that 'such policies may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers.'

The recent findings in the private motor insurance market investigation also included concerns relating to MFNs included in agreements between insurers and price comparison websites.

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 in relation to *Mobility Scooters II*, the OFT found that an arrangement by which supplier prevented a buyer from advertising its products for sale below a certain minimum price constituted a 'by object' restriction of competition for purposes of the Chapter I prohibition. The OFT arrived at this conclusion notwithstanding the fact that the buyers in question remained free to discount away from the minimum prices.

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 (see question 24), 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 such arrangements may increase prices and may increase the risk of price coordination.

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 OFT, had tended to see such restraints as hard-core restraints that would almost always infringe the Chapter I prohibition, would fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and would seldom qualify for exemption under section 9 of the CA.

There is one important exception to this. Where a supplier sets up a network of exclusive distributorships and prevents each buyer from selling actively into a territory granted exclusively to another buyer (or reserved to the supplier itself), it is generally accepted that this may lead to an increase in inter-brand competition. Such arrangements will fall within the safe harbour provided the other conditions of the Vertical Block Exemption are met (including supplier and buyer market share below 30 per cent), provided the restrictions relate only to active sales (ie, they do not cover passive or unsolicited sales) and provided the restrictions cover only active sales into territories granted on an exclusive basis to another buyer (or to the supplier itself).

Where restrictions on active sales into territories reserved exclusively to another buyer (or the supplier itself) are imposed by suppliers having a market share in excess of 30 per cent, such arrangements may still qualify for individual exemption under section 9 of the CA.

In October 2008, the OFT published an opinion in the long-running *Newspaper and Magazine Distribution* case, which dealt with the assessment of territorial sales restrictions under section 9 of the CA. The 2008 opinion outlines that while preventing passive sales by wholesalers of newspapers and magazines is likely to restrict competition on the retail level (because retailers are not able to switch wholesalers), a ban on passive sales may, at least in relation to newspapers, make more efficient the competition between wholesalers competing for the right to supply in a particular geographic market. The OFT considered that this would enable newspaper publishers to reduce their costs and would be likely to lead to reduced prices to end-consumers. Another factor considered by the OFT 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 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions (see question 28) and will tend to be viewed by the CMA as hard-core restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always infringe the Chapter I prohibition, will fall outside the safe harbours of the De Minimis Notice and the Vertical Block Exemption, and will seldom qualify for exemption under section 9 of the CA. However, there are certain key exceptions to this rule.

First, where the restriction applies only to active sales to customers of a class granted exclusively to another buyer (or reserved to the supplier itself), the arrangement may fall within the safe harbour created by the Vertical Block Exemption, provided the applicable conditions are met (including supplier and buyer market share below 30 per cent).

Second, restrictions on a buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of products as those produced by the supplier may also fall within the safe harbour created by the Vertical Block Exemption.

Third, restrictions on a wholesaler selling direct to end-users may also fall within the safe harbour created by the Vertical Block Exemption.

Fourth, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors.

30 How is restricting the uses to which a buyer puts the contract products assessed?

Objectively justifiable restrictions on the uses to which a buyer or subsequent buyer puts the contract goods are permissible and will not fall within the Chapter I prohibition (eg, restrictions on the sale of medicines to children). However, for such restrictions to be objectively justifiable, the supplier would likely have to impose the same restriction on all buyers and adhere to such restrictions itself.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Broadly speaking, the UK rules follow the principles set out in the Commission's EU Vertical Guidelines (see European Union chapter). A number of recent OFT investigations have given an indication as to how the EU-level principles will be applied in the UK.

On 5 August 2013, the OFT issued an infringement decision 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 benefitted from immunity under the 'small agreement' exemption (see question 8).

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.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

To the best of our knowledge, there have not yet been any decisions that distinguished between different types of internet sales channel. The most relevant resource in this regard is likely to be the EU Vertical Guidelines (see European Union chapter) which contain a number of observations of relevance to different types of internet sales channel (such as third-party platforms).

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Following the judgment of the CJEU in *Metro v Commission*, and pursuant to the obligation imposed on the CMA and the UK courts under section 60 of the CA, selective distribution systems will fall outside the Chapter I prohibition where distributors are selected on objective criteria of a purely qualitative nature. In order to fall outside the Chapter I prohibition:

- the contract products must be of a kind necessitating selective distribution (eg, technically complex products where after-sales service is of paramount importance);
- the criteria by which buyers are selected must be objective, laid down uniformly for all potential buyers and not applied in a discriminatory manner (though there is no necessity that the selection criteria be published); and
- the restrictions imposed must not go beyond that which is necessary to protect the quality and image of the product in question (see the European Union chapter).

Where selective distribution systems do not satisfy the above criteria, they will fall within the Chapter I prohibition but may benefit from safe-harbour protection (irrespective of the nature of the goods or any quantitative limits) under the De Minimis Notice or the Vertical Block Exemption, provided they do not incorporate certain further restraints. In particular, such systems may benefit from exemption under the Vertical Block Exemption provided that:

- resale prices are not fixed;
- there are no restrictions on active or passive sales to end-users; and
- there are no restrictions on cross-supplies among members of the system.

Separately, the EU Vertical Guidelines suggest that members of a selective distribution system must not be dissuaded from generating sales via the internet, for example by the imposition of obligations in relation to online sales that are not equivalent to the obligations imposed in relation to sales from a bricks-and-mortar shop. In addition, where selective distribution systems incorporate obligations on members not to stock the products of an identified competitor of the supplier, this particular obligation itself may be unenforceable. However, this last restriction should not affect the possibility of the system overall benefiting from the safe harbour.

Certain restrictions frequently incorporated into selective distribution systems are expressly permitted, including the restriction of active or passive sales to non-members of the network within a territory reserved by the supplier to operate that selective distribution system (ie, where the system is currently operated or where the supplier does not yet sell the contract products).

Insofar as concerns publication of selection criteria and rights to challenge supplier decisions on acceptance into, or rejection from, selective distribution networks, the UK rules follow those applicable at the EU level (see the European Union chapter).

34 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

According to the CJEU's judgment in *Metro v Commission*, and pursuant to the obligation imposed on the CMA and the UK courts under section 60 of the CA, in purely qualitative selective distribution systems, restrictions may fall outside the Chapter I prohibition, inter alia, where the contract products necessitate after-sales service.

In addition, the EU Vertical Guidelines provide that the nature of the contract products may be relevant to the assessment of efficiencies under article 101(3), to be considered where selective distribution systems fall within the prohibition under article 101(1). In particular, the Commission notes that efficiency arguments under article 101(3) may be stronger in relation to new or complex products or products whose qualities are difficult to judge before consumption (in the case of 'experience' products) or after consumption (in the case of 'credence' products).

Additionally, the OFT, recognised in the *Newspaper and Magazine Distribution* case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the Competition Act 1998) the advantages of selective distribution in relation to newspapers, since newspapers can be sold only during a limited period (ie, the newspapers must be delivered and

sold on the day of production, with the majority of demand for newspapers expiring by midday).

35 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The EU Vertical Guidelines state that: '[w]ithin a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet'. However, this section should be read in light of an earlier section of the EU Vertical Guidelines, which states that: 'the supplier may require quality standards for the use of the internet site to resell his goods'. (See the European Union chapter for information on the nature of the restrictions that might be permissible in this regard.)

Given the CJEU's decision in *Pierre-Fabre Dermo-Cosmétique*, in October 2011, it seems that restrictions amounting to an outright ban on internet sales to end users by approved buyers will fall within article 101 TFEU, will not benefit from the safe harbour of the Vertical Block Exemption but may be eligible for an individual exemption under article 101(3).

As regards UK enforcement, in its investigation of Yamaha's selective distribution system, the OFT, was concerned that Yamaha should take steps to remove any discrimination against Yamaha's distance sellers in its discount scheme (see question 31). However, the issue has not yet been considered in great detail in the United Kingdom. Likewise, in its recent decisions in relation to *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.

36 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

In a 2003 decision concerning the selective distribution agreements of Lladró Comercial SA (see question 37), the OFT, noted, in relation to Lladró's reservation of the right to repurchase goods that a retailer has proposed to sell below the recommended price level, that: '[w]hether or not Lladró Comercial has thus far exercised that ongoing contractual right is immaterial to the [...] finding of an infringement.'

In *Football Replica Kits*, the OFT did not object to Umbro's selective distribution system in itself, even though it included refusing or failing to supply the United Kingdom's major supermarkets. However, it did take the view that this facilitated the price-fixing arrangements, which were prohibited and in relation to which fines were imposed (see question 19).

37 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.*

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The following are identified in the EU Vertical Guidelines (to which the CMA and the UK courts will have regard) as hard-core restrictions of competition (ie, restrictions that will fall within article 101(1) or the Chapter I prohibition, will not benefit from the safe harbour provided by the Vertical Block Exemption and are unlikely to benefit from an individual exemption):

- restricting approved buyers at the retail level of trade from selling actively or passively to end users in other territories;
- restricting cross supplies between approved buyers in different territories in which a selective distribution system is operated; and
- restricting the territory into which approved buyers at levels other than the retail level in a selective distribution system may passively sell the contract products.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as 'exclusive purchasing', will only infringe the Chapter I prohibition where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier and the buyer each has a market share of 30 per cent or less, the restriction will benefit from the safe harbour created by the Vertical Block Exemption, regardless of duration.

According to the EU Vertical Guidelines, to which the CMA has regard, 'exclusive purchasing' is most likely to contribute to an infringement of the Chapter I prohibition where it is combined with other practices, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 29), an exclusive purchasing obligation would have the effect of preventing the members of the system from cross-supplying to each other and would therefore constitute a hard-core restriction.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Neither the CMA, nor its 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) in relation to the sale of fine fragrance products in supermarkets and low-cost retailers, the MMC suggested amendments to the manner in which the products were distributed, but recognised that suppliers should be able to control the distribution of their products 'in order to protect [...] brand images which consumers evidently value'.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete obligation) may infringe the Chapter I prohibition. The assessment of such a clause will depend on its exact effects, which will be determined by reference, inter alia, to the duration of the restraint, the market position of the parties and the ease (or difficulty) of market entry for other potential suppliers.

Providing that non-compete clauses do not have a duration exceeding five years, they may benefit from the safe harbour under the Vertical Block Exemption (if the other criteria for its application are met). If the criteria for the application of the Vertical Block Exemption are not met, non-compete clauses may nevertheless fall outside the scope of the Chapter I prohibition or, alternatively, may satisfy the conditions for exemption under section 9 of the CA, depending on the market positions of the parties, the extent and duration of the clause, barriers to entry and the level of countervailing buyer power.

The OFT, has considered long-term exclusivity provisions in a number of recent cases, including its 2011 Outdoor Advertising market study and related investigation into street furniture contracts concluded by advertising agencies Clear Channel UK and JCDecaux. The OFT closed its Clear Channel UK and JCDecaux investigation in May 2012 when the parties agreed voluntarily not to enforce certain exclusivity clauses, first-refusal clauses and tacit-renewal clauses in their long-term contracts with local authorities.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

The CMA considers such clauses to be akin to non-compete clauses, effectively restricting the ability of the buyer to stock products competing with the contract products (see question 41). They are, therefore, subject to a similar antitrust assessment. In particular, the UK Vertical Guidelines identify as equivalent to a non-compete obligation, a requirement to purchase minimum volumes amounting to substantially all of the buyer's requirements ('quantity forcing').

43 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. Such systems should therefore be assessed in accordance with the framework set out in questions 23 and 24.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

As noted in question 44, the EU Vertical Guidelines, to which the 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 Vertical Block Exemption and will seldom qualify for exemption under section 9 of the CA.

45 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, provide guidance on 'exclusive supply,' which covers the situation in which a supplier agrees to supply only to one buyer for the purposes of resale or a particular use. The main anti-competitive effect of such arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. As such, the buyer's market share is the most important element in the assessment of such restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are below 30 per cent, and the exclusive supply agreements are shorter than five years, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

In line with the modernisation reforms effected by the European Union in May 2004, the United Kingdom abolished the notification system that previously existed under the CA. Subject to the making of requests for guidance in novel cases (see question 47), a notification of a vertical restraint is therefore not possible. Note, however, that it is possible to apply to the CMA for immunity from fines in relation to resale price maintenance practices (see questions 19 and 51).

Authority guidance

47 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

In general, the 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) and where the CMA considers there is an interest in issuing clarification for the benefit of a wider audience. However, the OFT, only issued one such opinion. In limited circumstances, the CMA will also consider giving non-binding informal guidance on an ad-hoc basis.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Yes. The 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.

Enforcement

49 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

In the years from 2005 to 2014, the CMA/OFT published details of decisions (or other, lesser, enforcement actions) in an average of around two vertical restraint cases per year. The CMA considers on a case-by-case basis whether an agreement falls within its administrative priorities so as to merit investigation.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Under section 2(4) of the CA, any agreement that falls within the Chapter I prohibition and does not satisfy the conditions for exemption under section 9(1) of the CA (or does not benefit from a parallel exemption by virtue of section 10) will be void and unenforceable. However, where it is possible to sever the offending provisions of the contract from the rest of its terms, the latter will remain valid and enforceable. As a matter of English contract law, severance of offending provisions is possible unless, after the necessary excisions have been made, the contract 'would be so changed in its character as not to be the sort of contract that the parties entered into at all' (*Chemidus Wavin Ltd v Société pour la Transformation*). Such assessment will depend on the exact terms and nature of the agreement in question.

51 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. 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 pursuant to a court order, its management may be found to be in contempt of court, the penalties for which in the United Kingdom include imprisonment.

Where the CMA has taken a decision finding an infringement of the Chapter I prohibition or article 101, it may impose fines of up to 10 per cent of the infringing undertaking's worldwide revenues for the preceding year. In practice, however, the number of vertical restraints cases in which the CMA (or the OFT) has imposed fines is still relatively low. The leading case in which the OFT imposed fines for vertical restraints involved the imposition of minimum resale prices by Hasbro UK on 10 of its distributors. Hasbro was fined £9 million, reduced to £4.95 million for leniency. Many of the other cases involving vertical restraints in which fines have been imposed have included both horizontal and vertical elements. Examples include: the OFT's December 2003 decision to impose a penalty of £17.28 million on Argos (reduced to £15 million on appeal), £5.37 million on Littlewoods (reduced to £4.5 million on appeal), and £15.59 million on Hasbro (reduced by the OFT to nil for leniency) for resale price maintenance and price-fixing agreements for Hasbro toys and games; and the OFT's 2010 decision imposing fines totalling £225 million in relation to its finding that 10 retailers and two tobacco manufacturers had either linked the retail price of one brand of cigarettes to the retail price of a competing brand or had indirectly exchanged information in relation to proposed

future retail prices (note, however, that the UK Competition Appeals Tribunal quashed this decision in relation to the five retailers and one manufacturer who appealed).

The 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, in relation to compensatory measures, the OFT agreed in its 2006 decision in *Independent Schools* a settlement that included the infringing schools paying a nominal fine of £10,000 each, reduced in the case of six of the schools by up to 50 per cent for leniency, and contributing £3 million to an educational trust for the benefit of those pupils who had attended the schools during the period of infringement.

Investigative powers of the authority

52 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. In outline, where the CMA has reasonable grounds for suspecting an infringement of either the Chapter I prohibition or article 101, it may by written notice require any person to provide specific documents or information of more general relevance to the investigation. The CMA may also conduct surprise on-site investigations, requiring the production of any relevant documents and oral explanations of such documents.

In relation to vertical agreements not involving allegations of resale price-fixing, the CMA is more likely to investigate a case by means of 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.

In previous cases, the OFT has obtained information from entities domiciled outside the United Kingdom (eg, *Lladró Comercial SA*).

Update and trends

The two main case-related developments in 2014 were the decisions taken by the CMA's predecessor, the OFT: to close without action the case regarding alleged resale price maintenance in relation to sports bras; and to find, in the *Mobility Scooters II* case, that restrictions on advertised prices constituted 'by object' restrictions of the Chapter I prohibition.

Private enforcement

53 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private actions for damages for breaches of the Chapter I prohibition or article 101 may be brought in the UK High Court or in the UK's specialist competition court, the Competition Appeals 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* in relation to which, on reference, the CJEU confirmed that a party to an agreement infringing article 101 must be able to bring an action for damages if, as a result of its weak bargaining position, it cannot be said to be responsible for the infringement (see European Union chapter). In addition, non-parties to agreements can challenge their validity directly before the courts (see, for example, *Football Association Premier League Ltd & Others v LCD Publishing Limited*). Though relatively few cases have proceeded to final awards of damages, many private damages actions brought in the United Kingdom have been settled out of court.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

SIDLEY AUSTIN LLP
SIDLEY

Stephen Kinsella OBE **skinsella@sidley.com**
Patrick Harrison **pharrison@sidley.com**
Rosanna Connolly **rconnolly@sidley.com**

Woolgate Exchange
25 Basinghall Street
London EC2V 5HA
United Kingdom

Tel: +44 20 7360 3600
Fax: +44 20 7626 7937
www.sidley.com

United States

Joel Mitnick
Sidley Austin LLP

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

A number of federal statutes bear directly on the legality of vertical restraints. Section 1 of the Sherman Act is the federal antitrust statute most often cited in vertical restraint cases. Section 1 prohibits 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade' (15 USC, section 1 (2006)). Section 1 serves as a basis for challenges to such vertical restraints as resale price maintenance, exclusive dealing, tying, and certain customer or territorial restraints on the resale of goods.

Unlike section 1, section 2 of the Sherman Act reaches single-firm conduct. Section 2 declares that 'every person who shall monopolise or attempt to monopolise [...] any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony' (15 USC, section 2 (2006)). In the distribution context, section 2 may apply where a firm has market power significant enough to raise prices or limit market output unilaterally.

Section 3 of the Clayton Act makes it unlawful to sell goods on the condition that the purchaser refrain from buying a competitor's goods if the effect may be to substantially lessen competition (15 USC, section 14 (2006)).

Finally, section 5(a)(1) of the Federal Trade Commission Act (FTC Act) has application to vertical restraints. This declares unlawful unfair methods of competition (15 USC, section 45(a)(1) (2006)). Section 5(a)(1) violations are solely within the jurisdiction of the FTC. As a general matter, the FTC has interpreted the FTC Act consistently with the sections of the Sherman and Clayton Acts applicable to vertical restraints. In December 2009, however, the FTC filed a complaint against Intel Corp in which the FTC asserted a stand-alone claim that certain vertical restraints constituted unfair methods of competition under section 5 (in addition to conventional monopolisation claims) (see complaint, *In re Intel Corp*, FTC Dkt No. 9341 (16 December 2009), available at www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf). In doing so, the FTC appeared to assert enforcement authority under section 5 that it viewed as entirely independent of the limits on the Sherman and Clayton Acts. Although no court has yet addressed whether such independent enforcement authority exists (the FTC reached an out-of-court settlement of its claims against Intel in August 2010), the FTC's action against Intel suggests that it may seek to expand its powers under section 5 in the future.

Numerous states have also enacted state antitrust laws that prohibit similar conduct as the federal antitrust laws do. Nevertheless, unless otherwise specified below, these responses focus solely on federal antitrust law.

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 varying forms of vertical restraints are not expressly defined by statute. Rather, these concepts have evolved through judicial decision-making, which is commonly referred to as the 'common law' of antitrust. Numerous types of vertical restraints have been the subject of review under the applicable antitrust laws, the most common of which are the following:

- resale price maintenance – agreements between persons at different levels of the distribution structure on the price at which a customer will resell the goods or services supplied. Resale price maintenance can take the form of setting a specific price; but commonly it involves either setting a price floor below which (minimum resale price maintenance) or a price ceiling above which (maximum resale price maintenance) sales cannot occur;
- customer and territorial restraints – these involve a supplier or upstream manufacturer of a product prohibiting a distributor from selling outside an assigned territory or particular category of customers;
- channel of distribution restraints – these function similarly to customer or territorial restraints in that an upstream manufacturer or supplier of a product prohibits a distributor from selling outside an approved channel of distribution. Commonly, such restraints involve a luxury goods manufacturer prohibiting its distributors from selling over the internet;
- exclusive dealing arrangements – these require a buyer to purchase products or services for a period of time exclusively from one supplier. The arrangement may take the form of an agreement forbidding the buyer from purchasing from the supplier's competitors or of a requirements contract committing the buyer to purchase all, or a substantial portion, of its total requirement of specific goods or services only from that supplier. These arrangements may to some extent foreclose competitors of the supplier from marketing their products to that buyer for the period of time specified in the agreement;
- exclusive distributorship arrangements – these typically provide a distributor with the right to be the sole outlet for a manufacturer's products or services in a given geographical area. Pursuant to such an agreement, the manufacturer may not establish its own distribution outlet in the area or sell to other distributors;
- tying arrangements – an agreement by a party to sell one product (the tying product), but only on the condition that the buyer also purchases a different (or tied) product. Tying can involve services as well as products. Such tying arrangements may force the purchaser to buy a product it does not want or to restrict the purchaser's freedom to buy products from sources other than the seller; and
- hub-and-spoke conspiracies – an agreement between two or more parties at the same level of the distribution structure to enter into a series of agreements with the same counterparty at another level of the distribution structure.

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?

Yes, in modern federal antitrust enforcement and jurisprudence, the sole goal of antitrust is to maximise consumer welfare.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore

have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

Finally, state attorneys general can enforce federal antitrust laws based upon their parens patriae authority and state antitrust laws based upon their respective state statutes. Parens patriae authority allows the state to prosecute a lawsuit on behalf of citizens or natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act (see question 54).

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?

The long-standing rule in the United States is that conduct that has a substantial effect in the United States may be subject to US antitrust law regardless of where the conduct occurred (*United States v Aluminum Company of America*, 148 F2d 416, 443-44 (2d Cir 1945)). The Foreign Trade Antitrust Improvements Act of 1982 limits the subject-matter jurisdiction of the antitrust laws, however, by providing that the Sherman Act shall not apply to commerce or trade with foreign nations except where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce (15 USC, section 6a (2006)). Analogous jurisdictional principles also apply to the extraterritorial application of both the Clayton and FTC Acts.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

In the United States, the federal government is not subject to the Sherman Act (see *United States Postal Service v Flamingo Industries (USA) Ltd*, 540 US 736 (2004)). Litigation against federal entities thus often turns on whether the relevant entity is a 'person' separate from the United States itself. The United States Postal Service, for example, is immune from suit under the Sherman Act because it is designated, by statute, as an 'independent establishment of the executive branch of the Government of the United States' (ibid at 746). By contrast, the Tennessee Valley Authority, which was established by Congress as an independent federal corporation, is not immune from antitrust liability, despite the fact that it maintains certain public characteristics (see *McCarthy v Middle Tennessee Electric Membership Corp*, 466 F3d 399, 413–14 (6th Cir 2006)).

As to claims against state entities, under the 'state action' doctrine, the US Supreme Court has allowed defendants to show that the operation of a state regulatory scheme precludes the imposition of antitrust liability, thereby shielding the anti-competitive conduct in question. In the landmark case of *Parker v Brown*, 317 US 341 (1943), the Supreme Court upheld, as an 'act of government which the Sherman Act did not undertake to prohibit', a Californian programme that regulated the marketing of raisins. The *Parker* doctrine has been interpreted as requiring two standards for the application of antitrust immunity (see *California Retail Liquor Dealers Ass'n v Midcal Aluminum Inc*, 445 US 97 (1980)). First, the challenged restraint must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. And second, the policy must be actively supervised by the state itself. Departures from competition immunised by the state action doctrine can be independently authorised by state legislatures or the state's highest court. The availability of state action immunity to other lesser instrumentalities of the state varies depending upon how clearly articulated the state policy is under which the challenged activity is undertaken – namely, whether the challenged activity was a foreseeable result of a specific grant of authority.

Finally, foreign sovereigns may be shielded from US antitrust laws under the Foreign Sovereign Immunities Act (the FSIA). Under the FSIA, a foreign sovereign or any of its agents or instrumentalities is immune from suit in the United States unless, among other things, the suit involves the sovereign's commercial activities that occurred within, or directly affected, the United States (see *Republic of Argentina v Weltover Inc*, 504 US 607 (1992)).

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.

There are no particular rules or sections of the applicable federal antitrust laws that focus on a specific sector of industry. Nevertheless, in regulated industries, such as agriculture, communications, energy, and health care, there may be industry-specific laws enforced by the relevant regulatory agency that regulate vertical restraints or vest the agency with power to do so.

Additionally, certain regulations may influence a court's view on whether and how a particular vertical restraint affects competition. (See, for example, *Asphalt Paving Sys Inc v Asphalt Maintenance Solutions*, 2013 WL 1292200, at 5 (ED Pa 28 March 28 2013) dismissing exclusive dealing claims brought under the Clayton Act where municipal regulation, not contracts at issue, prevented competitors' use of equivalent alternative products.)

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

There are no such general exceptions.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Under US antitrust law, an 'agreement' entails 'a conscious commitment to a common scheme designed to achieve an unlawful objective' (*Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 768 (1984)).

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?

The long-standing rule is that 'no formal agreement is necessary to constitute an unlawful conspiracy' (*American Tobacco Co v United States*, 328 US 781, 809 (1946)). Further, there is no requirement that the agreement be written. In *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984), the plaintiff alleged the existence of an unwritten agreement among a manufacturer of agricultural herbicides and various distributors to, among other things, fix resale prices of the manufacturer's herbicides. The US Supreme Court held that, in order to prove a vertical price-fixing conspiracy in such circumstances, the plaintiff was required to present 'evidence that tends to exclude the possibility that the manufacturer and [...] distributors were acting independently' (ibid at 764).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

A violation of section 1 of the Sherman Act requires a showing of concerted action on the part of the defendants. In *Copperweld Corp v Independence Tube Corp*, 467 US 752, 777 (1984), the US Supreme Court held that, as a matter of law, a corporation and its wholly owned subsidiaries 'are incapable of conspiring with each other for purposes of section 1 of the Sherman Act'. The *Copperweld* exception has been applied by lower courts to numerous other situations including:

- two wholly-owned subsidiaries of a parent corporation (sister corporations);
- two corporations with common ownership;
- a parent and its partially-owned subsidiary;
- a wholly-owned subsidiary and a partially-owned subsidiary of the same parent corporation; and
- companies that have agreed to merge.

At least one court has extended the *Copperweld* exception to claims under section 3 of the Clayton Act where the purchaser and the seller are

affiliated. Courts generally hold the *Copperweld* exception to be inapplicable to partial holdings approaching or below 50 per cent. The *Copperweld* exception, however, is inapplicable to section 2 of the Sherman Act, which contains no requirement of concerted action on the part of the defendant.

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?

Consignment and agency arrangements between a manufacturer and its dealer do not constitute a vertical pricing restraint subject to Sherman Act liability as long as they are bona fide. Where a manufacturer does not transfer title to its products but rather consigns them, the manufacturer is free to unilaterally dictate the sale prices for those products. Moreover, in light of the US Supreme Court's recent decision eliminating the distinction between price and non-price restraints for the purposes of Sherman Act liability, see *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007), a 'sham' consignment or agency arrangement will be subject to analysis under the rule of reason (see question 15). Recent press reports in the United States indicate that there are active governmental investigations into the bona fides of certain agency agreements.

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?

A court assessing the validity of an agency agreement is likely to begin by determining whether the parties intended to establish an agency arrangement and whether, under their agreement, title to goods sold transfers directly from the principal to the end-consumer, bypassing the agent. Beyond these fundamental requirements, US courts examining the bona fides of an agency agreement look to three general factors:

- whether the principal or the purported agent bears 'most or all of the traditional burdens of ownership';
- whether the agency arrangement 'has a function other than to circumvent the rule against price-fixing'; and
- whether the agency arrangement 'is a product of coercion'. (*Valuepest.com of Charlotte Inc v Bayer Corp*, 561 F3d 282, 290–91 (4th Cir 2009)).

For example, in the landmark case of *United States v General Electric*, 272 US 476, 479 (1926), the government asserted that General Electric's (GE) use of a consignment system to fix the retail price of its patented incandescent lamps 'was merely a device to enable [GE] to fix the resale prices of lamps in the hands of purchasers', and that 'the so-called agents were in fact wholesale and retail merchants'. The US Supreme Court rejected the government's position, determining instead that GE's distributors were bona fide agents because GE:

- set retail prices for the lamps and dealers received fixed commissions;
- retained title to the lamps in the possession of dealers until the lamps were sold to end-consumers;
- assumed the risk of loss resulting from disaster or price decline; and
- paid taxes on the lamps and carried insurance on the dealers' inventory (ibid at 481–83).

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Restraints involving intellectual property are analysed under the same principles of antitrust that are applied in other contexts. The DoJ and FTC have jointly issued Antitrust Guidelines for the Licensing of Intellectual Property (www.usdoj.gov/atr/public/guidelines/0558.htm), which lays out three general principles that guide the agencies' antitrust analysis in the context of intellectual property. First, the FTC and DoJ regard intellectual property as essentially comparable to any other form of property. Second, the agencies do not presume that IPRs, particularly in the form of patents, create market power: *Illinois Tool Works Inc v Independent Ink*, 548 US 28, 42–43 (2006) (holding that there should be no presumption that a patent confers market power on the patentee). And finally, the FTC and DoJ recognise that, often, intellectual property licensing allows firms to combine complementary factors of production and, as such, is generally pro-competitive.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In recent years, most vertical restraints have been analysed under the rule of reason. Rule-of-reason analysis begins with an examination of the nature of the relevant agreement and whether it has caused or is likely to cause anti-competitive harm. The reviewing authority, whether it be a court, the FTC, or the DoJ, conducts a detailed market analysis to determine whether the agreement has or is likely to create or increase market power or facilitate its exercise. As part of the analysis, a variety of market circumstances are evaluated, including ease of entry. If the detailed investigation into the agreement and its effect on the market indicates anti-competitive harm, the next step is to examine whether the relevant agreement is reasonably necessary to achieve pro-competitive benefits that are likely to offset those anti-competitive harms. The process of weighing an agreement's reasonableness and pro-competitive benefits against harm to competition is the essence of the rule of reason. Where the pro-competitive benefits outweigh the harms to competition, the agreement is likely to be deemed lawful under the rule of reason. Where there is evidence that the arrangement has actually had anti-competitive effects, the rule-of-reason analysis may sometimes be shortened via a 'quick look' analysis.

Minimum resale price maintenance was long treated as per se illegal under federal antitrust law, rather than as subject to the rule of reason. In the recent case of *Leegin*, however, the US Supreme Court struck down the per se rule against minimum resale price maintenance agreements, ruling instead that such restraints will be subject to rule-of-reason analysis. The court explained that agreements should fall into the 'per se illegal' category only if they always or almost always harm competition; for example, horizontal price-fixing among competitors. Minimum resale price maintenance, on the other hand, can often have pro-competitive benefits that outweigh its anti-competitive harm. The court explained that resale price maintenance agreements are not per se legal, and suggested that such agreements might violate federal antitrust laws where either a manufacturer or a retailer that is party to such an agreement possesses market power (see question 16).

Likewise, tying arrangements, which are a type of vertical non-price restraint, are treated in a somewhat different manner by the courts. Although courts have been recently inclined to consider the business justifications for tie-ins and have analysed the economic effects of the tying arrangement, hallmarks of a rule-of-reason analysis, a tying arrangement may be treated as per se illegal (ie, irrefutably presumed to be illegal without the need to prove anti-competitive effects) if the following elements are satisfied:

- two separate products or services are involved;
- the sale or agreement to sell one product or service is conditioned on the purchase of another;
- the seller has sufficient market power in the tying product market to enable it to restrain trade in the tied product market; and
- a substantial amount of interstate commerce in the tied product is affected (*Service & Training, Inc v Data General Corp*, 963 F2d 680, 683 (4th Cir 1992). See also *First Data Merch Servs Corp v SecurityMetrics Inc*, 2013 WL 6234598, at 10-11 (D Md 13 November 2013) (denying a motion to dismiss tying claims, citing *Service & Training*).

In *Oracle America Inc. v Terix Computer Company* (2014 WL 5847532, at 2 (N.D. Cal. 7 November 2014), the district court specifically held that tying claims are subject to a rule-of-reason analysis. This ruling discusses activity subject to the rule of reason, '[a]n example of this latter category of activity can be the so-called tying arrangement, whereby a competitor with market power "agrees to sell one product (the tying product) but only on the condition that the buyer also purchase a different product (the tied product), or at least agrees that he will not purchase the tied product from any other supplier".')(citations omitted). Also, in *Schuykill Health System v Cardinal Health 200 LLC* (2014 WL 3746817, at 5, n8 (E.D. Pa. 30 July 2014), the court permitted a tying claim to proceed under a rule-of-reason theory, denying a motion to dismiss the tying claim. According to the court:

> *If the defendant's lack of market power in the tying product [revents a plaintiff from establishing per se illegality of a tying arrangement,*

the defendant's conduct may still be unlawful under a rule of reason analysis.... [Plaintiff] can still advance its claim under a rule of reason standard by demonstrating an actual adverse effect on competition... and an injury cognizable by the antitrust laws')(citations omitted).

To the extent that these conditions are not met and a tying arrangement is not found to be per se unlawful, it may still be unlawful under a fully fledged rule-of-reason analysis.

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?

Detailed market analysis, including consideration of market shares, market structures and other economic factors, often is central to the wide-ranging analysis of vertical restraints under the rule of reason (see questions 9 and 15). Indeed, under the rule of reason, a reviewing agency or court generally will attempt to define a relevant market, one with both product and geographic dimensions, and then analyse whether the entity imposing an individual restraint exercises market power within the defined market. The Supreme Court has defined 'market power' as 'the ability to raise prices above those that would be charged in a competitive market' (*NCAA v Board of Regents*, 468 US 85, 109 n38 (1984)). An entity's market share is an important, and sometimes decisive, element in the analysis of market power – an analysis that, by its very nature, requires consideration of the market positions of competitors. For instance, following the US Supreme Court's decision in *Leegin*, which remanded the case to the lower court for further proceedings, the plaintiff argued that, under the rule of reason, Leegin's conduct caused anti-competitive harm in the market for 'women's accessories', among others (*PSKS Inc v Leegin Creative Leather Prods Inc*, 615 F3d 412, 418–19 (5th Cir 2010)). The US Court of Appeals for the Fifth Circuit rejected the plaintiff's claim, however, explaining that '[t]o allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power', and that 'it is impossible to imagine that Leegin could have power' over such a broad and vaguely defined market (ibid).

Interestingly, in one recent case, a court held that the combined market power of two suppliers who each had exclusive supply contracts with the same buyer was adequate to support alleged harm to competition in the market for the suppliers' products (not per se, but under the rule of reason) – but only against the buyer, not either of the suppliers (*Orchard Supply Hardware LLC v Home Depot USA Inc*, 2013 WL 5289011, at 6-7 (ND Cal 19 September 2013), citing *Gorlick Dist Ctrs LLC v Car Sound Exhaust Sys Inc*, 723 F3d 1019 (9th Cir 2013)).

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?

While the significant majority of cases involve monopoly power of entities acting as sellers, a limited number of cases involve allegations of buyers' market power over prices or access, which is referred to as 'monopsony power'. See, for example, *In re Beef Industry Antitrust Litig*, 600 F2d 1148, 1154–60 (5th Cir 1979) affirming dismissal of a price-fixing claim by cattle ranchers, who alleged that the wholesale price of beef paid by large retail chains to middlemen (ie, meatpackers) is established by the retail chains acting in concert.

A recent case to address this issue is *Cascades Computer Innovation LLC v RPX Corp*, allowing a patent troll's claims of a hub-and-spoke conspiracy and monopsonisation among Android device makers and a defensive patent aggregator, or 'anti-troll'. The device makers allegedly agreed not to license the patent troll's patents and refused to deal with the patent troll independently, and only would do so through the anti-troll (*Cascades Computer Innovation LLC v RPX Corp*, 2013 WL 6247594, at 14 (ND Cal 3 December 2013 ('[Plaintiff] alleges a monopsony in the market to buy [its] patents, not a monopoly in the market to sell them')). Importantly, the relevant market alleged was patents owned by the patent troll.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

There are no such block exemptions or safe harbour provisions relevant to the analysis of vertical restraints.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Resale price maintenance agreements, whether setting minimum or maximum prices, are evaluated under a rule-of-reason analysis under federal law (*Leegin Creative Leather Products*).

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'?

Research has not uncovered any recent decision addressing resale price maintenance in these circumstances. Under federal antitrust law, however, the rule of reason is used to evaluate resale price maintenance no matter the context (*Leegin Creative Leather Products*).

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Research has not uncovered any significant post-*Leegin* decisions involving the interrelation of resale price maintenance and other forms of restraint. In *Leegin*, however, the court identified several instances where resale price maintenance may warrant heightened scrutiny in an effort to ferret out potentially anti-competitive practices. For example, the court suggested that resale price maintenance should be subject to increased scrutiny if a number of competing manufacturers in a single market adopt price restraints, because such circumstances may give rise to illegal manufacturer or retailer cartels. Likewise, the court explained that if a resale price maintenance agreement originated among retailers and was subsequently adopted by a manufacturer, there is an increased likelihood that the restraint would foster a retailer cartel or support a dominant, inefficient retailer.

On the other hand, see *P&M Distribs, Inc v Prairie Farms Dairy Inc*, 2013 WL 5509191, at 7 (CD Ill 4 October 2013), citing *Leegin* (also discussed below in response to question 22), denying a motion to dismiss alleging conspiracy to raise prices by instituting a minimum bid price for institutional milk contracts, which defendants argued was permissible resale price maintenance under *Leegin*.

Although the conduct at issue was not resale price maintenance, the decision in the e-books litigation addressed similar conduct – a vertical agreement pursuant to which the manufacturer, not the retailer, controlled the retail selling price – in the context of alleged horizontal collusion among e-book publishers to adopt a particular model of e-book distribution. In that decision, the court dismissed the distinctions between the conduct alleged and a traditional hub-and spoke conspiracy and held that the evidence at trial established per se liablility for Apple's role in facilitating a conspiracy among the publishers (*United States v Apple Inc*, 952 F Supp 2d 638, 699 (SDNY 2013)):

While vertical restraints are subject to review under the rule of reason, Apple directly participated in a horizontal price-fixing conspiracy. As a result, the conduct is per se unlawful. The agreement between Apple and the Publisher Defendants is, 'at root, a horizontal price restraint' subject to per se analysis. As such, it is not properly viewed as either a vertical price restraint or solely through the lens of traditional 'hub and spoke' conspiracies.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In *Leegin*, the Supreme Court described several potentially pro-competitive benefits of resale price maintenance, including, among other things, increasing inter-brand competition and facilitating market entry for

new products and brands. Research has not uncovered any decisions to date directly assessing such efficiencies in fact-specific contexts (*Leegin* Creative Leather Products Inc v PSKS Inc, 551 US 877, 890–92 (2007)). See also P*&M Distribs, Inc v Prairie Farms Dairy Inc*, 2013 WL 5509191, at 3 (CD Ill 4 October 2013), citing *Leegin*.

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.

Although research has not uncovered any recent decisions in this area, it is likely that such a case would be analysed under the rule of reason because '[r]esort to per se rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output"' (*Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877, 886-87 (2007), citing *Business Elecs Corp v Sharp Elecs Corp*, 485 US 717, 723 (1988)). It is likely that pricing relativity agreements would not be held to warrant per se treatment under this standard.

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.

Research has not uncovered any recent decisions concerning wholesale MFNs apart from the e-books decision (see question 21). In 2010, however, the US Department of Justice and the State of Michigan filed a lawsuit against the health insurer Blue Cross Blue Shield of Michigan (BCBSM), alleging that the wholesale MFNs contained In BCBSM's contracts with health-care providers barred market entry, raised prices, and discouraged discounting. This is the most significant recent challenge to the validity of wholesale MFNs, but the case was dismissed without a decision on the merits in March 2013 because a Michigan law was enacted that outlawed MFN provisions in contracts between insurers and hospitals in Michigan, thus mooting the litigation by prohibiting BCBSM from continuing to include the challenged MFNs in its contracts. Like the pricing relativity agreements discussed in question 23, it is likely that wholesale MFNs would not be held to warrant per se treatment under the *Leegin* standard.

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.

Genuine agency relationships are presumed to be lawful under the antitrust laws. It is likely, however, that a case involving retail MFNs, even if contained within a presumptively lawful agency agreement, would be analysed under the rule of reason in a manner similar to the analysis of wholesale MFNs, addressed in question 24. (See the e-books case, discussed in question 21, applying per se treatment to the inclusion of a retail MFN in a series of agency agreements.)

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.

The FTC has taken the general position that the rule of reason applies to any 'minimum advertised price' (MAP) policy, whereby a manufacturer restricts a reseller's ability to advertise resale prices below specified levels and conditions its provision of cooperative advertising funds on the reseller's compliance with the advertising restrictions (see Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs – Rescission, 6 Trade Reg Rep (CCH) paragraph 39,057, at 41728 (FTC 21 May 1987)). The FTC indicated that such MAP policies should permit a reseller the freedom to decline participation in the cooperative advertising programme and to advertise and charge its own prices.

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.

Although research has not uncovered any recent decisions in this area, it is likely that such a case would be analysed under the rule of reason in a manner similar to the analysis of wholesale MFNs addressed in question 24.

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?

Territorial restrictions prohibit a distributor from selling outside an assigned territory. These restrictions may stifle intra-brand competition, but also simultaneously stimulate inter-brand competition. In light of the complex market impact of these vertical restrictions, the US Supreme Court, in *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 (1977), concluded that territorial restraints should be reviewed under a rule-of-reason analysis. In order for a territorial restriction (and as referenced in question 29, a customer restriction) to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition. Courts have examined the purpose of the vertical restriction, the effect of such restriction in limiting competition in the relevant market, and, importantly, the market share of the supplier imposing the restraint in ascertaining the net impact on competition. So long as inter-brand competition is strong, courts typically find territorial restraints lawful under the rule of reason.

29 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 of this nature are subject to the same rule-of-reason analysis detailed in question 28, regarding territorial restrictions.

30 How is restricting the uses to which a buyer puts the contract products assessed?

A usage restriction will be analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 28.

31 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Research has not uncovered any recent decisions dealing with restrictions on internet selling. To some extent, the FTC's position on MAP policies appears to have had an impact on the manner in which resellers advertise prices on the internet. Consequently, restrictions of this nature are subject to the same rule-of-reason analysis detailed in question 26, regarding MAP policies.

32 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

Research has not uncovered any decisions or guidelines distinguishing between different types of internet sales channels.

33 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Agreements establishing selective distribution systems are analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 28.

34 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?

Although research has not uncovered any decisions on this subject, it is likely that selective distribution systems are more easily justified under the rule of reason where retailers are required to provide significant point-of-sale services.

35 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?

Restrictions on internet sales by approved distributors will be analysed under the rule of reason in a manner similar to other selective distribution systems. In order for a restriction on internet sales to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition.

36 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?

Research has not uncovered any recent decisions in this area.

37 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Pursuant to the rule-of-reason analysis under which selective distribution systems are analysed, the possible cumulative effect of overlapping selective distributive systems operating in the same market may be considered in assessing harm to competition.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

Research has not uncovered any recent agency decisions or guidance concerning distribution arrangements that combine selective distribution with territorial restrictions.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Research has not uncovered any recent decisions challenging an agreement restraining a buyer's ability to purchase the supplier's products from alternative sources. Such a challenge is likely to be analysed under the rule of reason.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restrictions on a buyer's ability to sell non-competing products that the supplier deems 'inappropriate' are assessed under the rule of reason.

41 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Exclusive dealing arrangements as described above may harm competition by foreclosing competitors of the supplier from marketing their products to that buyer. Exclusive dealing is subject to challenge under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and section 5 of the FTC Act. Because section 3 of the Clayton Act is limited to arrangements involving 'goods, wares, merchandise, machinery, supplies, or other commodities', when services or intangibles are involved, exclusive dealing can be challenged only under the Sherman Act or FTC Act. Exclusive dealing arrangements have not been considered to be per se unlawful and the courts and agencies have therefore analysed such conduct under the rule of reason. In conducting such analysis, the courts and agencies have considered a number of factors, the most important being, perhaps, the percentage of commerce foreclosed within a properly defined market, and the ultimate anti-competitive effects of such foreclosure. See *In re Pool Prods Dist Mkt Antitrust Litig*, 940 F Supp 367, 390–91 (ED La 2013) (citing *Leegin* and *Toys 'R' Us, Inc v FTC*, 221 F3d 928 (7th Cir, 2000) to hold that, under the rule of reason, plaintiffs adequately alleged anti-competitive harm as result of a distributor's exclusive agreements with three manufacturers). See also *Asphalt Paving* in question 7. See also *American Needle Inc v New Orleans Lousiana Saints* (2014 WL 1364022, at 1 (N.D. Ill. 7 April 2014)) where, because of demonstrated pro-competitive effects, the court declined to apply quick-look treatment, instead applying a full rule-of-reason analysis to exclusive dealing claims.

Recently, the DoJ filed a complaint against American Express, MasterCard and Visa, seeking to enjoin an alleged form of exclusive dealing arrangement under section 1 of the Sherman Act. The DoJ's complaint alleged that American Express, MasterCard and Visa each maintained rules prohibiting merchants from encouraging consumers to use lower-cost payment methods when making purchases; for example, by prohibiting merchants from offering discounts or other incentives to consumers in order to encourage them to pay with credit cards that cost the merchant less money. According to the complaint, in 2009, American Express had a 24 per cent share of the general-purpose credit card market, and American Express, MasterCard and Visa together had approximately 94 per cent market share. MasterCard and Visa reached an out-of-court settlement with the DoJ, whereby they were enjoined from enforcing certain rules of this type. American Express declined to settle the claims against it, and defended them at a trial that concluded in October 2014. No decision has yet been filed.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Requirements contracts are analysed under the same standards as exclusive dealing arrangements (see question 41).

43 Explain how restricting the supplier's ability to supply to other buyers is assessed.

Such a case would be analysed under the rule of reason in a manner similar to the analysis of exclusive dealing arrangements (see question 41) because, just as those arrangements may harm competition by foreclosing competitors of the supplier from marketing their products to a buyer, agreements restricting the supplier's ability to supply to other buyers may harm competition by foreclosing competitors of the buyer from seeking to acquire products from a supplier.

44 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Such a case would be analysed under the rule of reason in a manner similar to the analysis described in question 43.

45 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?

No, there are no guidelines or agency decisions addressing restrictions on suppliers that have not been discussed above.

Notifying agreements

46 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

No, there is no formal notification procedure.

Authority guidance

47 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?

Parties considering a course of action may request advice from the FTC concerning their proposed activity (see 16 CFR, section 1.1 to 1.4 (2009)). Parties may seek advisory opinions for any proposed activity that is not hypothetical or the subject of an FTC investigation or proceeding and that does not require extensive investigation (see 16 CFR at section 1.3). Formal advisory opinions issued by the FTC are provided only in matters involving either a substantial or novel question of law or fact or a significant public interest (see 16 CFR at section 1.1(a)). The FTC staff may render advice in response to a request when an agency opinion would not be warranted (see 16 CFR at section 1.1(b)). Staff opinions do not prejudice the FTC's ability to commence an enforcement proceeding (see 16 CFR at 1.3(c)). In addition to issuing advisory opinions, the FTC promulgates industry guides often in conjunction with the DoJ. Industry guides do not have the force of law and are therefore not binding on the commission. Finally, the FTC advises parties with respect to future conduct through statements of enforcement policy that are statements directed at certain issues and industries.

While the DoJ does not issue advisory opinions, it will upon request review proposed business conduct and it may in its discretion state its present enforcement intention with respect to that proposed conduct. Such statements are known as business review letters. A request for a business review letter must be submitted in writing to the assistant attorney general who heads the DoJ Antitrust Division and set forth the relevant background information, including all relevant documents and detailed statements of any collateral or oral understandings (see 28 CFR, section 50.6 (2008)). The DoJ will decline to respond when the request pertains to ongoing conduct.

Complaints procedure for private parties

48 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

A party who wishes to lodge a complaint with the FTC may make an 'application for complaint'. While there is no formal procedure for requesting action by the FTC, a complainant must submit to the FTC a signed statement setting forth in full the information necessary to apprise the FTC of the general nature of its grievance (see 16 CFR, section 2.2(b) (2009)). Parties wishing to register complaints with the DoJ may lodge complaints by letter, telephone, over the internet or in person. The DoJ maintains an 'antitrust hotline' to accept telephone complaints. Sophisticated parties frequently retain counsel to lodge complaints with either agency.

Enforcement

49 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?

The FTC and DoJ have filed comparatively few vertical restraint cases in the past few years. Recent examples, however, include DoJ's enforcement actions against American Express, MasterCard and Visa pertaining to exclusive dealing arrangements (see question 41), and against Blue Cross Blue Shield of Michigan pertaining to MFN provisions (see question 24). The DoJ also brought a successful challenge to the exclusive dealing practices of a manufacturer of artificial teeth (see *US v Dentsply Int'l Inc*, 399 F3d 181 (3d Cir 2005), cert denied, 546 US 1089 (2006)). The FTC also resolved by settlement its enforcement action against Intel Corp, which included, among other things, the charge that Intel Corp engaged in exclusive dealing practices in an effort to thwart competition from rival computer chip makers, including by punishing its own customers for using rivals' products (see question 1). State attorneys general and private parties have been somewhat more active in challenging vertical restraints (see questions 50 and 53).

The most high-profile FTC or DoJ enforcement action in recent years is the DoJ's successful case against Apple Inc and five e-book publishers (see questions 21, 24, and 36), alleging a horizontal conspiracy among the publishers, 'facilitated' by Apple, a distributor of the publishers' e-books. The nature of the conduct alleged resembles that of a hub-and-spoke conspiracy, in which a series of vertical agreements give effect to a horizontal agreement among parties at the same level of the distribution structure.

50 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

An agreement found to be in restraint of trade is invalid as against public policy. However, where an agreement constitutes 'an intelligible economic transaction in itself', apart from any collateral agreement in restraint of trade, and enforcing the defendant's obligations would not 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act', a contract containing a prohibited vertical restraint will be held enforceable (See *Kelly v Korsuga*, 358 US 516, 518–520 (1959); see also *Kaiser Steel Corp v Mullins*, 455 US 72 (1982)).

51 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 FTC can institute enforcement proceedings under any of the laws it administers, as long as such a proceeding is in the public interest (see 16 CFR, section 2.31 (2009)). If the FTC believes that a person or company has violated the law, the commission may attempt to obtain voluntary compliance by entering into a consent order. If a consent agreement cannot be reached, the FTC may issue an administrative complaint. Section 5(b) of the FTC Act empowers the FTC, after notice and hearing, to issue an order requiring a respondent found to have engaged in unfair methods of competition to 'cease and desist' from such conduct (15 USC, section 45(b) (2008)). Section 5(l) of the FTC Act authorises the FTC to bring actions in federal district court for civil penalties of up to US$16,000 per violation, or in the case of a continuing violation, US$16,000 per day, against a party that violates the terms of a final FTC order (15 USC, section 45(l)). Section 13 of the FTC Act authorises the FTC to seek preliminary and other injunctive relief pending adjudication of its own administrative complaint (15 USC, section 53). Additionally, section 13(b) of the FTC Act authorises the FTC in a 'proper case' to seek permanent injunctive relief against entities that have violated or threaten to violate any of the laws it administers. The FTC has successfully invoked its authority to obtain monetary equitable relief for violations of section 5 in suits for permanent injunction pursuant to section 13(b) of the FTC Act.

The DoJ has exclusive federal governmental authority to enforce the Sherman Act and shares with the FTC and other agencies the federal authority to enforce the Clayton Act. Sections 1 and 2 of the Sherman Act confer upon the DoJ the authority to proceed against violations by criminal indictment or by civil complaint, although it is unusual for the DoJ to seek criminal penalties in the vertical restraints area. Pursuant to section 4 of the Sherman Act and section 15 of the Clayton Act, the DoJ may seek to obtain from the courts injunctive relief 'to prevent and restrain violations' of the respective acts and direct the government 'to institute proceedings in equity to prevent and restrain such violations'. Pursuant to section 14A of the Clayton Act, the United States acting through the DoJ may also bring suit to recover treble damages suffered by the United States as a result of antitrust violations (15 USC, section 15a). Finally, a party under investigation by the DoJ may enter into a consent decree with the agency. Procedures governing approval of consent decrees are set forth in the Tunney Act (15 USC, section 16(b)–(h) (2008)).

In vertical restraints cases, federal agencies have tended to focus their efforts on cases where injunctive relief was necessary or where the law might be clarified, as opposed to pursuing cases seeking monetary remedies.

Investigative powers of the authority

52 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The FTC may institute an investigation informally through a 'demand letter', which requests specific information. A party is under no legal obligation to comply with such requests. Additionally, the FTC may use a compulsory process in lieu of or in addition to voluntary means. Section 9 of the FTC Act provides that the FTC or its agents shall have access to any 'documentary evidence' in the possession of a party being investigated or proceeded against 'for the purpose of examination and copying' (15 USC, section 49; 16 CFR, section 2.11 (2009)). Section 9 of the FTC Act gives the Commission power to subpoena the attendance and testimony of witnesses and the production of documentary evidence (15 USC, section 49 (2008)).

The most common investigative power utilised by the DoJ in conducting civil antitrust investigations is the civil investigative demand (CID). The Antitrust Civil Process Act (15 USC, sections 1311–1314 (2008)), authorises the DoJ to issue CIDs in connection with actual or prospective antitrust violations. A CID is a general discovery subpoena that may be issued to any person whom the attorney general or assistant attorney general has reason to believe may be in 'possession, custody or control' of material relevant to a civil investigation. A CID may compel production of documents, oral testimony or written answers to interrogatories.

Neither DoJ nor FTC typically demand documents held abroad by a non-US entity. However, DoJ and FTC are likely to demand such documents from any non-US entity if the court in which an action is brought possesses subject-matter jurisdiction under US antitrust laws, as well as personal jurisdiction over the non-US entity.

Private enforcement

53 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?

Section 4 of the Clayton Act permits the recovery of treble damages by 'any person [...] injured in his business or property by reason of anything forbidden in the antitrust laws'.

Section 16 of the Clayton Act similarly provides a private right of action for injunctive relief.

While sections 4 and 16 of the Clayton Act permit a private right of action for violations arising under both the Sherman and Clayton Acts, it does not permit a private right of action under section 5 of the FTC Act. Both sections 4 and 16 of the Clayton Act provide that a successful plaintiff may recover reasonable attorneys' fees. The amount of time it takes to litigate a private enforcement action varies significantly depending upon the complexity and circumstances of the litigation.

A private plaintiff seeking antitrust damages must establish antitrust standing, which requires, among other things, that the plaintiff show that its alleged injury is of the type that the antitrust laws were designed to protect. With certain exceptions, an indirect purchaser (ie, a party that does not purchase directly from the defendant) is not deemed to have suffered antitrust injury and is therefore barred from bringing a private action for damages under section 4 of the Clayton Act (see *Illinois Brick v Illinois*, 431 US 720 (1971)).

Both parties and non-parties to agreements containing vertical restraints can bring damage claims so long as they successfully fulfil the requirements for standing.

Other issues

54 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

In addition to private and federal agency enforcement of vertical restraints, section 4(c) of the Clayton Act authorises the states through their respective attorneys general to bring a parens patriae action, defined as an action by which the state has standing to prosecute a lawsuit on behalf of a citizen or on behalf of natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act. In pursuing treble damages, state attorneys general often coordinate their investigation and prosecution of antitrust matters with other states. Additionally, pursuant to section 16 of the Clayton Act, states may bring actions for injunctive relief in their common law capacity as a parens patriae in order to forestall injury to the state's economy.

Many states also have passed legislation analogous to the federal antitrust laws. For example, New York's antitrust statute, known as the Donnelly Act, is modelled on the federal Sherman Act and generally outlaws anti-competitive restraints of trade. New York's highest court has determined that the Donnelly Act 'should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justifies such a result' (*Anheuser-Busch Inc v Abrams*, 71 NY 2d 327, 335 (1998)).

Within the past 10 years the states have commenced a number of coordinated investigations involving allegations of resale price maintenance, most of which have resulted in settlements providing for monetary and injunctive relief. Monetary settlements have ranged from as little as US$7.2 million to as much as US$143 million. Although the Supreme Court's decision in *Leegin* is likely to diminish the frequency of such litigation for the foreseeable future, enforcement authorities in a number of states have continued to investigate, and have brought actions attempting to prohibit resale price maintenance under both federal and state laws. In *California v Bioelements* (Cal Sup Ct 2010), for example, the attorney general of California filed a complaint against a cosmetics manufacturer asserting that the manufacturer violated California's antitrust laws by engaging in resale price maintenance. The parties entered into a settlement decree that enjoined Bioelements from reaching any agreement with a distributor regarding resale price. Likewise, in *New York v Herman Miller Inc* (SDNY 2008), the attorneys general of New York, Illinois and Michigan filed a complaint asserting that a furniture manufacturer's resale price maintenance policy violated section 1 of the Sherman Act and various state laws. The action was resolved by a settlement decree prohibiting Herman Miller from reaching any agreement with distributors regarding the resale price of its products.

SIDLEY AUSTIN LLP
SIDLEY

Joel Mitnick **jmitnick@sidley.com**

787 Seventh Avenue
New York
NY 10019
United States

Tel: +1 212 839 5300
Fax: +1 212 839 5599
www.sidley.com

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