Vertical Agreements

Contributing editor
Patrick J Harrison

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Vertical Agreements 2017

Contributing editor
Patrick J Harrison
Sidley Austin LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2007
Eleventh edition
ISSN 1753-9250

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Vertical Agreements 2017

Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Vertical Agreements*, which is available in print, as an e-book 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 jurisdictions featured. Our coverage this year includes new chapters on Argentina, Indonesia and Macedonia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2017

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 anticompetitive 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 anticompetitive conducts in article 2 of the Antitrust Law is not comprehensive. It merely sets forth 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 anticompetitive practices, such as vertical restraints, with the purpose or effect of restricting or distorting competition in a manner that may be contrary to the general economic interest are prohibited. The general economic interest has been interpreted as comparable to 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 anticompetitive 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 anticompetitive vertical restraints are the National Commission for the Defence of Competition (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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 forth 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 anticompetitive acts or behaviour regardless of the way these are manifested, whereas article 3 of the Antitrust Law sets forth 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 forth 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, 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 anticompetitive 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 to subsequently 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 shall 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 anticompetitive 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

The Antitrust Law does not specify how a restriction on the territory into which a buyer selling via internet may resell contract products 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.

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

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.

31 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.

32 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.

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

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.

34 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.

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

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

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

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.

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

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.

38 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.

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

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.

Update and trends

Competition law in Argentina is going through times of deep transformation since the beginning of 2016 and, in less than one year, the scenario is vastly different from the one found at the end of 2015. After many years, Argentina is working hard to return to mainstream policies in regard to competition enforcement and these changes can be perceived on several fronts.

The most important front is clearly the new draft bill that is currently under review. Said bill contains important changes to the current law, the most important ones include:

- Per se hard-core cartels – The draft bill establishes that hard-core cartels are to be considered per se unlawful creating an exception to the general rule of reason regime. These conducts would also be considered null.
- Reform to the institutional framework – The creation of an independent agency, the National Competition Authority (the ANC), as a decentralised and independent agency within the sphere of the Argentine government. The ANC's five members would be: a president and four commissioners, all of them requiring technical background and suitability. They would have five-year terms and can only be removed with certain proper justification.
- Greater sanctions for anticompetitive conducts – The implementation of new criteria for the determination of fines, implementing a system based on the business volume of the affected markets, multiplied by the number of years of the duration of the conduct. There would be a limit based on the economic group's international business volume, taking into account the previous financial year. Second offences will be subject to a duplication of the fine. The draft bill also eliminates the requirement introduced in 2014 by which the parties had to pay the fines in order to have the right to appeal a fine.
- Introduction of a Leniency Programme – The creation of a Leniency Programme, which would fully exempt from any sanction to the first party that applies for leniency and meets the requirements, and would reduce the fines to those who file later but meet the requirements and provide useful information. The draft bill also contemplates the introduction of a Leniency Plus mechanism by which a party could be benefited in case it provides useful information about another cartel.
- Damages actions – The draft bill allows for damages suits as a consequence of infringements to the competition regulations.
- Judicial review – The draft bill would create the National Antitrust Court of Appeals, which would act as the competent court in matters regarding appeals to the ANC's decisions.

40 How is restricting the buyer's ability to obtain the supplier's products from alternative sources 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 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' 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 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 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 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 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 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.

45 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.

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

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

47 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

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

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

49 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 (usually 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

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

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 recent 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.

51 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.

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

The 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 anticompetitive practices are:

- cessation of the anticompetitive 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.

Investigative powers of the authority

53 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

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

Pursuant to article 51 of the Antitrust Law, any person damaged by anticompetitive 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 owing 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

55 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

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

Australia

Charles Coorey, Emma Ringland and Elyse Newell
Gilbert + Tobin

Antitrust law

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

The Competition and Consumer Act 2010 (Cth) (CCA) outlines the applicable law in relation to vertical restraints. While there is no single 'vertical restraint' provision, the following sections of the CCA regulate vertical restraint conduct:

- section 45, which is a general prohibition against anticompetitive agreements (anticompetitive agreements);
- section 46, which prohibits a corporation that has a substantial degree of power in a market from misusing its market power (misuse of market power);
- section 47, which prohibits exclusive dealing conduct and 'third line forcing' (exclusive dealing); and
- sections 48 and 96, which place restraints on price setting (resale price maintenance or RPM).

These prohibitions are explained in more detail in question 2.

To the extent that conduct may fall both under section 45 and section 47, or both section 45 and section 48, there are 'anti-overlap' provisions in section 45 that specify which of the two sections will apply depending on the circumstances.

In addition to the legislative requirements, the common law doctrine of restraint of trade may apply to vertical transactions that impose exclusive dealing restrictions or obligations. However, the common law restraint of trade doctrine is not discussed further in this chapter.

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 law regarding vertical restraints in Australia is briefly described below. We note that changes to these provisions have been recommended in a recent government-initiated review of Australian competition law (the final report in relation to this review was released on 31 March 2015, being the Competition Policy Review Panel's Final Report (Harper Report)). On 24 November 2015, the Australian Treasurer released the government's response to the Harper Report, indicating its support for several of these recommendations. Although as at the date of this publication legislation has not been passed to give effect to these recommended changes, changes that have been expressly supported by the government and that are relevant to the vertical restraints discussion in this chapter have been identified below in response to this question.

Resale price maintenance
Resale price maintenance prohibits a corporation that supplies goods or services from attempting to dictate the minimum price at which the buyer can resell the good or service (section 48). There is no prohibition against having a maximum resale price.

(We note that the Harper Report has recommended, and the government has supported, the amendment of the provision to include an exemption for resale price maintenance between related bodies corporate. However, the provision remains unchanged at this stage.)

Third line forcing
Third line forcing prohibits a corporation from supplying goods or services on the condition that other goods or services are acquired from an unrelated third party (sections 47(6) and 47(7)).

Resale price maintenance and third line forcing are prohibited regardless of the effect on competition. They are referred to as 'per se' prohibitions.

(We note that the Harper Report has recommended, and the government has supported, the amendment of this provision to include a competition based 'effects' test, while retaining the per se prohibition in relation to resale price maintenance. However, the provision remains unchanged at this stage.)

Exclusive dealing
Exclusive dealing is only prohibited where it has the purpose, effect or likely effect of substantially lessening competition in a market. Conduct that can constitute exclusive dealing includes the imposition of product, customer and territorial restrictions. Examples include:

- supplying goods or services on the condition that the buyer will not acquire or resupply goods or services from a competitor of the supplier (section 47(2));
- refusing to supply goods or services for the reason that the buyer has not agreed to not acquire or resupply goods or services from a competitor of the supplier (section 47(3));
- acquiring goods or services on condition that the supplier will not supply goods or services to particular persons or in particular places (section 47(4)); and
- refusing to acquire goods or services for the reason that the seller has not agreed to not supply goods or services to particular persons or in particular places (section 47(5)).

In addition to the above provisions, which explicitly target vertical arrangements, the prohibition against misuse of market power and anticompetitive agreements may also be relevant to vertical arrangements.

Anticompetitive agreements
Anticompetitive agreements are contracts, arrangements or understandings that contain exclusionary provisions or that have the purpose, effect or likely effect of substantially lessening competition in a market. This prohibition applies to both vertical and horizontal conduct (section 45).

Misuse of market power
Misuse of market power prohibits a corporation that has a substantial degree of market power from taking advantage of that market power for the purpose of substantially damaging a competitor in that or any other market, for the purpose of preventing the entry of a person into that or any other market, or for the purpose of deterring a person from engaging in competitive conduct in that or any other market (section 46).

(The Harper Report has recommended, and the government has supported, the amendment of this section such that instead of focusing solely on the purpose of the conduct, this section should also include an 'effect' or 'likely effect' test consistent with other provisions in the CCA.)

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 vertical restraint provisions in Part IV and VII of the CCA have the same objective as the rest of the CCA, being to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (section 2).

Responsible authorities

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

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the prohibitions against anticompetitive vertical restraints contained in the CCA. The ACCC is an independent, national statutory authority. The members of the ACCC are appointed by the Governor-General in accordance with the CCA, but there is no separate role for governments or ministers in the enforcement of the CCA.

The ACCC's Compliance and Enforcement Policy sets out the principles adopted by the ACCC to achieve compliance with the CCA. The ACCC directs its resources to investigations and matters in accordance with the priorities outlined in its policy, which is released in February each year.

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 CCA provisions apply to conduct engaged in by companies incorporated in Australia, registered as foreign corporations in Australia or carrying on business in Australia, even where the conduct occurs outside of Australia (section 5). However, where the CCA requires that conduct has the purpose, effect or likely effect of substantially lessening competition in a market before it amounts to a contravention (eg, exclusive dealing and anticompetitive agreements), the purpose, effect or likely effect must relate to a market in Australia.

The CCA has been applied extraterritorially (eg, to resale price maintenance outside Australia by Australian corporations). There are no unique jurisdictional or substantive rules that apply in a pure internet context.

The CCA provisions also extend to Australian citizens or persons ordinarily resident within Australia engaging in conduct outside of Australia (section 5).

Agreements concluded by public entities

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

Where carrying on a business, public entities are bound by all of the provisions under the CCA applicable to vertical arrangements. Under sections 2A, 2B and 2BA of the CCA, the competition law provisions of the CCA apply to the Commonwealth government, the state and territory governments, any governmental authorities or statutory bodies, and any local government bodies to the extent that they are carrying on a business.

Section 2C sets out some explicit exceptions where a public body would not be considered to be carrying on a business. For example, the collection of taxes, the acquisition of primary products by legislation, and transactions involving only parties acting for the same Commonwealth authority do not constitute carrying on a business.

The case law in this area suggests that a public body would be carrying on a business where it is engaging in commercial activities systematically and regularly. For example, statutory bodies that operated a postal service or a publishing service have been found to be carrying on a business. Other governmental authorities that simply provided services, such as managing national parks, have not.

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 CCA does not contain sector-specific laws or regulations for vertical restraints. However, Part XIB sets up a sector-specific regime to regulate anticompetitive conduct in the telecommunications industry. Section 151AJ(3) provides that a carrier or carriage service provider will engage in anticompetitive conduct if it contravenes the general vertical restraint provisions of exclusive dealing (section 47), resale price maintenance (section 48), misuse of market power (section 46) or anticompetitive agreements (section 45) and the conduct relates to a telecommunications market. Section 151AJ(2) also prohibits a carriage service provider with a substantial degree of market power in a telecommunications market from taking advantage of that power with the likely effect of substantially lessening competition in any telecommunications market. Section 151AF defines a 'telecommunications market' as a market in which carriage services, goods or services for use in connection with a carriage service, access to facilities or content services are supplied or acquired.

On 5 September 2016, the government published a discussion paper seeking submissions on the operation of Part XIB and whether it should be retained, removed or amended to provide greater certainty for business. The discussion paper notes that Part XIB of the CCA was introduced to facilitate the transition to open competition in the telecommunications market and that it required review in light of its interaction with section 46 and the change in market dynamics since its introduction. Submissions closed on 30 September 2016 and have since been made publicly available, although the government is yet to respond.

General exceptions

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

The CCA contains general exceptions that may apply to the prohibitions against vertical restraints. For example, the prohibitions do not apply:

- where the conduct is specifically authorised by the law (section 51(1)); and
- for exclusive dealing or anticompetitive agreements, where parties are related to each other (sections 47(12) and 45(8)).

In addition, the CCA provides special treatment for specific arrangements that might otherwise breach the prohibitions against vertical restraints (specifically, the provisions on exclusive dealing, anticompetitive agreements and misuse of market power, but not resale price maintenance). These exemptions relate to:

- acts or provisions of a contract relating to employment conditions (ie, remuneration, conditions of employment, hours of work, working conditions, etc);
- restraints of trade during or after the termination of employment or contract for services;
- compliance with particular standards;
- partnership conditions between natural persons;
- conditions on the sale of a business or shares of a company with respect to the protection of goodwill;
- exclusivity conditions on the export of goods or services from Australia; and
- acts done in concert by ultimate users or consumers of goods or services against the supplier of those goods or services (eg, consumer boycotts).

Section 51(3) also contains a limited exemption for intellectual property rights. The exemption does not apply to resale price maintenance or misuse of market power and not all types of intellectual property are covered (eg, unregistered trademarks, confidential information, trade secrets and know-how are not included).

The Harper Report recommends that section 51(3) should be repealed. The government has simply noted this recommendation.

In addition, if the agreement would give rise to public benefits that would outweigh any public detriments, the parties may apply for 'authorisation' to the ACCC. If authorisation is granted, the parties to the agreement will have immunity to make and give effect to the agreement.

Agreements

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

The prohibitions against exclusive dealing, resale price maintenance and misuse of market power do not require an 'agreement' between the parties. Instead, it is the conduct of a particular party that is relevant.

The prohibition against anticompetitive agreements (section 45) prohibits the making of and giving effect to certain provisions in 'contracts, arrangements or understandings'. The terms 'contract', 'arrangement' and 'understanding' are not defined in the CCA. However, the law of contract sets out the requirements for a legally binding contract, and the courts have interpreted 'understanding' (the form of agreement with the lowest threshold) broadly to require 'that the parties [...] shall have communicated [...] in some way and that, as a result of the communication, each has intentionally aroused in the other an expectation that he will act in a certain way' (*Re British Basic Slag Ltd's Agreement* [1963] 2 ALL ER 807).

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 set out in question 9, not all of the CCA provisions relevant to vertical arrangements require the existence of an 'agreement'.

Instead, the provisions regulate certain 'practices', which covers a much broader range of activities. For example, in relation to exclusive dealing, the CCA specifically states that a supplier may be found to have supplied goods on condition that the buyer does not acquire goods from a competitor of the supplier, even where the existence of that condition 'is ascertainable only by inference'.

The laws on vertical arrangements can encompass a broad array of conduct. For example, a comment by a supplier that it would not expect its products to be discounted and that the buyer would be liable to lose supply if it discounted was found to constitute resale price maintenance (*ACCC v IGC Dorel Pty Ltd* [2010] FCA 1303).

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)?

An exemption to exclusive dealing (section 47) and anticompetitive agreements (section 45) exists for bodies corporate related to each other (sections 47(12) and 45(8)). Further, sections 47(6) and 47(7) provide that third line forcing will not arise where the supply on condition or refusal to supply is to a related body corporate.

Bodies corporate are related to each other where a body corporate is:

- the holding company of another body corporate;
- the subsidiary of another body corporate; or
- the subsidiary of the holding company of another body corporate (section 4A).

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?

On 14 December 2016, the Australian High Court delivered a decision related to this subject in *Australian Competition and Consumer Commission v Flight Centre Travel*. By a majority of 4:1, the High Court found that even though Flight Centre acted as an agent for certain international airlines, Flight Centre could still be in competition with those airlines and be subject to the cartel prohibitions because of the freedom to act that Flight Centre retained under the agency agreement. The majority reasoned that where an agent can exercise its own discretion in the pricing of the principal's goods or services, and where the agent is not obliged to act in the interest of the principal, this may mean that the principal and agent are in competition with each other and subject to the cartel prohibitions and other horizontal offences. It also means that what may have previously been considered to be vertical restraints between a principal and agent could now instead be characterised as horizontal, cartel provisions between competitors. The level of risk will depend on the extent to which the agreement between the principal and agent requires the agent to act as a true agent or is free to act in its own interests.

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 response to 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)?

Section 51(3) of the CCA provides an exemption (other than for misuse of market power and resale price maintenance) in relation to:

- the imposition of, or giving effect to, a condition of a licence or assignment of a patent, registered design or copyright to the extent that it relates to the invention to which the patent relates or articles made by use of the patent, goods in respect of which a design is to be applied, or the work or other subject matter of the copyright;
- the inclusion in a contract, arrangement or understanding authorising the use of a certification trademark of a provision required under the Trade Marks Act 1995 (Cth); or
- the inclusion in a contract, arrangement or understanding between the registered proprietor of a trademark and a registered user of that trademark of a provision required under the Trade Marks Act 1995 (Cth).

Analytical framework for assessment

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

The prohibition against resale price maintenance (section 48) and third line forcing (sections 47(6) and 47(7)) are per se prohibitions. That is, the activity is prohibited once the elements are met regardless of its effect on competition. We note that the Harper Report has recommended, and the government has supported, amendments to the third line forcing provisions to include a competition-based 'effects' test (while retaining the per se prohibition in relation to resale price maintenance).

Exclusive dealing (section 47) is only prohibited where the corporation has the purpose of substantially lessening competition or where the corporation's conduct has the effect or likely effect of substantially lessening competition in a market.

In determining whether conduct is likely to substantially lessen competition, the ACCC uses a counterfactual test. The first step involves defining the relevant market the conduct occurred in. The second step involves measuring the state of competition in the relevant market without the alleged conduct and comparing that to what it would become with the alleged exclusive dealing. Where the conduct leads to an increase in a participant's market power that is significant and sustainable, that is generally treated as a substantial lessening of competition.

There is not, however, a 'rule of reason' analysis that weighs up the public benefit that might result to act as a countervailing factor to the lessening in competition. If substantial lessening of competition is intended or likely to occur, the conduct is prohibited. It should be noted that a corporation can apply for an authorisation or notification for immunity in certain circumstances (see question 47).

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 relation to third line forcing (sections 47(6) and 47(7)) and resale price maintenance (section 48), the market shares of the supplier engaging in the conduct are not relevant. This is because these provisions are per se prohibitions (though refer to our earlier comments noting that the Harper Report has recommended, and the government has supported, the introduction of a competition-based 'effects' test in relation to third line forcing).

In assessing other types of vertical restraints, the market share of a supplier or buyer engaging in the prohibited conduct is one of a range of relevant factors the courts will take into account when deciding whether there has been a substantial lessening of competition or a misuse of market power.

It is not strictly relevant whether certain types of restriction are widely used by suppliers, although if this is the case then there may be good arguments why another supplier adopting a similar restriction would not substantially lessen competition. It should be noted, however, that in assessing whether there has been a substantial lessening of competition, the courts are entitled to aggregate together all of the agreements entered into by a supplier.

In relation to misuse of market power (section 46), whether a firm has a substantial degree of market power (typically indicated by substantial market share, but not always) in the supply of a key input will be relevant if it refuses to supply that input to its downstream competitors or is only prepared to do so at a price that no competitor is willing to pay. This will similarly be relevant in the circumstances where a supplier with market power engages in tying or bundling to leverage this market power to its benefit in another 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?

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.

There are no block exemptions or safe harbours for vertical restraints.

Types of restraint

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

Section 96(3) of the CCA describes conduct that constitutes resale price maintenance. Resale price maintenance is prohibited outright.

Section 96(3) is drafted broadly to capture a range of ways in which the supplier may attempt to influence the minimum price charged by the buyer, including by withholding supply or inducing the customer not to resell goods or resupply services below a particular price. The prohibition extends to maintaining a minimum price at which the buyer advertises, displays or offers the goods or services for resale. The prohibition also extends to services.

A supplier will not have induced a person to engage in resale price maintenance if the price is a genuine recommended retail 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'?

While it is illegal for suppliers to cut off supply to wholesale or retail resellers in efforts to impose a minimum price, suppliers may withhold supplies of goods to a company that engages in 'loss leader selling' – defined under the CCA as purchasing goods with the intention of selling the goods below their cost so that the company can:

- promote its business; or
- attract customers who are likely to purchase other goods or services.

This exemption does not apply to genuine clearances, or to when a supplier has agreed to supply goods to a company for the purpose of loss leader selling.

It is also noted that in one instance the ACCC authorised a tool manufacturer, Festool, to engage in resale price maintenance in order to avoid free riding by retailers not providing an appropriate level of sales support considering the complex and technical nature of the tools. This is the first and only instance to date of the ACCC authorising resale price maintenance. See the response to question 47 for further detail.

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

There are examples where the ACCC has prosecuted companies for various types of conduct that involved contraventions of both resale price maintenance, and another prohibition, under the CCA.

For example, in *ACCC v Jurlique International Pty Ltd* (2007) 7 FCA 79, the ACCC alleged that Jurlique engaged in resale price maintenance relating to the distribution of its skin care, cosmetic and herbal medicine products, and also contraventions of section 45 in relation to price fixing of skin and body treatment services with competitors providing similar services. While the allegations of resale price maintenance and price fixing were not overlapping in respect of the same conduct, this case highlights that a dual distribution model can give rise to both vertical restraints and horizontal collusion.

A clearer example of where there may be overlapping allegations in relation to the same conduct is where resale price maintenance arrangements are being driven by a sufficiently powerful group of retailers. In circumstances of a retail cartel, minimum-price resale price maintenance agreements can achieve the same outcome as horizontal collusion between retailers. The notion that such arrangements can give rise to both resale price maintenance and price fixing was considered in *ACCC v High Adventure* (2006) ATPR 42-091, where the court commented that resale price maintenance is often a manifestation of price fixing among retailers.

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

As resale price maintenance is a per se offence in Australia, the efficiencies or commercial benefits that could be generated are not a relevant consideration.

However, the Harper Report noted that, in a competitive market, retail price maintenance may be beneficial to competition and consumers. For example, one purpose of imposing a minimum retail price within distribution arrangements is to create a financial incentive (through the retail margin) for a retailer to invest in retailing services (whether in the form of store fit-out or retailing staff). This is acknowledged by the government's response to the Harper Report. The government notes that '[Resale price maintenance] may be beneficial to competition and consumers by creating an incentive for retailers to invest in staff and training that could not be offered if products were sold at a discount'. Manufacturers may also wish to engage in retail price maintenance as a marketing or branding strategy, where a fixed retail price is a signal to consumers that the product is a premium product. If the conduct would give rise to public benefits that would outweigh any public detriments, a party may apply for authorisation to the ACCC under the CCA, which may result in the ACCC allowing such conduct to occur.

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.

A buyer of goods is entitled to choose the minimum retail price at which it will sell the goods.

However, a supplier cannot make it known to the buyer that it will not supply goods unless the buyer agrees not to sell those goods below a minimum price (such as the retail price of a competitor's product) (section 96(3)(a)). Similarly, a supplier cannot enter into an agreement

with a buyer containing a term that the buyer will not sell the goods or services below a minimum price (section 96(3)(c)). In both of these instances, the price relativity agreement amounts to resale price maintenance, which, as noted above, is prohibited, irrespective of the impact on competition in a market.

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.

Buyers and sellers are entitled to negotiate the terms and conditions of their sale or purchase.

However, a supplier must ensure that any wholesale 'most favoured nation' or 'terms no less favourable' agreements do not amount to an anticompetitive agreement (section 45) or exclusive dealing (section 47). In addition, where the supplier has market power it should ensure it does not enter into such agreements for an anticompetitive purpose (section 46).

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.

Vertical agreements between a supplier and a platform where the seller agrees to charge on that platform a retail price that is not higher than the retail price the seller charges on other platforms is known as 'across platform parity agreements' (APPAs). This can raise competition concerns where the retailer and platform operate under an agency relationship and where the platforms compete by offering lower commissions to the supplier. The interrelationship between vertical agreements, horizontal agreements and agency was considered in the Flight Centre and ANZ cases.

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

For resale price maintenance (section 48), the selling of goods at a price less than a price specified by the supplier is construed to include references to advertising, displaying or offering the goods for sale (section 96(7)).

Under a minimum advertised prices agreement (MAP) or where there is a minimum advertised price policy (MAPP), a retailer is prevented from advertising a supplier's product below a minimum agreed resale price. Although a MAP does not place any restrictions on the actual selling price, this still amounts to resale price maintenance due to section 96(7).

In September 2012, Narta International Pty Ltd, an electrical goods buying group, applied for authorisation to apply a MAP to a wide range of electrical goods collectively acquired by its members (resale price maintenance). The level of the MAP was to be set by Narta senior management and notified to members. Narta would not impose limitations or restrictions on members' actual selling prices. The ACCC denied authorisation finding that the MAP would not lead to public benefits in the form of increased retail competition. Further, the ACCC considered that the imposition of a MAP was likely to reduce Narta's members' incentive to compete strongly with other Narta retailers in relation to MAP products and with retailers that have substitutes. The ACCC found that competition was likely to be reduced between online retailers and bricks-and-mortar retailers.

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 is a type of 'most favoured nation' or 'terms no less favourable' agreement. As such, the supplier must still ensure the agreement does not amount to an anticompetitive agreement (section 45) or exclusive dealing (section 47). If the supplier and buyer are also competitors, this may also raise concerns under the cartel prohibition in the CCA.

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 exclusive dealing provisions (section 47) prohibit territorial restrictions only if they have the purpose or likely effect of substantially lessening competition.

Territorial restrictions may also contravene sections 45 and 46 of the CCA depending on the circumstances.

The CCA does not specify any distinction in the assessment of 'active sales' and 'passive sales'.

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

No.

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

The exclusive dealing provisions (section 47) prohibit customer restrictions only if they have the purpose or likely effect of substantially lessening competition.

Customer restrictions may also contravene sections 45 and 46 of the CCA depending on the circumstances.

The CCA does not specify any distinction in the assessment of 'active sales' and 'passive sales'.

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

The CCA does not contain any provision that specifically addresses vertical restraints on the use of goods or services by customers.

Any such restraint would contravene the CCA if it had the purpose or likely effect of substantially lessening competition in a market (section 45) or involved a misuse of market power (section 46).

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

The CCA does not contain any provisions that specifically address vertical restrictions on a buyer's ability to generate sales via the internet.

This particular type of restriction may be classified under a 'customer restriction' (ie, restricting supply to a particular class of persons, namely, people who acquire goods or services via the internet), see question 30.

If the vertical restraint cannot be characterised in this manner, it could be considered under the anticompetitive agreements prohibition (section 45) or the misuse of market power prohibition (section 46).

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

No.

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

There is no specific section in the CCA dealing with selective distribution systems. Selective distribution systems are assessed in the same way as other vertical restrictions (ie, customer and geographic restrictions).

There is no requirement for the criteria for selection to be published. However, a supplier should have evidence of a clear and objective business rationale. Otherwise, there is an increased risk the selective distribution system will be found to give rise to a substantial lessening of competition.

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

A selective distribution system is more likely to be lawful where:

- there is a legitimate business rationale (eg, giving rise to efficiencies, brand competition, encouraging investment in the provision of showrooms and facilities for presales and aftersale services);
- consumer welfare is enhanced (ie, when the costs of production and distribution are low and wholesale and retail margins do not exceed the competitive level);
- any restrictions imposed are in accordance with a legitimate business rationale; and
- importantly, there is sufficient competition in the market (eg, a number of substitutes and competitors) so that the restriction is not considered to be anticompetitive.

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

There are no specific prohibitions in relation to internet sales. These are assessed in the same way as any other type of vertical restraint.

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

There have been numerous cases in relation to selective distribution systems. For example, in *ACCC v Fila Sport Oceania Pty Ltd* (2004) ATPR 41-983, the court found that Fila misused its substantial market power by implementing a selective distribution policy under which Fila would not supply a retailer with sporting apparel if it stocked rival products. Similarly, in *TPC v CSR Limited* (1991) ATPR 41-076, the court found that CSR had misused its substantial market power by refusing to supply plasterboard (a material used to build ceilings) and related materials to a distributor that had stocked a competitor's products.

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

In assessing whether a selective distribution system substantially lessens competition, the courts will ascertain the level of competition that exists in that market. A relevant factor in assessing the level of competition in the market could be whether multiple selective distribution systems are operating in the same market.

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

Vertical restrictions involving selective distribution systems and vertical restrictions in relation to territories are assessed in the same way.

In a special project conducted by the ACCC in 2015 for the purposes of the International Competition Network, the ACCC commented that vertical restraints that limit online sellers' ability to deal with consumers outside a given territory may hinder consumers' opportunities to realise the benefits of the increased geographic scope for sales. Sometimes, such restrictions may be a necessary trade-off to ensure that consumers are provided with retail services that are valued by them when making purchasing decisions. However, sometimes the main purpose of such restrictions is to support a manufacturer's geographic price discrimination strategy by segmenting markets and preventing arbitrage from low-price to high-price regions. However, the effectiveness of restrictions on territory in this circumstance may be reduced by growth in online markets, which make it easier for consumers to locate and trade with lower-price online sellers located outside the particular exclusive territory in which they are located.

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

Restrictions placed on a buyer's ability to obtain products from alternative sources will only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition (section 47) or where the restrictions are imposed by the supplier misusing its market power (section 46).

If a supplier imposes a condition on the buyer to obtain other products from a third party, this will amount to third line forcing (sections 47(6) and 47(7)).

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

Restrictions imposed by a supplier preventing the buyer from selling 'inappropriate' non-competing products may engage competition law restrictions.

Exclusive dealing under sections 47(2) and 47(3) relates to a supplier imposing a restriction on the buyer to not acquire goods or services or not resupply goods or services of a competing supplier. These provisions may still be relevant where the non-competing product is issued by a competing supplier (where the two suppliers compete over other products). The conduct may also amount to a misuse of market power (section 46) or an anticompetitive agreement with the purpose or likely effect of substantially lessening competition (section 45).

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

Restrictions imposed on the buyer's ability to stock products from a competing supplier engage the exclusive dealing prohibitions (section 47). There will only be a contravention where the restrictions have the purpose, effect or likely effect of substantially lessening competition.

This scenario may also contravene the broader provisions under the CCA if it involves a misuse of market power (section 46) or if it constitutes an anticompetitive agreement with the purpose or likely effect of substantially lessening competition (section 45).

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

If a supplier requires a buyer to purchase a minimum amount of goods or services under the supply arrangement, this conduct may constitute an anticompetitive agreement if it has the purpose or likely effect of substantially lessening competition (section 45). Depending on the circumstances, the conduct could also amount to a misuse of market power (section 46).

Where the requirement to purchase a minimum amount of goods or services effectively amounts to a condition that the buyer will not purchase goods or services from a competing supplier, or will only purchase goods or services to a limited extent, the supplier's conduct may constitute exclusive dealing (section 47).

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

The exclusive dealing provisions govern the situation where a buyer acquires goods or services on the condition that the supplier does not supply to other persons. The conduct will amount to a contravention where the restriction has the purpose, effect or likely effect of substantially lessening competition.

Where this conduct may constitute a misuse of market power or substantially lessens competition, the prohibitions under sections 45 and 46 may apply.

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

Restrictions imposed by a supplier on the manner in which a distributor sells to end consumers could raise anticompetitive concerns. However, in some circumstances, restrictions may be for the purpose of preventing the supplier to free ride on a distributor's efforts (ie, the distributor will make all the effort (eg, in training staff or marketing, etc) but the supplier will enjoy the benefits).

As with the responses to questions above, these restrictions will amount to a contravention where the restriction has the purpose, effect or likely effect of substantially lessening competition.

Where this conduct may constitute a misuse of market power or substantially lessens competition, the prohibitions under sections 45 and 46 may apply.

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

No.

Notifying agreements

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

Authorisation

A party can apply to the ACCC for authorisation of conduct that may contravene the exclusive dealing, resale price maintenance or anticompetitive agreement prohibitions by lodging a proscribed application for authorisation (section 88). Authorisation is not available for misuse of market power, although this has been recommended as part of the Harper Report, and supported by the government.

The ACCC will only grant immunity where the proposed conduct meets the 'net public benefit' test, which requires the likely public benefit to outweigh any public detriment from the proposed conduct (section 90). What constitutes a public benefit or public detriment is not defined in the CCA and the ACCC adopts a broad approach based on the particular circumstances of the application. An authorisation can be granted with or without conditions.

In conducting its assessment, the ACCC will engage in a public consultation process. After considering submissions, it will issue a draft decision. The ACCC will then consider further submissions by the applicant and interested parties before releasing its final decision. The ACCC must make a decision within six months of receiving a valid application unless extended to 12 months under section 90(10A).

The authorisation process is public. Applications for authorisation and submissions are placed on the authorisation register on the ACCC's website (unless confidential).

On 20 June 2014, the ACCC granted its first authorisation for resale price maintenance in Australia. Although the ACCC has had the power to authorise resale price maintenance since 1995, this was the first time a request for authorisation of resale price maintenance had been lodged. The ACCC granted a conditional authorisation to Tooltechnic Systems (Aust) Pty Ltd, permitting Tooltechnic (an importer and wholesaler of power tools) to set minimum resale prices that retailers must charge for Festool power tool products. Tooltechnic, the sole Australian importer, submitted that Festool power tools are highly complex, differentiated and premium products targeted at trade users and that the provision of advice, training and product demonstrations is essential to its distribution model. The ACCC accepted there was a market failure caused by some Festool retailers free-riding on the services provided by other Festool retailers and that the setting of minimum retail prices was likely to limit this free-riding behaviour and encourage retailers to offer better services to customers. The ACCC determined this was likely to result in public benefits including customers continuing to be offered the choice of a premium trade quality power tool and quality customer service. The ACCC acknowledged the proposed conduct would result in customers being forced to pay a higher price but found that, on balance, the likely public benefit outweighed the clear but limited detriment.

Notification

A party can notify the ACCC of conduct that may contravene the exclusive dealing prohibitions by lodging a proscribed 'notification' (section 93). It provides an alternative process to authorisation for exclusive dealing. (The Harper Report has recommended, and the government has supported, amendments to the legislation such that notification should also be made available for resale price maintenance.)

Immunity begins 14 days after the date of lodgement for third line forcing (sections 47(6) and 47(7)) and on the date of lodgement for all other forms of exclusive dealing (sections 47(2), 47(3), 47(4), 47(5), 47(8) and 47(9)). The ACCC may revoke the immunity at any time if it is satisfied the likely public benefit would not outweigh the public detriment of the proposed conduct (sections 93 and 93(3A)). This is known as the public interest test. The ACCC must provide reasons.

The notification process is public. Applications for notification and submissions are placed on the exclusive dealing notifications register on the ACCC's website (unless confidential).

Authority guidance

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

Corporations deal with the ACCC, and seek exemptions from competition laws, through the notification and authorisation processes. The ACCC does not provide binding views on an informal basis on competition law issues.

The right to seek a declaration judgment from a court as to the assessment of a particular agreement in certain circumstances is limited. For example, section 163A of the CCA grants a person a right to seek a declaration in relation to the operation or effect of any provision of the CCA. However, this right only exists in relation to a 'matter' arising under the CCA.

Complaints procedure for private parties

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

Complaints can be made by contacting the ACCC via its website, phone number, in writing or in person. The ACCC has discretion as to what complaints it will investigate. The ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers.

Enforcement

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

The ACCC regards certain forms of conduct, including anticompetitive agreements and misuse of market power, to be so detrimental to consumer welfare and the competitive process that the ACCC will always regard them as an enforcement priority. As a result, this is an area the ACCC actively investigates and enforces. The ACCC may resolve an investigation by way of an administrative resolution (eg, commitment from the relevant person), court-enforceable undertaking, infringement notice or by initiating legal action.

Recent cases

The ACCC has an active enforcement and compliance agenda and, in recent years, the ACCC has undertaken numerous investigations and legal proceedings. Below are some examples of recent cases that have been before the courts.

Resale price maintenance

In August 2015, the Federal Court ordered OmniBlend Australia Pty Ltd, an online retailer of kitchen appliances, to pay a pecuniary penalty of A$17,500 for aiding, abetting, counselling and procuring an overseas supplier, Taiwan Star International, to engage in resale price maintenance. In August 2014, the ACCC commenced proceedings alleging that OmniBlend attempted to fix the retail price of its blenders with its competitor and that it induced its supplier to direct OmniBlend's competitor not to discount its prices. The supplier sought to induce OmniBlend's competitor not to discount its prices and subsequently withheld supply of OmniBlend blenders to that competitor. The parties agreed on consent orders except for the penalty which was determined by the Federal Court. The ACCC discontinued the allegations of price fixing.

Update and trends

As detailed in question 12, the decisions in *Flight Centre v ACCC* [2016] HCA 49 (*Flight Centre* case) and *ACCC v Australia and New Zealand Banking Group Limited* [2015] FCFAC 103 (*ANZ* case) have recently created uncertainty as to the use of dual distribution models and provided further insight into when a principal–agency arrangement will invoke the vertical restraint prohibitions against exclusive dealing or resale price maintenance.

The critical question in these two cases was the extent to which the relevant parties were acting as principal and agent, and the extent to which they were in competition with each other. Although the cases involved broadly similar distribution models, the approaches taken were very different.

The Full Federal Court in the *ANZ* case dismissed the ACCC's claim that ANZ had fixed prices with a mortgage broker that distributed ANZ home loans based on the fact that ANZ was not in competition with the mortgage broker in the relevant market. In contrast, on appeal from the Full Federal Court, a majority of the High Court in the *Flight Centre* case affirmed the primary judge's finding that Flight Centre was in fact in competition with certain airlines for the purposes of the price fixing provisions. The High Court found that where an agent exercises its own discretion in the pricing of the principal's goods and services, and where the agent is not obliged to act in the interest of the principal, this may mean that the principal and agent are in competition with each other.

Anticipated developments

As mentioned throughout this chapter, a recent review of competition law in Australia has made various recommendations relating to the CCA provisions discussed, with the final recommendations released on 31 March 2015 by the Competition Policy Review Panel (Harper Report). On 24 November 2015, the Treasurer released the government response to the Harper Report, stating that it either 'supported', 'supported in part', 'supported in principle', 'remained open to' or 'noted' each recommendation.

Although as at the date of this publication no changes have been made to the CCA as a consequence of the government's response to the Harper Report, the government's support of certain of these recommendations means that it is likely that legislation will be introduced to Parliament in due course to implement these amendments.

Among other matters, the Harper Report recommended that both the third line forcing provisions in section 47 and the misuse of market power prohibition in section 46 should be amended to include a competition based 'effects' test rather than focussing solely on the purpose of the conduct. The government supported these recommendations.

The Harper Report further recommended that the prohibition on exclusive dealing in section 47 should be repealed and vertical restrictions (including third-line forcing) and associated refusals to supply be addressed by amendments to sections 45 and 46. The government simply noted this recommendation, stating instead that simplification of section 47 would be considered as part of its proposal to further simplify the competition law in Australia.

Lastly, the Harper Report recommended that the prohibition against resale price maintenance should be amended to include an exemption for such conduct between related bodies corporate. The government supported this recommendation.

As many of the recommendations are in areas of state and territory responsibility, the government will work with states and territories to secure their agreement to implement the competition law and policy reforms identified and supported as part of the Harper Report.

Misuse of market power

The most significant misuse of market case in recent years concerned Pfizer. In February 2014 the ACCC commenced proceedings against Pfizer for misuse of market power and exclusive dealing regarding the supply of atorvastatin to pharmacies. Atorvastatin is medication widely used to lower cholesterol and Pfizer's original brand, Lipitor, was protected by patent until May 2012. The ACCC alleged that Pfizer offered significant discounts and rebates on the sale of Lipitor, provided pharmacies bought a minimum volume of Pfizer's generic atorvastatin product.

In February 2015, the Federal Court dismissed the ACCC's case, finding that Pfizer's market power was no longer 'substantial' by the time the offers were made in January 2012. The ACCC also failed to establish that Pfizer had pursued its conduct for the proscribed purpose of preventing competitors from engaging in competitive conduct or for the purpose of substantially lessening competition. The ACCC appealed this decision and the hearing was held in November 2015. Judgment is pending.

Exclusive dealing

In February 2013, the ACCC commenced proceedings against Visa Inc and a number of its related entities for misuse of market power and exclusive dealing in relation to the use of dynamic currency conversion services at POS and ATMs in Australia. The matter resolved by way of settlement, with Visa admitting to having engaged in anticompetitive exclusive dealing. Visa's admission concerned the effect of its conduct on competition, not the purpose motivating that conduct. As part of the settlement, the parties agreed that all other claims be dismissed. The ACCC did not pursue its misuse of market power allegation, stating that 'one reason for this is the significant legal hurdle and complexity presented by proceedings under section 46 of the CCA.'

In September 2015, the Federal Court ordered Visa to pay a pecuniary penalty of A$18 million for engaging in conduct that had the likely effect of substantially lessening competition in the market in Australia for currency conversion services on the Visa Network.

More recently, in October 2015, the ACCC commenced proceedings against Little Company of Mary Health Care Ltd and Calvary Health Care Riverina Ltd for exclusive dealing in relation to the terms on which they acquired services from medical practitioners who had been granted accreditation to perform procedures at day surgery facilities operated by them. The terms gave the respondents the ability to refuse to grant accreditation to, or to revoke the accreditation of, a medical practitioner who owned or controlled an entity that was in competition with the services offered by the respondents.

The Federal Court found that, since the conduct could discourage practitioners from establishing a new private hospital or day surgery, the conduct had the likely effect of substantially lessening competition in the market in which day surgery services in Wagga Wagga NSW were supplied. The respondents admitted that their conduct resulted in a contravention of the exclusive dealing provisions in section 47 of the CCA.

Authorisations and notifications

As noted above in response to question 47, the ACCC can provide statutory immunity through the authorisation and notification process.

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

If the making of a contract contravenes the CCA owing to the inclusion of a particular provision, subject to an order under sections 51ADB or 87, that provision is void and will be severed from the contract in so far as that provision is severable (section 4L). The remainder of the contract is valid and enforceable.

Section 51ADB provides that on application by the ACCC, the court may order redress for loss or damage suffered by non-parties. Section 87 provides that a court can vary the contract to prevent or reduce the loss or damage of an applicant. So, for example, if a particular provision in the contract is rendered unenforceable by the anticompetitive prohibition in section 45 and cannot be severed, one of the parties to the contract is entitled to apply to the court for it to be varied under section 87.

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

The ACCC is an investigative body. It does not have the power to determine whether competition law has been breached or directly impose penalties. However, it may issue infringement notices and may institute Federal Court proceedings, as described below.

The ACCC can issue infringement notices where it has reasonable grounds to believe a person has contravened certain consumer protection provisions. If the recipient does not agree with the infringement notice, it is contestable before a court. However, if the recipient pays an infringement notice penalty, the ACCC cannot institute proceedings in relation to the alleged contravention. This, however, does not affect the rights of action of other parties.

The ACCC can institute proceedings in the Federal Court of Australia for an alleged contravention to seek declarations, injunctions, civil pecuniary penalties or compensation orders. The maximum pecuniary penalty payable for a contravention of the exclusive dealing, resale price maintenance, anticompetitive agreement or misuse of market power provisions in Part IV is the maximum of the following for each act or omission:

- for corporations – A$10 million, three times the total value of the benefit from the contravention, or if the total value of the benefit cannot be determined, 10 per cent of the annual turnover of the body corporate and its related bodies corporate in the 12 months prior to the conduct; and
- for individuals – A$500,000 (section 76(1)).

The court can also make orders disqualifying individuals from managing corporations (section 86E).

The ACCC has publicly stated that part of its role is to 'act as a form of deterrence' and that penalties 'should be substantial in order to adequately deter the misconduct'' (ACCC Chairman Rod Sims in the speech 'ACCC compliance and enforcement priorities for 2016' (23 February 2016)).

Investigative powers of the authority

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

Section 155 of the CCA grants the ACCC the power to obtain information, documents and conduct examinations for evidence where it 'has reason to believe a person is capable of furnishing information, documents or evidence relevant to a matter that constitutes or may constitute a contravention'. This is quite a broad-ranging power and is frequently employed by the ACCC.

Failure to comply with a section 155 notice is an offence. In past cases, this has resulted in sentences ranging from 200 hours of community service to six months' imprisonment.

The ACCC also has the power to require information and documents from a person in New Zealand to be produced where the alleged contravention relates to trans-Tasman markets.

Private enforcement

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

Private enforcement action is available under the CCA. Section 82 provides that a person who has suffered loss or damage because of a contravention by another person can recover damages compensating for the amount of their loss (from the contravening party or another party involved in the contravention). This enables parties who are affected by the contravention to claim losses from those involved by the contravention. It would also enable a party to the agreement to bring a claim against another party.

Section 80 also grants the power to apply for an injunction to the ACCC and any other person.

The ACCC also cooperates with a number of other agencies and countries to share information.

Other issues

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

No.

GILBERT +TOBIN

Charles Coorey **ccoorey@gtlaw.com.au**
Emma Ringland **eringland@gtlaw.com.au**
Elyse Newell **enewell@gtlaw.com.au**

Level 35, Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
www.gtlaw.com.au

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 anticompetitive 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 anticompetitive 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 antitrust law 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 and in which matters of jurisdiction were considered. 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 thatundertakings 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 not exceeding 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.

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. 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 context 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 market shares of the buyer, as well as the market positions of competing buyers, may be a relevant factor in the assessment of vertical restraints. 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.

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 (the 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 2016. 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'?

According to the FCA's new guidelines on resale price maintenance published in July 2014, resale price maintenance restrictions related to a promotion or 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 that 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 promotion or sales campaign (which it can also do with regard to regular resale prices in the absence of a specific sales campaign).

The Cartel Court has confirmed in its decisional practice that fixed or minimum resale prices that apply to a promotion or sales campaign would, in principle, infringe Austrian competition law.

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). In a recent decision, the Supreme Court (acting as Appellate Cartel Court) held that the harmfulness of a vertical price-fixing arrangement would be reinforced if it is combined with horizontal elements (in the case at hand, a leading Austrian retailer had required its suppliers to influence the resale prices of competing retailers).

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 guidelines addressing the efficiencies that can arguably arise out of resale price maintenance arrangements. In one decision issued in 2016, a supplier engaged in resale price maintenance arrangements argued, inter alia, that these arrangements would protect the value of its trademark and would generate efficiencies within the meaning of article 101(3) of the TFEU. The Cartel Court rejected the view that the protection of the value of the supplier's trademark would in itself qualify as an efficiency within the meaning of article 101(3) of the 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.

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' assessment of MFNs. In one decision of 2015, the Supreme Court mentioned that MFNs would infringe article 101(1) TFEU (without addressing this aspect in detail).

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

We are not aware of decisions or guidance by the Austrian competition authorities on vertical restraints that have specifically dealt with restrictions on the territory into which a buyer selling via the internet may resell contract products.

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

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.

31 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.

32 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. The Austrian Cartel Court has recently imposed fines on a number of suppliers of electronic devices that had required certain distributors to increase their resale prices in the online sales channel.

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

The 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.

34 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 that 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.

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

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). Austrian competition law is in line with EU competition law in this regard.

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

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.

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

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

38 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).

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

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 that 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).

40 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.

41 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.

42 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.

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

The 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.

44 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.

45 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.

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

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

47 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.

Update and trends

Recent developments

The Austrian competition authorities continued to have an enforcement focus on vertical price fixing arrangements in the retail sector in 2016. The Cartel Court imposed a fine of €10.2 million on a leading food retailer for its involvement in arrangements through which retailers coordinated their resale prices via suppliers (hub-and-spoke agreements). Furthermore, the Cartel Court imposed a fine of €1.7 million on a supplier of non-alcoholic beverages and a fine of €0.64 million on a supplier of electronic devices for resale price maintenance (the latter decision was already issued at the end of 2015 but only published in the course of 2016).

Anticipated developments

Amendments to the Cartel Act and the Competition Act are expected to enter into force in the first half of 2017. These amendments mainly concern procedural aspects and the transposition of Directive 2014/14/EU on antitrust damages actions into Austrian law (which can also be relevant for the area of vertical restraints even though actions for antitrust damages have so far typically been brought in relation to horizontal restraints). At the time of writing, the authors are not aware of important decisions expected in the near future that will specifically concern the area of vertical restraints.

Authority guidance

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

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

49 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

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

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 2016 (see question 19).

51 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.

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

The 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 anticompetitive behaviour.

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 anticompetitive conduct in general. Vertical agreements have not been the focus of the Austrian competition authorities' sanctions policy for quite some time. In recent 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). Two leading Austrian food retailers were imposed fines in the amount of €20.8 million and €40.2 million for resale price maintenance arrangements reinforced by horizontal elements (hub-and-spoke agreements).

Investigative powers of the authority

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

The 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

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

Private 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 anticompetitive 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 anticompetitive 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 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

55 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 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 54) and criminal investigations for anticompetitive 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 the 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 anticompetitive 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 anticompetitive 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 anticompetitive 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-competitive and anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive 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. More recently, in January 2016, CADE initiated an administrative proceeding against Empresa Brasileira de Correios e Telégrafos (Correios), a state-owned company that provides postal services in Brazil, for alleged sham litigation, naked restraint (by depriving competitors from providing services that Correios itself does not provide) and discrimination practices against competitors.

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 anticompetitive practices by CADE. Vertical restraints rules apply to agreements between companies of the same economic group whenever the agreements result in anticompetitive 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 anticompetitive 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 anticompetitive practices conduct performed through the abuse of intellectual property rights, and CADE has been consistently stating that the grant of IPRs may lead to anticompetitive 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 anticompetitive 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.

In a recent case, CADE sanctioned auto parts manufacturer SKF for setting a minimum sales price. Pursuant to the decision, resale price maintenance (RPM) will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be per se illegal. Elaborating further, the reporting commissioner Vinícius Marques de Carvalho, who later became CADE's president, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence – in fact, there is no instance in CADE's case law clearing an anticompetitive merger or dismissing an anticompetitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF's total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of the commissioners, departs from previous decisions issued by Brazilian authorities on RPM and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.

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 anticompetitive given the low market shares of the distributors).

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 anticompetitive 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 anticompetitive 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. 20/99 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 anticompetitive 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-competitive and anticompetitive 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-competitive and anticompetitive 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-competitive and anticompetitive effects.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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-competitive and anticompetitive 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-competitive and anticompetitive 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 interbrand competition is usually addressed by CADE in its decisions.

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

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-competitive and anticompetitive effects.

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

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 anticompetitive effects (eg, facilitate collusion), those should be balanced against possible benefits that could result from the conduct.

31 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-competitive and anticompetitive effects.

32 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. 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-competitive and anticompetitive effects. Please note that following complaints presented by Brazilian shopping comparison websites and Microsoft, the DG launched in 2013 three antitrust probes against Google relating to:

- Google's allegedly abusive behaviour in displaying its own specialist search services more favourably than competing services (Administrative Proceeding No. 08012.010483/2011-94);
- Google's use of content from competing specialist search services in its own offerings (Administrative Proceeding No. 08700.009082/2013-03); and
- the portability of online search advertising campaigns from Google's AdWords to the platforms of competitors (Administrative Proceeding No. 08700.005694/2013-19).

No relevant developments occurred in 2016 with regard to Administrative Proceedings No. 08012.010483/2011-94 and No. 08700.009082/2013-03, which were still pending decision as of 6 January 2017. In 25 April 2016, Microsoft Corporation – which presented the complaint that substantiated CADE's Administrative Proceeding No. 08700.005694/2013-19 – dropped the complaints against Google. CADE, however, decided to continue the investigation.

More recently, in September 2016, CADE opened another investigation against Google (Preparatory Proceeding No. 08700.003211/2016-94) for allegedly using its dominant position to divert search traffic from its competitors to its own products (ie, Google+). The investigation was triggered by a complaint submitted by the company Yelp.

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

CADE has not had the opportunity to review this issue, including 'platform bans', 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-competitive and anticompetitive effects.

34 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.

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

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-competitive and anticompetitive effects.

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

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-competitive and anticompetitive effects.

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

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-competitive and anticompetitive effects.

38 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-competitive and anticompetitive effects.

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

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.

40 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-competitive and anticompetitive effects.

41 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-competitive and anticompetitive effects.

42 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).

In June 2015, AmBev settled an investigation regarding its exclusivity practices and refrigeration policy with regards to distributors. Under AmBev's policy, AmBev would provide refrigerators to its distributors, which conversely would have to meet certain criteria, including not storing competitors' drinks in AmBev's refrigerators. Under the settlement, AmBev agreed to limit relationships of exclusivity to 8 per cent of the point of sales per region, as listed in the agreement. Moreover, in relation to such exclusive distributors, AmBev agreed to limit exclusivity to 10 per cent of their sales volume. AmBev also committed to alter its refrigeration policy. The settlement provides that AmBev shall not require distributors to sell only one brand of AmBev beers per refrigerator or to demand exclusivity in exchange for providing refrigerators.

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

The 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-competitive

and anticompetitive 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.

44 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-competitive and anticompetitive effects.

45 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-competitive and anticompetitive effects.

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

No.

Notifying agreements

47 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 issued secondary legislation on this subject. CADE Resolution No. 10, issued on 29 October 2014, provided that, among others, any associative agreement with a term of over two years and in which there was 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. CADE has recently changed its secondary legislation on this subject with the purpose of increasing legal certainty. CADE Resolution No. 17, issued on 18 October 2016, which revoked CADE Resolution No. 10, provides that only agreements with a term of over two years in which the companies are competitors in the market involved in the agreement should be previously notified to CADE, as long as the agreement provides for the sharing of profits or losses between the parties. Therefore, CADE Resolution No. 17 excluded vertical agreements as a type of associative agreement.

Authority guidance

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

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. CADE's Resolution No. 12, issued on 11 March 2015, establishes specific rules for the consultation procedure.

Complaints procedure for private parties

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

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

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

In 2016 CADE's tribunal adjudicated 24 anticompetitive conduct cases. Out of the 13 cases where the defendants were found guilty of an infringement, fewer than five were related to vertical restraints. Moreover, there are several pending investigations for alleged abuse of dominance affecting Brazil, including allegations of sham litigation in the pharmaceutical and auto parts markets.

51 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 anticompetitive effects, CADE might request only the modification of some clauses.

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

The 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 anticompetitive behaviour may be sanctioned

Update and trends

Regarding vertical restraints, the most significant decision in the past 12 months is the *Gemini* case (Administrative Proceeding No. 08012.011881/2007-41). On 7 December 2016, three years after opening a formal investigation, CADE convicted Petrobras, White Martins and GNL for discriminatory conduct. CADE understood that Petrobras charged lower prices to Gemini – a consortium formed by Petrobras, White Martins and GNL – for the supply of natural gas in comparison with other companies. CADE found that the defendants failed to demonstrate a legitimate reason for the supply of natural gas to Gemini at prices lower than were charged to the rest of the market. Petrobras was fined 15.2 million reais, White Martins 6.2 million reais and GNL 96,680 reais.

Also in 2016, CADE fined three port operators for imposing abusive port storage fees (Administrative Proceedings No. 08012.003824/2002-84 and 08012.005422/2003-03). Tecon Salvador and Intermarítima Terminais were fined 3.7 million reais and 2.1 million reais respectively for imposing extra fees to unload containers in the Salvador port that were destined for competing and non-integrated custom warehouses. Company Tecon Rio Grande was also fined in 4.7 million reais for charging fees to store in-transit containers for fewer than 48 hours in the Rio Grande port. According to CADE, these extra fees – in addition to the fees already due for handling services – had the potential of creating anticompetitive effects and increase the costs of competing custom warehouses.

Anticipated developments

An important development at the end of 2016 that will have an impact in the near future was the issuance of a new secondary legislation by CADE related to the review of associative agreements. CADE Resolution No. 17, issued on 18 October 2016, provides that any agreement with a term of over two years in which the companies are competitors in the market involved in the agreement should be previously notified to CADE, as long as the agreement provides for the sharing of profits or losses between the parties. With this new legislation, which is simpler than the previous one and excludes vertical agreements as a type of associative agreement, CADE expects to increase legal certainty and reduce the number of transactions notified, allowing the antitrust authority to focus on transactions that could be potentially more problematic.

Also with regard to merger review involving vertical integration, CADE has been paying close attention to risks of market foreclosure brought by transactions submitted to the authority. CADE has been addressing potential anticompetitive effects in these cases basically through behavioural remedies and did not block any transaction owing to vertical concerns. Relevant cases include the joint venture between Itaú Unibanco and Mastercard for the creation of a new credit and debit card brand (Merger No. 08700.009363/2015-10) and the creation of a credit bureau formed by banks Bradesco, Banco do Brasil, Santander, Caixa Econômica Federal and Itaú Unibanco (Merger No. 08700.002792/2016-47). Behavioural remedies included complex monitoring procedures and there is a certain level of uncertainty regarding their effectiveness. The results that will be achieved in the cases cleared based on these remedies may lead CADE to reassess its approach in the near future.

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 anticompetitive 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 anticompetitive 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) (Administrative Proceeding No. 08012.003805/2004-10). In 2009, AmBev challenged CADE's decision before the judicial courts. The lawsuit was settled in 2015 with the execution of a judicial agreement between AmBev and CADE, through which AmBev commited to end its To Contigo programme and pay a sum of 229.1 million reais.

Investigative powers of the authority

53 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

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

Pursuant to article 47 of the Antitrust Law, victims of anticompetitive 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 opposing conclusions (administrative and judicial) regarding the same facts.

Parties should expect it to take at least five 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

55 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
Brazil
Tel: +55 11 3555 5000
Fax: +55 11 3555 5048

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

www.levysalomao.com.br

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.

Also, on 7 April 2015, SAIC issued the Rules on Prohibition of Restriction or Elimination of Competition Through Abuse of Intellectual Property Rights, which became effective on 1 August 2015. These Rules will apply to IPR issues in vertical restraints.

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 anticompetitive 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, NDRC and SAIC are responsible for enforcing the prohibitions on anticompetitive activities, including vertical restraints. NDRC is in charge of investigating and sanctioning anticompetitive activities related to pricing. SAIC has

jurisdiction over anticompetitive 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 and 2015, the Antimonopoly Law was applied extraterritorially in at least three 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. On 23 March 2016, NDRC published for public comment a draft of the Antimonopoly Guidance in the Automobile Sector by the Antimonopoly Commission of the State Council. The comment period ended on 12 April 2016. NDRC stated that it had drafted the Guidance in accordance with the work plan of the Antimonopoly Commission of the State Council, and the Guidance also stated that it would be issued in the name of the Antimonopoly Commission.

Highlights of the Guidance are as follows: (i) the Guidance describes several instances in which companies may seek exemption from the prohibition on resale price maintenance; (ii) the Guidance states that 'Recommended Prices', 'Guidance Prices' and 'Maximum Prices' might constitute resale price maintenance if they have the effect of fixing prices or setting minimum prices; (iii) territorial restrictions imposed by companies without 'significant market power' are presumed to be exempted; (iv) four particular types of territorial restrictions, however, cannot be presumed to be exempted and may be exempted only on a case-by-case basis, including restrictions on passive sales.

In addition, some regulations enacted before the inception of the Antimonopoly Law have addressed vertical restraint issues in specific industry sectors. These regulations have very rarely been enforced, if at all, and it appears very unlikely that they will be enforced following the implementation of the Antimonopoly Law.

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.

In addition, NDRC is drafting the Guidance on Procedures for Exemption of Monopoly Agreements. On July 29, 2015, NDRC held a kick-off meeting for drafting of the Guidance, but did not disclose details about its content.

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.

As stated earlier, SAIC issued the Rules on Prohibition of Restriction or Elimination of Competition Through Abuse of Intellectual Property Rights in 2015. The Rules apply to the scenarios of both monopoly agreements and abuse of market dominance, including tying and bundling, exclusive grant-back of technology improvement, prohibition of challenging the validity of the IPR, etc. These issues are not unique to, but 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 anticompetitive.

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 yuan. 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 anticompetitive 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 resale 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 anticompetitive 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.

Also, in a number of enforcement cases in 2016, NDRC started to introduce the concept of 'market power' into its anticompetitive effect analysis. For example, the penalty decision in the *Medtronic* case stated that after being investigated by NDRC for resale price maintenance violations, Medtronic took a series of 'voluntary rectification measures', one of which was removal of exclusivity requirements for dealers with respect to products for which Medtronic had 'market power'. This seems to imply that it could be problematic if companies engaged in non-pricing vertical restraints for products for which they had market power. NDRC has not explained the criteria to which it will have regard when determining whether a company has market power, but very likely the most important factor is market share. NDRC's practices in this regard are still evolving, and should be closely watched.

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 setting a 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 (albeit 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 resale price maintenance and ordered it to pay damages (530,000 yuan) to the distributor that filed the suit. The appellate court upheld the first-instance court's view that resale price maintenance is not a per se violation of law. It also laid out four factors that need be assessed when determining whether resale price maintenance practices have anticompetition 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 resale price maintenance activities, and whether the motivation is pro or anticompetitive; and
- what are the effects of the resale price maintenance activities on competition, and whether the effects are pro or anticompetitive.

In 2016, more court cases have demonstrated that the court system in China employs a rule of reason approach, not a per se illegal approach. On 30 August 2016, the Guangdong Intellectual Property Court ruled, in *Gree*, that resale price maintenance obligations do not violate antitrust law if they have no intention and effect of eliminating competition. In this case, upstream distributors of Gree air-conditioners imposed clear, undisputed resale price maintenance obligations on downstream distributors. The court decided that it should apply the Rule of Reason, instead of the per se illegal doctrine, and on this basis decided that the resale price maintenance obligations did not violate the antitrust law, because: (i) Gree air conditioners did not have market dominance, and therefore the obligations had not restricted consumers from choosing other brands; (ii) the obligations did not seem to impact intra-brand competition; and (iii) even if the resale price maintenance obligations had hurt price competition, distributors could still compete in other ways, such as advertisements, promotion and after-sales services.

However, NDRC has continued to employ a per se illegal approach to resale price maintenance issues. 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 yuan and 202 million yuan 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 yuan. 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 yuan on FAW-Volkswagen and 29.96 million yuan on eight of its distributors.

In 2016, NDRC, including its local offices, issued several penalty decisions in relation to resale price maintenance, in which the agency continued with its per se illegal approach. For example, in the *Medtronic* case, NDRC found that Medtronic's resale price maintenance activities violated the Antimonopoly Law, and imposed a fine of 118.52 million yuan. In the *Smith & Nephew* case, Shanghai DRC found Smith & Nephew's resale price maintenance policies violated the Antimonopoly Law, and imposed a fine of around 742 thousand yuan.

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. However, the draft Antimonopoly Guidance in the Automobile Sector provided for several examples of exemptions, which may be argued on a case-by-case basis, to the per se illegal classification of resale price maintenance violations (one being promotional periods for new-energy cars). This seems to be an indirect recognition of the legitimacy of resale price maintenance policies after the launch of a new product.

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' were hospitals, not geographical areas) as evidence proving J&J's 'strong market position', but did not find such territorial sales restrictions to be a per se violation of 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 territorial restrictions in their decisions on resale price maintenance. However, the authorities seemed to imply that these territorial restrictions were a means of implementing or strengthening 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 – or lack thereof – in great detail. The appellate court determined that the agreements 'do not have obvious effects of promoting competition', because the defendant had 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
- it needed to use the resale price maintenance agreements to promote a new brand or a new product in the relevant market, because the products at issue had been sold in China for over 15 years.

In the draft Antimonopoly Guidance in the Automobile Sector, NDRC stated that territorial restrictions and customer restrictions imposed by companies without 'significant market power' should be presumed to be exempted from the Antimonopoly Law's prohibitions, because these restrictions 'typically can improve the quality of distribution services, increase distribution efficiency, and strengthen the business efficiency and competitiveness of small-and-medium-sized dealers'. However, 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 to subsequently 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, including the *Medtronic* case in 2016, 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

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.

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

This type of restriction might constitute abuse of market dominance. 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.

However, SAIC has not made any penalty decision on this issue.

In the *Medtronic* case, Medtronic took a series of 'voluntary rectification measures', one of which was removal of restrictions on platform dealers' sales of products to end users. However, NDRC did not state that this type of restriction was a violation of the Antimonopoly Law, and what Medtronic committed to appears to be purely voluntary rather than as a result of a specific violation.

31 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.

32 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.

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

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

34 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.

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

Not applicable – see question 34.

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

Not applicable – see question 34.

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

Not applicable – see question 34.

38 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 34.

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

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

40 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.

41 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.

42 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.

In the *Medtronic* case, NDRC stated that one problematic practice of Medtronic was that it prohibited dealers from distributing competing products, and this practice 'further expanded the restriction on competition'. As a result, Medtronic voluntarily agreed to remove exclusivity requirements for dealers with respect to products for which Medtronic had 'market power'. However, NDRC did not state that such restriction itself was a violation of the Antimonopoly Law.

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

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

44 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.

45 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.

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

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

Notifying agreements

47 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.

Specifically, Chongqing AIC issued a penalty decision in 2015 in an abuse of market dominance case (*Allopurinol API*), and in the penalty decision mentioned that the investigation started with a voluntary enquiry by the penalised company on the antirust compliance status of its practices of refusing to sell Allopurinol API to its customers. Therefore, despite the absence of formal procedures, in practice there is a channel for notification to agencies on vertical restraints.

Authority guidance

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

On 12 May 2016, NDRC published a draft Guideline on General Conditions and Procedures for Amnesty on Monopoly Agreements. Notably, the Guideline provides that under certain conditions NDRC may provide consultancy concerning the amnesty on monopoly agreements. However, this guideline is still a draft document and is not finalised yet. Except this draft guideline, neither the NDRC, the SAIC nor the Chinese courts have disclosed any information that indicates such a possibility.

Complaints procedure for private parties

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

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

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

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, 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 2015, NDRC imposed fines on spirits manufacturers, milk powder manufacturers and car companies in relation to alleged resale price maintenance (see question 19). In 2016, NDRC and its local

Update and trends

Recent developments

The most significant development is the continuing divergence between NDRC and the court system with regards to the standards that need to be applied to resale price maintenance. NDRC has continued to use a per se illegal approach, and has expressed a view in its penalty decisions that resale price maintenance automatically hurts competition and are strictly prohibited by the Antimonopoly Law. The courts, however, have employed a rule-of-reason approach, and analysed whether resale price maintenance policies actually have any anticompetition effects given the specific circumstances of the products and the market.

Another significant development is that NDRC has started to introduce the concept of 'market power' into vertical restraint analyses. In the draft Antimonopoly Guidance in the Automobile Sector, NDRC proposed that certain vertical restraints, mostly territorial restrictions, imposed by companies without 'significant market power' are presumed to be exempted, which seems to imply that such vertical restraints imposed by companies with significant market power are problematic and may be a violation of the Anti-monopoly Law. In the *Medtronic* case, NDRC described that Medtronic voluntarily agreed to remove certain vertical restraints for products for which it had 'market power'. There has been a concern that NDRC and SAIC may deal with 'significant market power' in a similar manner to 'market dominance', and, by doing so, lower the standard for abuse of market dominance.

Anticipated developments

NDRC and SAIC have been very active in 2015 and 2016 in issuing draft Guidelines on key antitrust enforcement topics. These initiatives have reflected their increasingly strong interest in antitrust enforcements and have also reflected the agencies' efforts to increase transparency and certainty. All these guidelines are still drafts, but some of them are expected to be finalised and formally issued in 2017, which would have a significant impact on issues in the area of vertical restraints.

agencies have been very active enforcing vertical restraint cases, and have made final penalty decisions in the *allupurinol* case (by NDRC), the estazolam *API* case (by NDRC), the *Medtronic* case (by NDRC), the *Smith & Nephew* case (by Shangahi DRC), the *General Motors* case (by Shanghai DRC), the *Haier* case (by Shanghai DRC). According to NDRC, it has several other cases that are near finalisation.

51 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.

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

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 yuan 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

53 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.

Private enforcement

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

Non-parties to a monopolistic agreement can bring damages claims if they have suffered losses due to an anticompetitive 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

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

Not applicable.

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

Colombia

Ximena Zuleta-Londoño, Alberto Zuleta-Londoño and María Paula Macías

Dentons 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 Superintendency 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 antitrust authorities 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 anticompetitive 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 currently 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, or 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 12. 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 – that 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.

In a most recent development, by way of Resolution 26129 of 2015, the SIC held that exclusive-dealing arrangements could be anticompetitive when their sole intent was to limit the access of potential competitors to the market and not the achievement of legitimate efficiencies within it. Through this resolution, the SIC filed charges against an automobile manufacturer company that prevented its dealers as well as its dealers' shareholders from incorporating companies or opening retail establishments through which the manufacturer's competitors could sell their cars to final consumers. SIC limited the illegality charge to the agreement's purpose and did not study its impact on the market.

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 intrabrand restrictions could have pro-competitive effects or, in other words, could stimulate interbrand 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 as 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 interbrand 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.

In 2015 a new decision with regard to RPM in Resolution 16562 was seen, in which the SIC reiterated that it would use an effects-based approach in establishing the illegality of this particular type of conduct, however, all but saying that there is a presumption of illegality with regard to it. The SIC said that RPM is generally inadmissible, but if an investigative party showed efficiencies that justified the demand of a particular resale price from its distributors, the conduct would be legally valid.

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 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 the SIC does not necessarily establish a direct relationship between market share and market power, the former is usually considered, at least, evidence that the latter exists (in the event of high market shares). It follows that a restriction imposed by a company with a 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 anticompetitive 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 question 16 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.

There is also a block exemption established in article 1 of the Law 155 of 1959, applicable to any restrictive agreements (including vertical restraints), that means 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, see 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 anticompetitive 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 and financing. 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 interbrand 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 to subsequently 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

There have been no decisions in this regard in Colombia.

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

There is no specific rule in this regard. We believe it should be reviewed with the same antitrust logic as vertical territorial allocations.

31 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.

32 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.

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

No.

34 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.

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

We do not think that the type of product would influence the legality of any agreement.

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

There is no rule in this regard.

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

No.

38 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.

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

No.

40 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.

41 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.

42 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.

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

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.

44 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.

45 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.

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

No.

Notifying agreements

47 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

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

No.

Complaints procedure for private parties

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

Yes. 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

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

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 SIC enforcement was directed at vertical agreements. This percentage has not increased significantly in the subsequent seven years.

51 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.

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

The 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

53 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.

Private enforcement

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

Private 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$22 million (amount in US$ varies according to the exchange rate) and the order to cease 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

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

No.

大成 DENTONS CARDENAS &CARDENAS

Ximena Zuleta-Londoño **ximena.zuleta@dentons.com**
Alberto Zuleta-Londoño **alberto.zuleta@dentons.com**
María Paula Macías **maria.macias@dentons.com**

Cra 7 No. 71-52 Torre B, Piso 9
Bogotá
Colombia

Tel: +57 1 313 7800
Fax: +57 1 312 2420
dentons.cardenas-cardenas.com

European Union

Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy
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 anticompetitive 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 (the Commission) has published two documents of particular relevance to the assessment of vertical restraints:

- Commission Regulation (EU) No. 330/2010 of 20 April 2010, on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices (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 *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?

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 anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Commission's Directorate General for Competition is the main administrative body responsible for applying article 101 at an EU level. However, national courts and national competition authorities in each of the European Union's 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, as confirmed by the Court of Justice of the European Union (CJEU) in *Expedia*.

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 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.*

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

Parent and 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 anticompetitive practices in the supply of e-books by accepting commitments from Apple and five international publishers.

The commitments accepted by the Commission included that Apple and the publishers would terminate e-book agency agreements that provided for publishers – as principals – to determine consumer prices (see questions 19 to 22) and that 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 32, 33 and 36).

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

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, among others. Setting maximum resale prices or 'recommended' resale prices from which the distributor is permitted to deviate without penalty may be permissible (provided these do not amount to fixed or minimum selling prices as a result of pressures from, or the offer of incentives by, the seller). 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.

Further guidance may be expected to come in 2017 from judgments of the CJEU in two Spanish cases and one Bulgarian case, all of which concern the setting of minimum compensation/remuneration in the legal services sector.

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

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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 interbrand competition. In January 2016 the Commission emphasised in *Aquatrend* that there is no presumption that exclusive distribution agreements are caught by the prohibition in article 101(1).

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. In July 2016, the Commission accepted commitments from one of the US film studios

under investigation, Paramount, not to prohibit passive sales by any European pay-television company outside its licensed territory, nor to afford absolute territorial protection in such territory, for a period of five years. In its decision the Commission concluded that the contested clauses in Paramount's licensing agreements had an anticompetitive object because they were designed to prohibit or to limit cross-border passive sales and to grant absolute territorial exclusivity in relation to Paramount content. The Commission's investigation continues in respect of several other major US film studios and the largest European pay-television companies, including Canal Plus, which in December 2016 lodged an application with the General Court for annulment of the Commission's decision to accept Paramount's commitments.

Also, in June 2016 the Commission carried out unannounced inspections at the premises of several companies active in the supply and transport of natural gas in Romania, as part of an investigation into practices alleged to be aimed at hindering natural gas exports from Romania to other EU member states.

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

Restraints preventing a buyer from selling contract products from one EU member state into another can be among the most serious infringements of article 101. Such agreements face heightened scrutiny by the Commission because they tend to restore the divisions between national markets that the EU aims to abolish. In relation to content, the CJEU considered in *Karen Murphy v Media Protection Services* (2011) whether distribution agreements between broadcasters licensing content from the Football Association Premier League infringed article 101. The agreements in question required broadcasters to encrypt their signals in order to prohibit potential customers outside the broadcasters' respective territories from accessing the matches. The CJEU held that agreements that are designed to prohibit or limit the cross-border provision of services are deemed to have as their object the restriction of competition, unless other circumstances justify the finding that such an agreement is not liable to impair competition.

However, as discussed in response to question 32, a supplier may by agreement restrict a buyer from making 'active sales' into a territory allocated exclusively to another buyer or which the supplier has reserved exclusively to itself. The Commission's Vertical Guidelines identify as examples of active selling in an online context both territory-based website banners and advertisements within search engines displayed specifically to users in a particular territory. Restrictions on these activities are permissible under the Vertical Block Exemption, subject to the rule that similar restrictions apply to equivalent forms of active selling of the same goods or services off-line by that distributor (Pierre Fabre Dermo-Cosmétique).

If a vertical restraint amounts to a restriction on passive sales via the internet, however, it will be deemed a hard-core restriction (see question 15).

As part of its current Digital Agenda for Europe, the Commission has identified better online access to goods and services as one of the three pillars of its Digital Single Market strategy. In particular, the Commission has described as 'unjustifiable' the practice of geo-blocking within the EU (ie, prohibiting customers from certain territories from accessing goods or services in other territories or redirecting them to a local supplier with different prices), and its increased focus in this area has been reflected in enforcement. In March 2015 the Commission confirmed that it was investigating geo-blocking of certain video games sold online for personal computers. Then in July 2015 the Commission issued a statement of objections to several major US film studios and one of the largest European pay-TV companies on the basis that the licensing agreements between them hinder the provision of pay-TV services across EU borders, both via satellite and online. In July 2016 the Commission accepted commitments to end the investigation in respect of one of the major US film studios, although in December 2016 one of the European pay-television companies under investigation lodged an application with the General Court to annul the Commission's decision (see question 28).

In May 2016 the Commission submitted a proposal to the Council and European Parliament to prohibit geo-blocking and certain other practices which differentiate the price or the terms of goods or services supplied, on the basis of the nationality, or of the place of residence or establishment, of a customer. If approved, the proposal is expected to enter into force in 2017, with additional provisions on electronically provided services that do not concern copyright-protected content (eg, cloud services, data services, and web-hosting) becoming effective from July 2018.

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

Customer restrictions give rise to issues similar to those arising in 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 directly to end users may also fall within the Vertical Block Exemption's safe harbour.

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

Fourth, distributors appointed within a selective distribution system can be restricted from selling to unauthorised distributors (see question 36).

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

31 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.

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

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

The Vertical Guidelines provide examples of the types of internet-related restrictions that will be deemed to amount to a 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 34 to 39), 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 that dissuades authorised dealers from using the internet by imposing criteria for online sales that are not overall equivalent to criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales, but they should pursue the same objectives and should achieve comparable results. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution methods.

Although there has been comparatively little recent enforcement activity by the European Commission in relation to internet sales restrictions, a number of cases merit discussion. In its October 2011 judgment in *Pierre-Fabre Dermo-Cosmétique,* the CJEU ruled that a contractual clause that amounted to an absolute ban on buyers in a selective distribution network from selling the contract products to end users 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'. The Commission undertook further unannounced inspections on 10 March 2015.

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

The 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 32). The Commission's investigation of Amazon's e-books business, opened in June 2015, is also likely to address differential treatment of online sales channels. That investigation focuses on Amazon's contractual rights to be informed of different or more favourable terms offered by publishers to competing online platforms and to be offered terms at least as favourable. In January 2017 the Commission opened a consultation on commitments proposed by Amazon to end the contested practices. If accepted, a decision can be expected during the second quarter of 2017.

Equally, in September 2015, the European Technology & Travel Services Association, which represents online travel agents, filed a complaint with the Commission, alleging that certain airlines' practice of surcharging for tickets purchased through online platforms other than their own was anticompetitive. In April 2016 the Commission sent requests for information to several air carriers, travel agents, online reservation websites and global distributors.

With regard to outright platform bans, the CJEU, pursuant to German reference for a preliminary ruling in April 2016, has been asked to consider the lawfulness of a prohibition on members of a selective distribution system from engaging third-party undertakings discernible to the public to handle their internet sales and, if unlawful, whether such prohibition constitutes a restriction of competition by object. A ruling in the case – *Coty* – is expected in late 2017.

In its preliminary report in the e-commerce sector inquiry in September 2016, the Commission stated that its preliminary findings did not show that absolute marketplace bans generally amounted to a de facto prohibition to sell online, irrespective of the markets concerned. In its view, marketplace bans could not be equated to a prohibition to sell via the internet, nor did such clauses constitute hard-core restrictions for the purposes of the Vertical Block Exemption.

34 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 aftersales 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.' A narrower question included in the German reference for a preliminary ruling in *Coty* in April 2016 (see question 33) asked the CJEU whether the luxury image of a brand can justify imposing qualitative criteria through a selective distribution system, irrespective of whether, in a given case, a manufacturer's legitimate quality standards might be contravened by sales through online platforms. A preliminary ruling in the case is expected in late 2017.

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

According to the CJEU's 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, 'experience' products (whose qualities are difficult to judge before purchase), or 'credence' products, whose qualities are difficult to judge even after consumption. The Commission also recognised the need for selective distribution in relation to newspapers in *Binon & Cie v Agence et Messageries de la Presse*, as newspapers can only be sold during a limited time period.

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

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

The 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 that dissuades authorised dealers from using the internet by imposing criteria for online sales that are not equivalent to criteria imposed for offline sales. Criteria imposed for online sales need not be identical to those imposed for offline sales but they should pursue the same objectives and should achieve comparable results. Further, any differences between the criteria for online and offline sales must be justified by the different nature of the two distribution methods. See also the cases discussed in question 32.

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

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.

38 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.

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

The 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.

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as 'exclusive purchasing' will only 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 34), 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.

Further guidance may be expected from a judgment of the CJEU in early 2018, pursuant to a Spanish reference for a preliminary ruling in November 2016, in respect of certain long-term supply agreements entered into by Repsol.

41 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.

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

An obligation on the buyer not to manufacture or stock products competing with the contract products (non-compete obligation) may 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 interbrand 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.

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

The 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 42). 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; and
- incentives or obligations agreed between the supplier and the buyer that 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).

44 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 in the response to question 28.

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

As noted in question 44, 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).

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

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

The Vertical Guidelines also deal with a supplier-specific restriction termed 'exclusive supply', which covers the situation in which a supplier agrees to supply only to one buyer in the entire European Union. The main anticompetitive effect of such arrangements is the potential

Update and trends

Recent developments
Over the course of 2016, the Commission issued a commitments decision in respect of one of the Hollywood studios in the *Pay-TV* case, but continued its investigation of several others, one of which is challenging the Commission's commitments decision before the General Court. The Commission's characterisation of the contested clauses as restrictions of competition by object may be among points of dispute in the forthcoming proceedings in the case. Like the General Court's 2016 judgment in *Lundbeck*, disputes over the intersection of intellectual property rights and competition law obligations seem poised to continue in 2017. With regard to MFN clauses, the Commission expanded the scope of an investigation into e-books that concerns Amazon's contractual rights to be informed of different or more favourable terms offered by publishers to competing online platforms and to be offered terms at least as favourable. In January 2017 the Commission opened a consultation on commitments proposed by Amazon to end the contested practices. The Commission also began assessing the effect of commitments by online travel agents to remove 'rate parity' clauses from their agreements with hotels, through a study in partnership with the national competition authorities of 10 EU member states that were principally responsible for a recent series of enforcement actions in the sector.

Anticipated developments
The important developments in this area are likely to come out of the Digital Single Market strategy and the e-Commerce Sector Inquiry, which covered e-commerce in consumer goods and digital content. In May 2016 the Commission submitted a proposal to the Council and European Parliament which, if approved, will prohibit geo-blocking and certain related practices which the Commission views as restrictive of cross-border trade in the European Union's single market. Consultations on a preliminary report in the e-Commerce Sector Inquiry, published in September 2016, closed in November 2016, and the final report is expected for delivery in the first quarter of 2017. Based on responses from nearly 1,800 stakeholders in the EU and a review of around 8,000 distribution agreements which they submitted, the preliminary report found that the use of selective distribution networks has expanded substantially in the past 10 years, that more than two fifths of respondent retailers are subject to some form of price restriction or recommendation, and that nearly a fifth are prohibited from selling through online platforms. As with previous sector inquiries, the findings of the e-Commerce Sector Inquiry likely presage increased enforcement activity by the Commission, which has stated that its report should be a trigger for companies to review their current distribution agreements.

exclusion of competing buyers, rather than competing suppliers. As such, the Vertical Guidelines explain that it is the buyer's market share that is most important in the assessment of such restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are below 30 per cent, and the exclusive supply agreements are shorter than five years, such restrictions will benefit from the safe harbour created by the Vertical Block Exemption.

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

Notifying agreements

47 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 48), 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

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

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

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

Complaints procedure for private parties

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

Yes. 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

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

In the 16 years from 1 January 2001 to 1 January 2017, 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 2013, the Commission has opened (and not yet closed) formal investigations into consumer electronics and domestic appliances, cross-border aspects of pay-TV, and Amazon's sale of e-books, all of which appeared to relate, in part, to vertical restraints. In January 2017 the Commission opened a consultation on commitments proposed by Amazon in respect of the investigation into the sale of e-books. If accepted, a decision can be expected during the second quarter of 2017.

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

51 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.

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

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 2016, 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 aftersales service provision to the sale of new cars; and
- in April 2003 the Commission approved supply agreements between Interbrew and pubs, restaurants and hotels located in Belgium, on the condition that Interbrew amended the agreements to offer its brewer competitors access to the outlets in question.

While the Commission still actively enforces its rules on vertical restraints, especially in the motor vehicle sector, it is fair to suggest that market liberalisation, the reduction of anticompetitive state aid and the fight against cartels have been higher enforcement priorities in recent years. Since suppliers often organise distribution at a national level within individual member states, there has been more frequent enforcement of national and EU antitrust rules on distribution by member state-level competition authorities than by the Commission. However, in some individual cases the Commission may consider that it is better placed to enforce the EU rules on vertical restraints than individual, member state-level competition authorities.

Investigative powers of the authority

53 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

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

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 EU Damages Directive, which EU member states were required to transpose into national law by 27 December 2016, goes some way towards harmonising rules on limitation periods, disclosure, and the 'passing on' defence, although there is no EU-wide scheme for collective actions.

The Commission is required under the EU Damages Directive to publish guidelines for national courts on passing-on of overcharges to

SIDLEY

Stephen Kinsella OBE **skinsella@sidley.com**
Patrick Harrison **pharrison@sidley.com**
Rosanna Connolly **rconnolly@sidley.com**
Kyle Le Croy **klecroy@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

indirect purchasers, although at the date for transposition such guidelines had not been published. The Commission is also reassessing its 2013 recommendation on introducing collective redress mechanisms in the EU member states and has indicated that it may propose further measures by July 2017.

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

Other issues

55 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.

France

Marco Plankensteiner and Elise Créquer
Kramer Levin

Antitrust law

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

Rules applicable to vertical restraints are set out under articles L420-1 ff of the French Commercial Code. EU antitrust law (ie, article 101 of the Treaty on the Functioning of the European Union) may also be applicable to vertical restraints if they restrict competition within the common market and may affect trade between the EU member states.

Under French law, article L420-1 of the French Commercial Code prohibits concerted practices, contracts, explicit or tacit agreements or coalitions between independent companies having as their object or effect the prevention, restriction or distortion of competition on the market, including in vertical agreements. Vertical restrictions of competition may benefit from an individual exemption if the conditions set out under article L420-4 of the French Commercial Code are met. Article L420-2, paragraph 2 of the French Commercial Code prohibits abuse of economic dominance if it is likely to affect competition, and may also be applicable to vertical agreements if a company abuses the situation of economic dependency of a customer or supplier.

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 vertical restraints. As under EU law, vertical restraints caught by French antitrust law are typically direct or indirect price restrictions, such as resale price maintenance and tying, restrictions on territory and customers, such as exclusive customer or territory allocation, and restrictions on sourcing, such as non-compete obligations and single branding. Direct or indirect restrictions on exports or on parallel imports are sanctioned if they affect the French market. Selective distribution, exclusive distribution and franchise are also monitored.

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?

While the first objective is the protection of economic efficiency and free competition, the assessment of vertical restraints will take into account the effect of practices on economic welfare and the wellbeing of the consumer. Article L420-4 I 2 of the French Commercial Code, which exempts certain agreements, explicitly mentions the creation or preservation of employment as a criterion to assess the positive effects of a restrictive practice. The protection of small and medium-sized companies or of weaker parties in their relations with companies with strong market power is also a driving consideration.

Responsible authorities

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

The French Competition Authority, the Autorité de la concurrence (the Competition Authority), is empowered under articles L461-1 ff of the French Commercial Code to enforce the prohibition of anticompetitive vertical restraints.

Under article L464-9 of the French Commercial Code, if the practices are not already examined by the Competition Authority, the Minister of the Economy has jurisdiction over practices affecting a local market, provided that they do not fall within the scope of EU antitrust law and that the turnover of each of the companies in France does not exceed €50 million and their aggregate turnover does not exceed €200 million. In such cases, the Minister of the Economy has injunction and settlement powers that are exercised by the regional directorates for companies, competition, consumer protection, labour and employment (DIRECCTE) under coordination by the Directorate-General For Competition, Consumer Protection And Repression Of Fraud (DGCCRF). If the companies concerned do not comply with the injunction or the obligations set forth in the settlement, the case is referred to the Competition Authority.

Article L420-7 of the French Commercial Code provides that specialised courts of first instance (eight commercial courts and eight civil courts) and the Paris Court of Appeal have exclusive jurisdiction in disputes relating to the application of antitrust laws (private enforcement).

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 French antitrust law when they are likely to affect competition on the French market, according to the 'territorial effect' theory. Article L420-1 of the French Commercial Code covers anticompetitive practices carried out 'even through a company of a group established outside France, directly or indirectly'. Restrictions on exports by companies established in France are not subject to French antitrust law if the effects of the practice occur outside of France (Decision No. 99-D-52) unless there are indirect national effects. The Competition Authority has only intervened in cases where at least one undertaking concerned has had an establishment in France.

Agreements concluded by public entities

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

Antitrust laws fully apply to public entities when they are involved in production, distribution or services activities as set out by article L410-1 of the French Commercial Code. However, the administrative judge will have jurisdiction rather than the Competition Authority if the public entity is exercising a public service mission through acts of public

authority. A court decision clarified that the Competition Authority has jurisdiction over anticompetitive practices conducted by a public entity in the context of public procurement (T confl, 4 May 2009, No. C3714).

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 rules generally assessing vertical restraints in specific sectors. However, specific regulations may apply to address identified restrictions.

Articles L5125-33 ff and R5125-70 ff of the French Public Health Code set forth specific provisions concerning the online sale of drugs. Taking into account the Competition Authority's Opinion No. 16-A-09, two orders were adopted on 28 November 2016 setting out Good Practices for the sale of drugs and Technical Rules applicable to online sales sites.

In the hotel sector, articles L311-5-1 ff of the French Tourism Code regulating contractual relations between hotels and online booking platforms provide for full pricing freedom for hotels by prohibiting any form of price parity clauses.

In the retail sector, article L341-2 of the French Commercial Code prohibits post-contractual non-compete clauses, except if they relate to goods and services that compete with the contractual goods and services, in which case:

- they are limited to the premises and territory from which the buyer operated during the contract period;
- they are indispensable to protect know-how transferred by the supplier to the buyer; and
- the duration of the obligation is limited to one year.

Article L. 420-2-1 of the French Commercial Code prohibits agreements granting exclusive importation rights to a company in certain French overseas territories. In its Decision No. 16-D-15 the Competition Authority applied this provision for the first time and fined a large homecare products manufacturer and five distributors for exclusivities granted after 22 March 2013 in various French overseas territories.

General exceptions

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

Article L464-6-1 of the French Commercial Code provides for a general de minimis exemption under which the Competition Authority can decide not to open proceedings against parties to an agreement if such parties jointly hold a market share not exceeding 10 per cent in one of the affected markets, if they are actual or potential competitors in one of such markets, or not exceeding 15 per cent in one of the affected markets, if they are not actual or potential competitors in any such affected markets. However, the de minimis exception is not applicable to the hard-core restrictions listed in article L464-6-2 of the French Commercial Code.

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 French antitrust law. According to the Competition Authority, an anticompetitive agreement results from the concurrence of wills, which is not necessarily evidenced by a contract or a jointly adopted decision, but only requires a conscious adherence to a collective behaviour (Decision No. 97-D-52).

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?

Vertical relationships are generally evidenced by a contract, which, if it contains restrictive provisions, demonstrates in itself the concurrence of wills (eg, Decisions No. 05-D-66 and No. 07-D-04). Absent such contractual provisions, the individual intention of each party to take part in the restrictive agreement must be demonstrated in the form of an offer made by one of the parties and accepted by the other (eg, Decisions No. 05-D-70 and No. 06-D-04). On the contrary, if one party (ie, a supplier or manufacturer) unilaterally adopts a new policy that is not implemented by the other party (ie, the distributor), a concurrence of wills cannot be established (Decisions Nos. 05-D-06 and 05-D-72).

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 a parent company and its subsidiary or between two subsidiaries of a same parent company are not, in principle, caught by article L420-1 of the French Commercial Code if such subsidiaries do not freely determine their commercial policy. If they act autonomously on the market, antitrust laws are applicable to agreements between related companies. Commercial and financial autonomy of the subsidiary and its parent must be mutual and sufficient to ensure each company takes independent decisions in economic matters (for instance, in Decision No. 94-D-21). The same applies to two subsidiaries of the same 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?

It is admitted in France, as under EU case law, that antitrust rules (ie, article L420-1 of the French Commercial Code) do not apply to agreements entered into between commercial intermediaries, such as agents, and the companies they represent, when such intermediaries do not bear the risk of the transactions they negotiate or conclude in the name of and on behalf of their partner.

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 its annual report for 2006, the Competition Authority considered that:

> *when an agent, while having a distinct legal personality, does not independently determine his behaviour on the market but implements instructions given to him by his principal, the prohibitions set out by article 81 of the treaty* [article 101 of the Treaty on the Functioning of the European Union] *and by article L420-1 of the Commercial Code are inapplicable to the relations between the agent and his principal, with whom he forms a single economic entity.*

The driving criteria are whether the financial and commercial risks are borne by the agent or by the principal and the determination of an independent commercial strategy by the agent (see Decisions Nos. 06-D-18 and 09-D-23 and Paris Court of appeal, 12 December 1996, OFUP).

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 antitrust rules governing IPRs, including in vertical agreements. However, the protection of IPRs granted to a commercial partner, for instance, the franchiser's trademark in a franchising agreement, is a relevant criterion for the assessment of potentially restrictive obligations imposed on the franchisee in order to safeguard the identity, unity and reputation of the network and the trademark (Decisions Nos. 97-D-51 and 07-D-04).

Analytical framework for assessment

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

The Competition authority applies EU regulations and guidelines relating to vertical restraints as 'useful guidance' (eg, Decisions Nos.

00-D-82 and 01-D-45) in the implementation of French antitrust rules to vertical agreements and decisions of the EU Commission and the European Court of Justice are taken into consideration. As under EU law, the Competition Authority examines first whether the supplier and the buyer's respective market shares on the relevant market or markets do not each exceed 30 per cent, and second whether the agreement contains one of the hard-core or excluded restrictions listed in Regulation No. 330/2010. If the thresholds are not exceeded and there are no hard-core or excluded restrictions, there is no further scrutiny and the vertical restraint is considered as not raising any competition issue.

If the relevant market share thresholds are met or the agreement contains a hard-core or excluded restriction, the entire agreement, or the excluded restriction, is scrutinised under general antitrust rules in order to assess whether it has as its object or effect to prevent, restrict or distort competition (article L420-1 of the French Commercial Code). If the agreement is considered as restrictive by its object or by its actual or potential effects on competition, the agreement may qualify for an individual exemption under article L420-4 of the French Commercial Code. The exemption is granted to an agreement that either results from the implementation of an applicable law or that fulfils certain conditions (ie, if it creates economic progress and if a fair share of the profit derived therefrom is allocated to consumers, without enabling the companies concerned to eliminate competition for a substantial part of the products concerned, provided that the agreement does not contain restrictions which go beyond what is necessary to reach the claimed economic progress). There are no per se infringements that as such disqualify the agreement from an individual exemption under article L420-4. However, serious restraints such as price fixing or market or customer sharing will usually not satisfy the conditions set out by this article.

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 relevant for the assessment of the legality of individual restraints, in particular with respect to the effects on competition of exclusive supply or purchase obligations. The market position of other suppliers is also relevant, since the Competition Authority takes into consideration the potential 'cumulative effect' of similar vertical restraints on a given market. In Decision No. 00-D-82, a cumulative effect was not upheld, since the suppliers applying such agreement only represented 47 per cent of the market. The same solution was adopted in Decision No. 06-D-04 concerning luxury perfumes, where the five main suppliers collectively held only 38 per cent of the market. On the contrary, a cumulative effect was established in Decision No. 05-D-49 for practices carried out by the three main manufacturers of franking machines representing, collectively, over 95 per cent of 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?

Buyer market shares as well as market shares of other buyers are relevant parameters for the assessment of the restrictive effects of an individual restraint. In its Opinion of 28 September 2009 on the revision of the EU vertical restraints block exemption regulation, the Competition Authority expressed the view that the buyer power of distributors had considerably increased in recent years and that it was necessary to preserve access by suppliers to these distributors and to protect suppliers from exclusive supply agreements of excessive duration or scope. In Decision No. 08-MC-01 concerning practices relating to the distribution of iPhones, the authority considered that the anticompetitive risks of such exclusive supply agreements were all the more significant since the market power of the beneficiary of the exclusivity was important and competition was already weak on that market. The cumulative effect of vertical restraints may also be taken into account where the buyers hold together an important market share (see Opinion No. 10-A-26 on the food distribution 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 national legal provisions providing for a general block exemption or safe harbour. However, the EU block exemption regulation relating to vertical agreements is applied by the French Competition Authority as a guide in the implementation of French antitrust rules with respect to vertical restraints even if they do not affect the common market.

Article L420-4 II of the French Commercial Code provides that agreements or categories of agreements may be exempted from national antitrust rules by a regulation. There are very few regulations adopted under this provision. For instance, Decree No. 96-500 of 7 June 1996 covers vertical agreements between agricultural producers and distributors in situations of crisis, providing for the reduction of production capacities, the increase of quality requirements and temporary limitation of the quantity of products sold on the market.

Types of restraint

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

Imposed fixed prices or minimum prices are considered to be a restriction of competition by object (Decisions Nos. 06-D-04 and 07-D-50). Article L442-5 of the French Commercial Code specifically prohibits imposing minimum resale prices. In Decision No. 01-D-45, a supplier was sanctioned for having imposed resale prices to its distributors, in particular through the prohibition of discounts and promotions.

Maximum resale prices are not prohibited as such. If maximum prices are uniformly adopted by the distributors, this will constitute an anticompetitive agreement only if there is proof of collusion between the resellers (Decision No. 91-D-31).

Suggested prices are authorised unless they disguise imposed prices, which is the case when the supplier sanctions the distributor, or threatens to do so, if the suggested price is not applied (Decision No. 96-D-16), or if the distributor is contractually bound to do so. In the *Kontiki* case, the French Supreme Court prohibited an agreement whereby a supplier conditioned the referencing of its distributors on its website to the effective application by the latter of suggested retail prices (Cass com, No. 13-19.476).

In Decision No. 15-D-07 the Competition Authority referred to the conditions necessary to prove a vertical pricing agreement by a consistent body of evidence in the absence of material evidence of an agreement – the mention of a retail price between the supplier and the distributor, the existence of a mechanism to monitor or oversee the pricing and the effective or significant application of the agreed price – which together demonstrate compliance by the distributor with the agreed policy. The 'mention of a retail price', may take any form of communication, including an announcement at a press conference to launch the new product (Decision No. 15-D-18). In Decision No. 16-D-17, the Competition Authority considered that where direct documentary evidence proves the agreement between a supplier and a distributor to effectively apply public 'suggested' prices, there is no need to also search for a consistent body of evidence.

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 date, no decision has focused on this issue. However, the assessment on such restrictions would be the same as under EU law: resale price maintenance may be justified temporarily for the launch of a new product. In Decision No. 96-D-76, a supplier was found to have violated antitrust law by prohibiting its distributors from selling at 'loss leader' prices, which was analysed as resale price maintenance because distributors were discouraged from reselling the concerned products at prices lower than the suggested retail price.

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

To date, no decisions have addressed a possible link between resale price restrictions and other types of restraints.

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

In the *Luxury Perfumes* case, the efficiency argument was put forward by the companies sanctioned by the Competition Authority that suppliers of luxury products could preserve their image and prestige through high prices and should be able to control retail prices of their products. The Court of Appeal considered that the companies did not demonstrate any concrete efficiency gains (Paris Court of Appeal, No. 2010/23945).

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.

Such a pricing relativity agreement will be analysed as a retail price-fixing agreement and thus be considered anticompetitive by object.

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 French antitrust law, the assessment of the potentially restrictive object or effect of such a clause would be the same as under EU law. Since such an agreement does not restrict the buyers' ability to freely set their retail prices, they may not be considered problematic.

However, under article L442-6 II d) of the French Commercial Code, any clause or contract providing that a trade partner automatically benefits from an alignment on more favourable conditions granted to competing undertakings by its contractual partner is considered void. This rule is not an 'overriding mandatory provision' and thus will not apply if the parties have not chosen French law to govern their contract (*Expedia*, Paris Commercial Court, No. 2013/059306).

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 its *Booking.com* commitment Decision No. 15-D-06, the Competition Authority, without reaching a final decision on the qualification of such practices, considered through an effects-based approach that while narrow most favoured nation (MFN) clauses, which restrict the supplier's ability to offer more favourable conditions to users via its direct online sales channels, may have certain pro-competitive effects such as preserving the economic model of online platforms by preventing free-riding by the suppliers, broad MFN clauses are viewed as harmful for competition as they might lessen competition between platforms and raise barriers to entry. The Competition Authority further suggested that such agreements could be analysed under the rules prohibiting abuse of dominance. The Competition Authority continued, with its European counterparts, to monitor the sector, and has set out to release a report on Booking.com's commitments in January 2017.

Also, article L442-6 II d) of the French Commercial Code expressly prohibits these types of agreements, but is only applicable if French law governs the contract.

However, in the above-mentioned *Expedia* judgment, the commercial court considered that such practices could also be prohibited under article L442-6 I 2 (which is an overriding mandatory provision applicable to contracts implemented in France) if they create a significant imbalance in the contractual rights and obligation between the parties to the contract. The same court recently declared that Booking.com's automatic alignment clauses violated articles L 442-6 I 2 and L442-6 II d).

In the hotel sector, as mentioned under question 7, all price parity clauses between hotels and online platforms are void under the new provisions introduced by the Law No. 2015-990 of 6 August 2015 in the French Tourism Code (articles L311-5-1 ff).

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

In Decision No. 07-D-06, concerning the distribution of games consoles, an agreement between a supplier and its distributors preventing them from advertising a different price than the maximum price suggested by the former when launching the product was sanctioned. Ultimately, it is an analysis of resale price maintenance.

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.

Most favoured supplier clauses will be analysed as set out under question 24. This type of clause is generally viewed as potentially raising wholesale prices, which in turn may raise retail prices and harm end consumers.

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 analysis of territorial restrictions under French law is the same as under EU law (see Decisions Nos. 93-D-50 and 91-D-31): contractual provisions preventing the distributor from selling outside the contractual territory, even if such sales are made on request of the customer (passive sales) are unlawful; contractual provisions restricting the buyers' right to offer products or promote sales (active sales) in the contractual territory allocated exclusively to another buyer or to the supplier are, in principle, lawful. And while the head of a network cannot prohibit passive sales, it must enforce the exclusivity which it granted in the event of a manifest violation by one of the members of the network of its obligation not to prospect the territory allotted to another member (Cass Com, No. 13-15.935).

Case law insists on the freedom of suppliers to organise their networks and as such they may resort to poly-distribution by creating exclusive and non-exclusive territories (Paris Court of Appeal, No. 14/10659).

Indirect means of creating absolute territorial protection are also sanctioned (eg, refusal by the supplier to provide technical assistance for passive sales, Decision No. 02-D-57; delivery delays and other unfair measures, Decision No. 97-D-42). Also, article L464-6-2 of the French Commercial Code excludes application of the de minimis rule to agreements containing restrictions on passive sales by a distributor to end customers outside his or her contractual territory.

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

In two recent decisions, the Paris Court of Appeal found that two clauses concerning territorial restrictions in Coty's selective distribution agreements constituted hard-core restrictions rendering the selective distribution network illicit (Decisions No. 14/0318 and 14/00335). The first clause prohibits the resale of goods to unauthorised distributors even if the latter operate outside the territory of the selective distribution network. The clause is deemed restrictive since Coty did not justify that the network covered all territories. The second clause prohibits active sales of a new contractual product into a territory where Coty has not commercialised it within one year following the launching of the product. These decisions appear to be more severe than the more permissive approach favoured by the European Commission Guidelines on vertical restraints (§§55 and 62).

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

The principles applicable to territorial restrictions (see question 28) also apply to customer restrictions.

Restrictions on the clients to whom a buyer may sell the products is a restriction by object (Decisions Nos. 07-D-24 and 05-D-32) unless an

exclusive distribution agreement provides that a supplier agrees to sell products to one exclusive distributor for resale to a specific category of customers, provided that passive sales are not restricted.

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

There is no internal case law on restrictions on the uses to which a buyer puts the contract products. The analysis of this type of restriction under internal law would be the same as under EU law. Such restriction would probably be considered unlawful, except if it is necessary to comply with legal or regulatory provisions, such as with marketing authorisations for drugs.

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

The assessment is the same as under EU law. Additional guidance on the limitation of the buyer's ability to generate sales via the internet has emerged essentially through two landmark decisions: *Pierre Fabre* (Decision No. 08-D-25; ECJ Case C-439/09; Paris Court of Appeal No. 2008/23812) and *Bang & Olufsen* (Decision No. 12-D-23; Paris Court of Appeal No. 2013/00714). These decisions set out the key principle, the 'prohibition to forbid'. The supplier may not directly or indirectly prevent the buyer from selling its products online.

However, certain limitations may be admitted in a selective distribution system. A supplier can require that a buyer maintains a bricks-and-mortar point of sale in order to be allowed to sell online, provided this is justified by the objectives sought by the supplier (Decision No. 06-D-24; Paris Court of Appeal No. 13/11588). This restriction enables the supplier to exclude pure players. In Decision No. 06-D-28, the Competition Authority validated a contractual provision under which the end consumer had to prove that he received prior advice from a seller in a bricks-and-mortar establishment in order to make an online purchase.

Also, the supplier can impose online sale criteria that do not have to be strictly identical, but must be equivalent to the criteria imposed for offline sales. This means that they must pursue the same objective and achieve comparable results and the difference between the criteria must be justified by the different nature of these two distribution modes. Thus, in Decision No. 07-D-07, the Competition Authority ruled that suppliers could require the buyers to respect criteria relating to the graphic charter of the website, the use of specific descriptions of each product, or the availability of a hotline. However, these restrictions must not exceed what is necessary to protect the supplier's legitimate interests.

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

The French competition authority has not yet sanctioned suppliers in a selective distribution agreement for banning sales by their authorised distributors through online marketplaces. However, in November 2015, the Competition Authority closed a probe into adidas' online sales practices after it removed the ban on sales via online marketplaces from its contracts. More recently, in summary proceedings, the Paris Court of Appeal decided that prohibiting members of a selective distribution network from reselling cosmetics through online platforms may constitute, failing an objective justification, a hard-core restriction (Decision No. 15/01542).

In its Opinion No. 12-A-20, the Competition Authority described platforms as 'playing the role of intermediary between sellers and buyers, providing to sellers, professional or non-professional, the possibility of offering all or part of their catalogue, as would an actual shopping centre'. It considered their pro-competitive effects, such as reducing barriers to entry and generating a wider offer online.

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

The assessment is similar to the one carried out under EU law. A selective distribution system does not infringe article L420-1 of the French Commercial Code when the following conditions are met:

- the supplier's and the buyer's respective market shares do not exceed 30 per cent;
- the selective distribution system is justified by the nature of products in question (see question 35); and
- the selection of authorised retailers is made on objective and qualitative criteria, such as the obligation to have suitable premises or skilled staff.

These criteria must be applied to all potential retailers in a uniform and non-discriminatory manner and cannot aim to exclude a form of distribution in itself. Selection criteria must also be strictly proportionate to the objective pursued by the seller.

There is no explicit obligation for the supplier to publish the criteria. However, in order to be able to prove their objective and uniform application to all retailers, it is better to write them clearly and to communicate them to all potential retailers.

In addition, the selective distribution system must not contain any hard-core restrictions (eg, territorial restrictions, resale price maintenance, restrictions of passive online sales). The Paris Court of appeal recently ruled that the head of a selective distribution network bringing an action for unfair competition against an unauthorised distributor must first prove the legality of the selective distribution. Such is not the case where the distribution contracts contain hard-core restrictions (Decisions No. 14/03918 and 14/00335).

Quantitative criteria may apply when combined with qualitative criteria. However, the selective distribution system cannot be a purely quantitative selection system (Decision No. 99-D-78).

The retailer that has not been selected can challenge the refusal in front of the judge who will examine the proper application of the selection criteria by the supplier (see Cass com, No.15-15.042). However, suppliers are free to organise their selective network as they see fit and may reject a candidate distributor even if the selection criteria are met, and such rejection may not constitute an anticompetitive agreement where competition is not eliminated on the relevant market (Paris Court of Appeal, Decision No. 14/07956).

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

Selective distribution is more likely to be lawful for certain types of products if their nature justifies a particular distribution system. For example, luxury products are more likely to be considered as justifying a high quality of distribution to preserve the brand's image (eg, Versailles Court of Appeal, No. 99/07658 concerning luxury cosmetic products). In addition, technically complex products can justify selection criteria such as the requirement for skilled staff.

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

See question 32.

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

In Decision No. 05-D-50, the Competition Authority admitted that a supplier can control its distributors' invoices in order to ensure that no sales are made to unauthorised buyers. However, this control cannot be systematic and must be limited to situations where there are suspicions of such sales.

If an authorised buyer is selling products in an unauthorised manner the supplier can also terminate the contract on the ground of a breach of contract which entails its exclusion from the network.

The supplier can also seek damages or injunction measures against unauthorised retailers in court. Such action is based on tort law (article L442-6 I 6 of the French Commercial Code) so the buyer must prove that its selective distribution system is lawful and that the unauthorised retailers committed a fault. Selling a product outside a selective distribution network is not as such considered as a fault. The fault is

constituted when an unauthorised retailer refuses to disclose the source of supplies (Cass com, No. 90-15.831).

The French Supreme Court considered that sales by private users on eBay could not constitute unauthorised sales outside a selective network (Cass com, No. 11-10.508). The same court recently judged that the resale of Chanel goods purchased at an auction organised following the judicial liquidation of an authorised distributor to which Chanel was opposed, and without the latter's prior approval, constitutes a violation of the prohibition to sell outside the network. The liquidation had not affected the selective distribution contract which was binding on the liquidator (Cass com, No. 14-13.017).

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

Cumulative restrictive effects of multiple selective distribution networks have been taken into account by the Competition Authority in its Opinion No. 12-A-20, referring to Decision No. 07-D-07, both relating to restrictions on internet sales.

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

In Decision No. 07-D-25, such arrangements were analysed under applicable EU law and considered non-restrictive.

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

The assessment is similar to the analysis to be made under EU law. In France, the Competition Authority decided that a clause prohibiting a buyer from selling products to other authorised buyers constitutes a breach of antitrust rules (Decision No. 95-D-14).

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

The assessment is similar to the analysis to be made under EU law. French courts have admitted the restriction in selective distribution systems on the sale of products the proximity of which might damage the suppliers' brand image (eg, Cass com, No. 99-17.183).

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

The analysis is similar to under EU law.

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

The assessment is the same as in EU law. For example, in Decision No. 07-D-08, a provision that required that the buyer should purchase an amount corresponding to its total needs was declared anticompetitive.

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

The assessment is the same as under EU law. In Decision No. 08-MC-01, the Competition Authority adopted interim measures to end Apple's exclusive supply agreement with Orange for the sale of iPhones, as it considered that it could affect competition.

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

The assessment is the same as under EU law. The ability of wholesalers to sell directly to end consumers may be restricted as they would have an unfair competitive advantage compared to retailers.

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

Not at present.

Update and trends

Parallel to ongoing investigations before the Competition Authority concerning Samsung's ban on internet sales through platforms (see Decisions No. 14-D-07 and 15-D-11, rejecting requests for interim measures), the French Supreme Court had referred to the ECJ for a preliminary ruling in the context of litigation proceedings introduced by Concurrence, an independent electronic goods distributor, against Samsung and Amazon. The French Court asked whether a distributor claiming that it has been harmed by unauthorised sales via an online marketplace and requesting the removal of offers made on sites in different EU states can seek redress before a court in the territory from which this content is accessible. The ECJ answered that to determine whether a court has jurisdiction to hear an action to establish liability for infringement of the prohibition on resale outside a selective distribution network resulting from offers on websites operated in various member states, the territory of the member state that enforces the said prohibition of resale is to be considered as the place where the damage occurred, that territory being the place where the claimant alleges to have suffered a reduction in its sales. This means that French courts would be able to force Amazon to stop selling certain high-end Samsung products via its websites in other European countries.

The Competition Authority has also been asked to rule on a ban on internet sales via platforms imposed on members of a selective distribution network in a complaint lodged by e-Nova on 7 December 2015 against Caudalie.

Notifying agreements

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

There is no general formal procedure for notifying agreements containing vertical restraints. Law No. 2015-990 of 6 August 2015 introduced a notification obligation for joint purchase agreements in the retail sector (article L462-10 of the French Commercial Code) which must be notified to the Competition Authority if certain turnover thresholds are met (article R462-5 of the French Commercial Code).

Authority guidance

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

The Competition Authority does not give any guidance and there is no possibility for the parties to obtain any declaratory judgment from a court. The Authority may be referred to for an Opinion, namely under article L462-1 of the French Commercial Code; however, this procedure is only open to the government and certain organisations.

Complaints procedure for private parties

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

Private parties such as companies or consumer associations can lodge a complaint with the Competition Authority. A consumer alone cannot bring such a complaint.

The complaint must mention the French law and, if applicable, EU law provisions that are allegedly violated, the description of the infringement and the complete identification of the complainant. It also indicates, if possible, the identity and address of the entity responsible for the alleged infringement. It is not necessary for a complainant to bring all evidence, but concrete elements establishing the likelihood of such infringement must be brought.

The Competition Authority may adopt injunction measures, sanctions, accept commitments by the parties and agree to a settlement. It can also declare the complaint inadmissible for lack of standing or reject it for insufficient evidence.

It may take several years to obtain a decision of sanction from the Competition Authority.

If the complainant demonstrates a serious and immediate threat to competition, urgent interim measures may be ordered by the Authority. The Competition Authority ordered as an interim measure the suspension of the agreement granting Canal Plus the exclusive broadcasting rights for the French rugby first division championship for five years (Decision No. 14-MC-01).

Enforcement

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

In the past five years, the Competition Authority ruled 123 decisions on anticompetitive practices; fewer than 15 of these decisions relate to vertical agreements.

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

Under article L420-3 of the French Commercial Code, any clause or agreement that relates to an anticompetitive practice is null and void. The judge may pronounce a partial invalidity of an agreement and only the restrictive contractual provisions are null and void and the rest of the contract or agreement remains valid, unless the clause containing illegal restriction is a determining and critical condition of the contract .

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

Under article L464-2 of the French Commercial Code, according to the Guidelines issued on 16 May 2011, the Competition Authority may impose fines either immediately or to sanction a violation of an injunction or a commitment procedure. The fines cannot exceed 10 per cent of the company's or the group's worldwide turnover.

The authority may impose a daily fine of up to 5 per cent of the company's average daily turnover to compel it to implement an injunction or interim measures.

In its annual report for 2015, the Competition Authority announced record fines, with a total of €1.25 billion in sanctions (while the average yearly amount between 2008 and 2013 was only €400 million). Significant fines were imposed in the milk sector (Decision No. 15-D-03, €192.7 million) and in the parcel delivery services industry (Decision No. 15-D-19, €672.3 million).

The Competition Authority is particularly active in ordering interim measures, much more so than other NCAs (30 times in the past 15 years, three in the past three years, including one case concerning vertical restraints, Decision No. 14-MC-01).

Investigative powers of the authority

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

Article L450-3 of the French Commercial Code provides for 'ordinary investigations' that do not require any judicial authorisation. This article enables administrative agents to enter business premises and professional means of transport, to request the notification or make a copy of professional documents, to interview company's employees and to collect oral or written statements.

The 'judicial investigation' set out in article L450-4 is subject to a judge's authorisation. Administrative agents can carry out dawn raids in any premises, request information, seize or copy any kind of documents (eg, emails), place seals and take oral or written statements.

The DGCCRF may also investigate specific sectors on the basis of evidence or suspicion of restrictions to identify competition concerns after having alerted the Competition Authority, which can decide to take over investigations (article L450-5 FCC). At the end of the investigation the Competition Authority decides whether to open a case.

Private enforcement

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

Private enforcement actions are possible under French law, on the basis of article 1240 (formerly 1382) of the French Civil Code, before one of the specialised jurisdictions (see question 4). The person seeking compensation must bring evidence of a fault and of the harm personally suffered. A party to an agreement containing vertical restraints can bring an action for compensation, provided that the claimant proves it was not responsible for the infringement and was forced to take part in the agreement (Paris Court of Appeal, No. 07/05460).

Since the introduction of the Law of 17 March 2014, certified consumer protection associations are allowed to bring follow-on collective actions in front of a court of first instance in order to obtain compensation for harm caused by antitrust practices. Collective actions are only open to consumer associations as opposed to business and professional associations.

Private enforcement action can take several years and may be suspended until a final decision is reached in the competition infringement case.

Other issues

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

No.

KRAMER LEVIN

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

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 that 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 that 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 anticompetitive 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 that 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, under certain circumstances, 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. While only one contact after the submission of recommended sales prices might not yet be problematic, renewed approaches of a retailer by the supplier may already qualify as (attempted) 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)?

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)?

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.

Similarly 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, 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. In addition, section 2(2) GWB refers to the EU block exemptions, 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.

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 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 that may be granted in relation to a given price level;
- agreements on 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 32 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'?

Article 4(b) of the EU block exemption on vertical restraints applies by virtue of the reference in section 2(2) GWB. In any case, such an agreement needs to have an appreciable effect on the competitive process.

In a decision handed down in 2003, 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. An important reason for the legitimacy of this practice was that it resulted in lower prices and ultimately benefitted the consumers.

According to the enforcement practice as laid down in a guidance letter from the FCO in 2010, 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. The FCO announced it would publish an updated guideline paper on vertical restraints in 2016, which may also address such exceptions, however, the paper has not yet been published.

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.

Garmin, a manufacturer of outdoor navigation systems, 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 regarding 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 and 2015, the FCO imposed fines to the total amount of €27.08 million on manufacturers of mattresses for requiring resellers not to sell certain products below predetermined resale prices. The manufacturer 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. Another manufacturer, Tempur, also forced the resellers to follow the recommended resale prices by threatening them with delivery stops and ordering them to exclude the Tempur products from general sale campaigns such as '25 per cent discount on everything'. The FCO imposed a fine in the amount of €15.5 million against Tempur. However, the FCO did not find evidence of horizontal agreements between the manufacturers.

Recently, the FCO imposed a fine on the toy manufacturer Lego for enforcing vertical resale price maintenance in the sale of 'highlight articles'. In some cases the retailers were threatened with a reduction of supply, or even with a refusal to supply, if they deviated from the recommended resale price. In other cases the level of discount on retailers' purchase prices granted by Lego was made conditional on the retailers' maintenance of the recommended resale prices. In 2016, the investigation against Lego was closed, because the toys manufacturer committed to change its rebate system with a view to granting equally high rebates for online and stationary sales.

The *Vitalkost* case decided by the Higher Regional Court of Celle concerned the distribution conditions of Vitalkost, a manufacturer of a product sold via pharmacies, drugstores and different vendors on the Internet. For a limited period of time, Vitalkost offered pharmacists discounts for buying certain amounts of its product. In return, they inter alia committed not to undercut a retail price of €15.95. The court qualified the practice as a vertical minimum price agreement, which is generally prohibited as a hard-core restriction according to section 1 ARC. However, although Vitalkost's market share amounted to more than 20 per cent, the court did not find a violation of section 1 ARC due to a lack of appreciability. According to the court, the assessment of appreciability requires an overall assessment of the circumstances including the objectives of the agreement, the market structure, the significance of the companies concerned and the nature of the competition restriction. A solely quantitative definition of appreciability based on market shares would not be feasible. Since the discount was restricted to a relatively small amount of customers and the economic disadvantages for the final customers were minor, the court denied the appreciability of the restriction.

In 2013, the FCO 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. In addition, the FCO recently announced publication of an updated guideline paper on vertical restraints in 2016, but has not done so yet. For further details regarding restrictions of online sales see questions 32 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 franchiser 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 franchiser 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.

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 not 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 portals HRS, booking.com and Expedia illustrate the FCO's position. According to the FCO, the agreements between Amazon and marketplace sellers, and between HRS/booking.com 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. In December 2015, the FCO decided that not only a broad most favoured nation clause, which prevents the seller from offering lower prices anywhere, but also a clause applying only to certain sales channels, is illegal. Booking.com, after having been ordered by the FCO to stop its most favoured nation practice, had modified the respective clause in a way that hotels should be allowed to sell their service for lower prices on other platforms, however, not on their own website. The FCO found that also this narrower clause restricted competition between the hotels and between platforms as in the FCO's view, the hotels' incentive to reduce prices on certain platforms is low in case they are not allowed to reduce the price on their own website. In an appeal the FCO's decision before the Higher Regional Court of Düsseldorf, the court confirmed the FCO's decision that booking.com's narrow best favoured nation clause violated article 101 TFEU and section 1 ARC as it resulted in a restriction of competition by effect. The FCO's investigation in the case of Expedia is still ongoing.

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 portals HRS, booking.com and Expedia (see question 24).

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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.

The requirement of a buyer not to purchase the contract products on more favourable terms from other suppliers is not 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?

A restriction with regard to the territory into which a buyer may resell its contract products is regarded as covered by the prohibition of anticompetitive 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

There does not seem to be any recent practice or guidance dealing with restrictions on the territory into which a buyer selling via the internet may resell contract products. However, considering that the FCO's practice on restrictions of online sales is very strict, it can be assumed that such clauses would probably be viewed critically.

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

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 customers) 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 32).

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

Such restrictions are 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.

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

The FCO has not yet published any official guidance with regard to the assessment of sales via the internet. It is, however, possible to infer certain key principles from the FCO's published decisions, case reports and activity reports, as well as court decisions. It is generally considered a hard-core restriction to impose a complete ban of internet sales on distributors. Furthermore the FCO found certain quantitative restrictions as being anticompetitive 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 35).

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.

A highly disputed question is whether restrictions of sales via online platforms such as eBay or Amazon, particularly within selective distribution systems, are illegal or might be justified under certain circumstances. 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. For more details regarding differential treatment of different types of internet sales channels, and in particular platform bans, see question 33.

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.

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

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 an 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 that manufacturer of consumer audio products Sennheiser had imposed on the members of its selective distribution system to be illegal. In that 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. In a recent case regarding Asics, the FCO also decided that clauses that prevent retailers from using online sales platforms and price comparison engines for their online presence and from using Asic's brand name on the websites of third parties to guide customers to their own online shops, are illegal. In the FCO's view, these prohibitions primarily served to control price competition in both online and offline sales.

In 2015, the FCO led an administrative investigation against the automotive OEMs Ford, Opel and PSA for possible vertical restrictions of competition related to their authorised dealers' cooperation with internet intermediaries (eg, autohaus24.de, meinauto.de) The contracts between the OEMs and the authorised dealers contained 'internet qualitative standard clauses' regarding online sales, which provided for bonuses for the authorised dealers in case of compliance with the respective standards. Although the clauses did not explicitly prohibit authorised dealers to cooperate with internet intermediaries, the FCO found that the OEM's internet qualitative standard clauses may have resulted in indirect restrictions of such cooperation. In addition, the FCO's investigation showed that most of the authorised dealers concerned indeed had terminated their cooperation with internet intermediates because they were concerned to lose a significant part of their bonuses. The FCO closed the investigation after the OEMs agreed to adjust the internet standards in their respective agreements with authorised dealers (ie, to explicitly clarify that these standards do not apply to intermediaries who are not resellers, but who act on behalf of the final customer).

In recent years, various courts have 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 the brand image, provided the selective distribution criteria were applied in a non-discriminatory manner, other courts concluded that the ban of sales via platforms such as Amazon marketplace and eBay 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. However, in a very recent decision regarding high-quality backpacks (Deuter), the Frankfurt Higher Regional Court decided that a clause preventing retailers within a selective distribution system from selling the contract products via certain online platforms, such as Amazon marketplace, may be regarded as an appropriate and admissible qualitative criteria for the selective distribution system. According to the court, the manufacturer had a legitimate interest to safeguard its brand image by offering qualified service, through selected retailers, to end customers. Due to the structure of Amazon marketplace, the customers are not directed to the selected retailers' online shops, but get the impression that they buy directly from Amazon. In the court's view this mechanism may interfere with the manufacturers' premium image, because the end consumer may get the impression that Amazon is a 'selected dealer', which is not the case. So far, none of the cases dealing with platform bans has been decided by the Federal Court of Justice.

In another case also decided by the Higher Regional Court of Frankfurt, Coty, a leading cosmetics supplier had, in the context of its qualitative selective distribution system, prohibited its buyers from engaging third-party companies for distribution in the internet and filed an action for injunction against one of its buyers, who distributed the products via his own website as well as the so-called marketplace function of Amazon. In this case the court addressed several questions to the European Court of Justice, especially whether selective distribution systems, which are aimed at the distribution of luxury and prestigious products and primarily serve to the secure the 'luxury image'

of these products, are in accordance with article 101(1) TFEU and whether in accordance with article 101(1) TFEU a prohibition can be imposed on the members of a selective distribution system operating on the retail level to distribute their products via companies, which are recognisable as third-party distributors on the internet without further assessment if the producer's legitimate quality requirements are met by these providers. Moreover, the Higher Regional Court of Frankfurt posed the question if the prohibition to engage companies in internet sales, which are recognisable as a third party, is an intended restriction of the customers to whom the products may be sold in the sense of article 4(b) or an intended restriction of passive sales to consumers under article 4(c) of the EU block exemption regulation on vertical restraints.

34 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.

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

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.

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

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 ('equivalence test').

The European Court of Justice held in a recent decision 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 also affects decisions at the national level.

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 a very recent decision regarding high-quality backpacks, the Frankfurt Higher Regional Court decided that a clause preventing retailers within a selective distribution system from selling the contract product via certain online platforms such as Amazon marketplace, may be regarded as an appropriate and admissible qualitative criteria. 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 equivalence test, meaning 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).

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

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.

38 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 into account cumulative effects arising from a parallel series of vertical restraints and leading to market foreclosure. 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.

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

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.

40 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 anticompetitive 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.

41 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.

42 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 anticompetitive 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.

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

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 42.

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.

44 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.

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

There is no explicit guidance in this regard, but such a restriction would generally be treated as an exclusive or direct supply obligation. Since pursuant to section 2(2) GWB, the EU block exemption on vertical restraints also applies to purely national cases, the circumstances in which it exempts exclusive or direct supply obligations of the supplier are also relevant under German law.

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

No.

Notifying agreements

47 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 48).

Authority guidance

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

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

49 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.

Enforcement

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

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 active specifically 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. Online sales restrictions and resale price maintenance continue to be an enforcement priority of the FCO. 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, particularly the areas of beer, baby food, baby care and personal hygiene.

Meanwhile, the investigation has finished with a considerable number of fines against both food retailers and producers of branded products. In 2015 and 2016, the FCO imposed fines on several retailers for resale price maintenance in the beer business which amounted to €112 million in total. The FCO also imposed fines that amounted to more than €60 million on six food retailers and Haribo, a producer of confectionery, for their participation in a hub-and-spoke price maintenance system. While Haribo forced the retailers to stick to the recommended price level, the individual retailers requested Haribo to ensure that their competitors would do the same. According to the FCO's assessment, for more than three years the respective undertakings operated a complex information system with the effect that end consumer prices were raised and maintained on a certain level. In 2016 a fine was imposed on Lidl for resale price maintenance of Haribo products. A price maintenance system was also identified in relation to the coffee roaster Melitta, which had already been fined for horizontal infringements with other coffee roasters in 2010. In addition, the FCO imposed total fines of about €50 million on five food retailers for participating in a hub-and-spoke cartel with Melitta. In 2016 a fine was finally imposed against Rossmann for resale price maintenance of Melitta coffee products. The investigations in the consumer goods sector, which were initiated in 2010, resulted in total fines of €260.5 million.

Moreover, in 2014 and 2015, the FCO imposed fines in the total amount of €27.08 million on manufacturers of mattresses for requiring resellers not to sell certain products below predetermined resale prices. The manufacturer 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 case of deviations, Recticel threatened to delay shipments or to prevent the dealers from using eBay or Google adwords. Another manufacturer, Tempur, also forced the resellers to follow the recommended resale prices by threatening them with delivery stops and ordering them to exclude the Tempur products from general sale campaigns such as '25 per cent discount on everything'. The FCO imposed a fine against Tempur in the amount of €15.5 million. However, the FCO did not find evidence of horizontal agreements between the manufacturers.

The FCO also fined the toy manufacturer Lego for enforcing vertical resale price maintenance by threatening the retailers with a reduction of or refusal to supply. In other cases, Lego made the level of discount granted on the retailers' purchase prices conditional on the maintenance of the recommended resale prices. In 2016, an investigation against Lego was closed, because the toy manufacturer committed to change its rebate system with a view to granting equally high rebates for online and stationary sales.

Already in 2013, 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 anticompetitive 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. Moreover, the sports equipment manufacturer adidas agreed to terminate the ban of sales via online marketplaces that it had imposed on the members 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, most favoured nation clauses used by Amazon and the online booking portals HRS, booking.com and Expedia were subject to review by the FCO in recent years. The Düsseldorf Higher Regional Court confirmed the FCO's approach in the HRS case, stating that most favoured nation clauses restrict competition among different hotel-booking platforms and with regard to direct marketing of these hotels. In December 2015 the FCO decided, in a case relating to the hotel-booking platform booking.com, that not only a broad most favoured nation clause, which prevents the seller from offering lower prices anywhere, but also a clause only applying to the hotel's own online booking systems as well as their offline sales, but excluding other platforms, is illegal. A further investigation against Expedia is pending.

The fact that restrictions of online sales remain an enforcement priority of the FCO is also illustrated by the workshop regarding vertical restraints in the internet economy that it held in 2013, about which it published a background paper. Recently, the FCO founded a 'task force' that is assessing the new challenges in competition law practice resulting from the growing importance of online sales.

51 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.

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

The 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 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. Garmin, a manufacturer of outdoor navigation systems, 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 cosmetics manufacturer WALA Heilmittel was fined €6.5 million in 2013 for vertical price-fixing practices. In 2014, fines

Update and trends

In 2016, the FCO concluded its investigations in the consumer goods sector, which were initiated in 2010 and resulted in total fines of €260.5 million, by imposing fines for resale price maintenance on several branded goods manufacturers and retailers. Although there were no ground-breaking new developments in the field of vertical infringements in 2016, vertical restraints remain one of the focal points of the FCO and are still subject to several court decisions in private litigation. In particular, online sales restrictions and resale price maintenance continue to be an enforcement priority of the FCO and the German competition authority also continues to be tougher on most favoured treatment clauses than other competition authorities in Europe. In view of this, it is not surprising that the relevant vertical investigations concerned well-known areas such as resale price maintenance, restrictions of online sales and most favoured treatment clauses. An investigation against Lego was closed, because the toy manufacturer committed to change its rebate system with view to granting equally high rebates for online and stationery sales. While the investigation dealing with the most favoured treatment clause of the online booking portal Expedia is still ongoing, the Higher Regional Court of Düsseldorf confirmed the FCO's decision that booking.com's narrow best favoured nation clause violated article 101 TFEU and section 1 ARC as it resulted in a restriction of competition by effect. In the *Vitalkost* case the Higher Regional Court of Celle denied a violation of section 1 ARC owing to a lack of appreciability. Furthermore, as in previous years, also in 2016, restrictions of sales via online shops, 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 are likely to be considered to be illegal. In particular, the question whether or not a ban of sales via certain platforms such as Amazon marketplace or eBay might be regarded as an appropriate qualitative criterion within or even outside a selective distribution system has been a highly disputed matter in German jurisprudence. It is not yet finally decided if a ban of online sales via online platforms outside selective distribution systems constitutes a hard-core restriction within the meaning of article 4(b) of the EU block exemption regulation on vertical restraints as conflicting decisions have been handed down by two Higher Regional Courts. As regards selective distribution systems, some courts, in line with the FCO, decided that platform bans would constitute a hard-core restriction within the meaning of article 4(c) of the EU block exemption regulation on vertical restraints. As opposed to that, the Frankfurt Higher Regional Court found in the *Deuter* case that a clause preventing retailers from selling via Amazon marketplace can be an appropriate and admissible tool to protect a manufacturer's legitimate interest to safeguard the image of its premium brand products. However, according to the court, a ban on online price comparison engines could be regarded as a legitimate qualitative criterion within a selective distribution system. In the *Coty* case, also decided by the Higher Regional Court of Frankfurt, a leading cosmetics supplier had, in the context of its qualitative selective distribution system, prohibited its buyers from engaging third-party companies for distribution in the internet and filed an action for injunction against one of its buyers, who distributed the products via his own website and via Amazon marketplace. In this case, the court addressed several questions to the European Court of Justice, especially whether selective distribution systems, which are aimed at the distribution of luxury and prestigious products and primarily serve to secure the 'luxury image' of these products, are in accordance with article 101(1) TFEU and if it can be in accordance with article 101(1) TFEU to impose a prohibition on the members of a selective distribution system operating at retail level to distribute their products via companies, which are recognisable as third-party distributors in the internet without further assessment if the producer's legitimate quality requirements are met by these providers. Moreover the Higher Regional Court posed the question whether the prohibition to engage companies, which are recognisable as a third party, in internet sales is an intended restriction of the customers to whom the products may be sold in the sense of article 4(b) or an intended restriction of passive sales to consumers under article 4(c) of the EU block exemption regulation on vertical restraints. Against this background how the Court of Justice will answer the submitted questions is eagerly awaited.

Anticipated developments

With respect to vertical restraints especially the guidance paper on vertical restraints, originally announced by the FCO for 2016, will address resale price maintenance and probably also restrictions of online sales. Another important development will be the ninth amendment of the ARC, which will become effective in 2017. It will implement the EU's Directive 2014/104/EU on antitrust damage actions, which technically had to be accomplished by 27 December 2016.

in the amount of €8.2 million were imposed on mattress manufacturer Recticel.

In 2015, the FCO imposed fines on food retailers and producers of branded food products in the total amount of €93.2 million for participating in hub-and-spoke price maintenance systems. Further, a fine of €15.5 million was imposed on the manufacturer of mattresses Tempur for threatening retailers to use the recommended resale price and keeping up a monitoring system combined with sanctions for lower prices. United Navigation, a manufacturer of portable navigation systems, was fined €300,000 for enforcing resale price maintenance on retailers. With regard to the restriction of online sales that do not concern resale price maintenance (such as platform bans, double pricing systems, and most favoured nation clauses imposed by sales platforms), no fines have been imposed yet, but the FCO has handed down cease-and-desist orders. However, with the FCO's position in the field of online sales restrictions to be clarified and consolidated, it might be expected that fines will be imposed for such restrictions in the future.

Investigative powers of the authority

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

The 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, search business premises based on orders of the Local Court of Bonn, seize documents and interrogate witnesses or experts.

Private enforcement

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

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 anticompetitive behaviour. Further, they may be ordered to terminate anticompetitive 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 anticompetitive 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. Damages proceedings will normally take months, if not years.

In addition, section 33(2) GWB provides for the possibility of industry associations to bring lawsuits 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. The 9th amendment of the ARC, which will implement the EU's Directive 2014/104/EU on antitrust damage actions in order to facilitate antitrust damage claims, will become effective in 2017.

Other issues

55 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

Hong Kong

Clara Ingen-Housz and Marcus Pollard
Linklaters

Antitrust law

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

The Hong Kong Competition Ordinance (CO) was adopted in June 2012. It introduced the first economy-wide prohibitions against anticompetitive agreements and abusive conduct in Hong Kong. The substantive provisions of the legislation came into force on 14 December 2015.

The First Conduct Rule (FCR) of the CO prohibits an undertaking from making or giving effect to an agreement, engaging in a concerted practice or, as a member of an association of undertakings, making or giving effect to the association's decision, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong (section 6 CO). The CO does not explicitly reference vertical agreements but the broad language of the FCR is interpreted to capture both horizontal and vertical agreements.

The Hong Kong Competition Commission (HKCC) has published guidelines detailing its interpretation of the CO. The guidelines provide explanations as to when vertical restraints will be considered to contravene the CO.

As the CO only recently came into force, there have not yet been any enforcement outcomes regarding vertical restraints. Therefore, unless otherwise specified, the below interpretations of how the CO will be enforced are based on the wording of the CO, together with the content of the HKCC's guidelines. However, it is to be noted that, since the HKCC's guidelines merely represent the HKCC's interpretation of the CO, the Competition Tribunal (Tribunal) may not adopt the same approach as is set out in the HKCC guidelines when making its determinations under the CO.

Where a party to an agreement has a substantial degree of market power in one of the markets to which an agreement relates, the Second Conduct Rule (SCR) of the CO (which regulates the conduct of companies with substantial market power) may also be relevant to the antitrust assessment. However, conduct falling within the SCR 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?

The CO does not specifically define vertical restraints but the HKCC's FCR Guideline clarifies that a vertical agreement is considered to be 'an agreement between undertakings that operate, for the purposes of the agreement, at a different level of the production or distribution chain'. Vertical price restrictions are restrictions imposed or recommended by an undertaking that affect the prices at which another undertaking operating at a different level of the production or distribution sells products. Examples of vertical restraints that may, in some circumstances, contravene the CO include resale price maintenance (RPM), exclusive distribution and exclusive customer allocation.

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 CO primarily seeks to protect consumers and to foster a culture of competition in Hong Kong. The HKCC's functions, as established by section 130 CO, include:

- to investigate conduct that may contravene the competition rules;
- to promote public understanding of the value of competition and how the CO promotes competition;
- to promote the adoption by undertakings carrying on business in Hong Kong of appropriate internal controls and risk management systems, to ensure their compliance with the CO;
- to conduct market studies into matters affecting competition in markets in Hong Kong; and
- to promote research into and the development of skills in relation to the legal, economic and policy aspects of competition law in Hong Kong.

In the absence of enforcement outcomes, it remains to be seen how the policy objectives of the HKCC will play out in practice.

Responsible authorities

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

The HKCC and the Tribunal are responsible for enforcing the CO.

Pursuant to the CO, the HKCC has the primary function to investigate conduct that may contravene the competition rules and to bring proceedings before the Tribunal with respect to suspected contraventions.

The Tribunal has jurisdiction to hear and determine applications made by the HKCC with regard to alleged contraventions of the CO, and to make orders accordingly, including imposing pecuniary penalties.

The HKCC shares concurrent jurisdiction with the Communications Authority, which may perform the functions of the HKCC under the CO in so far as those functions relate to the conduct of certain undertakings operating in the telecommunications and broadcasting sectors. References to HKCC are therefore intended to include the Communications Authority.

The Hong Kong government does not have a direct role in enforcing the CO. However, the Chief Executive in Council may exempt specified agreements or categories of agreements from the FCR if there are exceptional and compelling public policy reasons for doing so. To date that power has not been used. The Chief Executive also has the power under section 4 of the CO to exempt specific entities from the scope of the competition rules. In July 2015, this power was used to exempt seven entities relating to the Hong Kong Stock Exchange.

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 FCR (including in relation to its application regarding vertical restraints) applies to an agreement, concerted practice or decision that has the object or effect of preventing, restricting or distorting competition in Hong Kong even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

There are not yet any precedents relating to potential extraterritoriality or jurisdictional issues 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 CO as a general matter does not apply to government (including government departments). Unless otherwise required by an order by the Chief Executive in Council, the FCR does not apply to statutory bodies (section 3 CO) (ie, entities established under another Hong Kong Ordinance). To date, the Chief Executive has only applied the competition rules to six statutory bodies.

By way of exclusion from the FCR, a vertical restraint may be permitted to the extent the relevant undertaking was entrusted by the government with the operation of services of general economic interest in so far as the Conduct Rule would obstruct the performance of the particular tasks assigned to it (paragraph 3, Schedule 1 CO).

The HKCC has indicated these exclusions will be interpreted strictly and any conduct by public entities that does not fall within the definition of statutory bodies or does not relate to the activities the undertaking has been entrusted by the government to perform could still be captured under the FCR.

Undertakings that are not statutory bodies are still subject to the CO. Therefore, an anticompetitive vertical restraint in an agreement between a statutory body or an undertaking entrusted by the government and a third party could still be caught under the CO.

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 laws or regulations applicable to the assessment of vertical restraints in specific sectors at this stage.

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 block exemptions relating to vertical agreements at this stage. However, by way of general exclusion under the CO, the FCR does not apply to:

- any agreement that contributes to enhancing overall economic efficiency;
- any agreement to the extent that it is made for the purpose of complying with a legal requirement;
- an undertaking entrusted by the government with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance of the particular tasks assigned to it;
- the extent to which an agreement results in, or if carried out would result in, a merger; and
- an agreement or concerted practice between the undertakings, or a decision of an association of undertakings if the combined turnover of the undertakings for the turnover period does not exceed HK$200 million.

Agreements

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

'Agreement' is defined under the CO as including any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings (section 2 CO). In determining whether there is an agreement, the HKCC will generally seek to determine whether there is a 'meeting of minds' between the parties concerned.

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 for vertical restraints to contravene the FCR. 'Agreement' does not only cover a formal written agreement, but also any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings. Further, a concerted practice, which is also captured by the FCR, is a form of cooperation that falls short of an agreement, whereby undertakings knowingly substitute practical cooperation for the risks of competition.

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)?

Whether vertical restraints rules apply to agreements between a parent company and a related company depends on whether the two companies are part of the same undertaking. The FCR does not apply to conduct involving two or more entities if the relevant entities are part of the same undertaking. In this regard, the HKCC will assess whether the relevant entities constitute a 'single economic unit'. Generally, if one entity exercises decisive influence over the commercial policy of another entity, whether through legal or de facto control, the HKCC will consider both entities together as a single economic unit and part of the same undertaking. An agreement between a parent company and its subsidiary, or between two companies under the control of a third, will not be subject to the FCR if the relevant controlling companies exercise decisive influence over their respective subsidiaries, notwithstanding that these various entities might have separate legal personalities.

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 the FCR applies to agent-principal agreements in the context of vertical restraints depends on whether the third party is a separate undertaking from the supplier. The FCR will not apply to such agreements if the third party and the supplier are viewed as a single undertaking, but it will apply in the situation where they are considered separate undertakings.

Where a supplier enters into a distribution agreement with an independent third party distributor, the agreement will, in principle, be subject to the FCR, as the supplier and distributor are likely to be separate undertakings.

In certain cases, however, a supplier may appoint a third party to conclude contracts on behalf of the supplier for the sale of the supplier's products, with the third party acting as a distribution agent for the supplier. Whether the third party acts as a true distribution agent (and

is, therefore, considered part of the same undertaking as the supplier) depends on the level of control the supplier exercises over the third party and the level of commercial risk borne by the third party in relation to the activities for which it has been appointed as a distribution agent by the supplier. The HKCC has, in its FCR Guideline, provided a non-exhaustive list of examples of risks that, if borne by a third party, are likely to indicate that it is an independent distributor rather than a true agent of the supplier.

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)?

Neither the CO nor the HKCC's FCR Guideline set out any special or different rules relating to the granting of IPRs.

Analytical framework for assessment

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

The HKCC acknowledges in its FCR Guideline that vertical agreements are generally considered to be less harmful to competition than horizontal agreements and, therefore, most vertical restraints will be analysed as to whether they have any anticompetitive effects.

However, the HKCC has indicated some RPM agreements (ie, fixed or minimum resale price restrictions) may be considered as having the object of harming competition depending on the content of the agreement, the way it is implemented and its context. An example of a situation where RPM will be considered as having the object of harming competition is where there is evidence that the RPM was implemented by a supplier in response to pressure from a distributor seeking to limit competition from competitors of the distributor at the resale level. Similarly, if the RPM is implemented by a supplier solely to foreclose competing suppliers, the RPM may be considered by the HKCC to have the object of harming competition. If an RPM agreement does not have an anticompetitive object, it may, nevertheless, contravene the FCR if it has an anticompetitive effect.

The CO makes a distinction between serious anti-competitive conduct (SAC), which is considered to be most harmful to competition, and other types of conduct. Generally, vertical restraints are unlikely to be considered to amount to SAC. However, in the HKCC's view, RPM may, in certain circumstances, amount to SAC. This has procedural implications since the HKCC may institute proceedings in relation to SAC before the Tribunal without having to first issue a warning notice to the undertakings involved.

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 determining whether a vertical restraint in an agreement has the effect of harming competition, the HKCC will consider the extent to which the undertakings concerned have market power in a relevant market. Generally, competition concerns in relation to vertical agreements will only arise where there is some degree of market power at the level of the supplier, the buyer or both.

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.

The HKCC has the power to issue block exemptions to certain categories of agreements. However, as yet, it has not indicated that it intends to issue a block exemption that would apply to vertical agreements and that would provide a safe-harbour threshold below which a vertical agreement is unlikely to have the effect of harming competition.

Types of restraint

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

Minimum or fixed RPM restrictions may be considered by the HKCC to have the object of harming competition and may also constitute SAC in certain cases. See question 15 for further details.

Where a supplier recommends a resale price to a distributor or requires a reseller to respect a maximum resale price, the agreement will not be considered by HKCC to have the object of harming competition but, instead, will be analysed on its effects. However, recommended or maximum resale price arrangements may give rise to a concern where they establish a 'focal point' for distributor pricing or where they soften competition between suppliers or facilitate coordination between suppliers. Recommended or maximum resale price arrangements, when they are combined with measures that make them work in reality as fixed or minimum prices, will be assessed similarly to RPM.

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'?

Where a supplier introduces a new product, RPM may serve to induce distributors to take into account the supplier's interest in promoting the product during the introductory period of expanding demand. In this context, the RPM might incentivise increased sales or promotional efforts on the part of the distributors. Similarly, RPM may assist a franchise distribution system for the purposes of organising a coordinated price campaign. In these scenarios, the HKCC would consider that the RPM does not have the object of harming competition and would, therefore, assess whether the arrangement had harmful effects on competition.

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

The HKCC's FCR Guideline has not addressed the possible links between RPM 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?

RPM may help address free rider concerns at the distribution level where the extra margin guaranteed by the RPM encourages parties to provide certain sales services for the consumers' benefit. This efficiency may have relevance in the case of 'experience' or complex products but the HKCC would expect to see compelling evidence of an actual free rider problem in practice. In the case of maximum resale prices, resale price restrictions may help ensure that a brand competes more effectively with other brands, notably when it avoids 'double marginalisation' (where the supplier and buyer both have market power and both apply a high margin when selling the product, resulting in the end price being higher than the price that would be charged by a vertically integrated monopolist).

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.

This is assessed according to the framework set out in question 15 and 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 HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed by the HKCC in terms of whether it has any anticompetitive 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.

No specific distinction is made between brick and mortar and internet sales in the HKCC FCR Guideline. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

The HKCC FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive 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 HKCC FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive 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?

Restricting the territory into which a buyer may resell contract products is dealt with in the context of exclusive distribution under the HKCC's FCR Guideline. Exclusive distribution agreements restricting the territory into which a buyer may resell products will not generally be considered as having the object of harming competition, but, rather, will usually require an analysis of their effects. Such assessment will include an assessment of how intra-brand and inter-brand competition is affected, the extent of the territorial limitation, and whether exclusive distributorships are common in the relevant markets.

If such an agreement has anticompetitive effects, the agreement may, nonetheless, benefit from the exclusion from FCR for agreements enhancing overall economic efficiency. In this regard, the HKCC notes that exclusive distribution agreements may incentivise distributors to invest in marketing and customer service, thereby making a product more competitive as against other branded products in the market.

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

Neither the CO nor the HKCC's FCR Guideline specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

Restricting the customers to whom a buyer may resell contract products is dealt with in the context of exclusive customer allocation agreements under the HKCC's FCR Guideline. Such agreements are analysed in the same way as exclusive distribution agreements as set out in question 28. In assessing the effects of customer allocation agreements, the HKCC will consider the supplier's market power. Selective distribution systems that include customer resale restrictions are more likely to cause concern where inter-brand competition is limited and the supplier's market position is particularly strong.

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

The HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

The HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

The HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

Where a supplier selects retailers on the basis of purely qualitative criteria (such as criteria relating to the training or qualifications required of staff), the arrangement will, generally, not give rise to concerns under the FCR where the following conditions apply:

- the nature of the product is such as to require a selective distribution network in order to protect its quality and ensure its proper use;
- members of the network are selected on the basis of non-discriminatory qualitative criteria relating to their technical ability to handle the product or the suitability of their premises to protect the product's brand image; and
- the relevant criteria do not go beyond what is necessary for the particular product concerned.

Where the selective distribution system does not have the above characteristics, the HKCC may need to assess whether the arrangement has anticompetitive effects. Competition risks may be more likely where the supplier has market power, where the number of authorised retailers is small or where all major competing suppliers in the market have similar selective distribution methods.

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

Neither the CO nor the HKCC's FCR Guideline provide any guidance on this.

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

Neither the CO nor the HKCC's FCR Guideline provide any guidance on this.

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

There have been no decisions on this since the CO came into force.

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

The CO and the HKCC's FCR Guidelines provide no guidance on this. However, the FCR Guideline states that selective distribution systems are more likely to cause concern where inter-brand competition is limited and the supplier's market position is particularly strong. Where there is wide scale use of selective distribution systems in the relevant

Update and trends

Recent developments

Following the full entry into force of the CO on 14 December 2015, the HKCC has engaged in wide-ranging enforcement actions in a number of sectors, including vertical restraints.

In an enforcement priorities paper published by the HKCC in November 2015, the HKCC notes that, in enforcing against breaches of the FCR, it will accord priority to cases involving cartel conduct and any other agreements that cause significant harm to competition in Hong Kong.

To date there has been little public comment by the HKCC on vertical restrictions of competition. However, in May 2016, the HKCC issued a report on study into aspects of the market for residential building renovation and maintenance. This related to conduct before the full commencement of the CO. While the report focussed on potential bid rigging allegations which could give rise to concerns under the CO, in included an overview of specific vertical issues in the relevant markets. The HKCC assessed the potential impact of alleged 'bid manipulation' between consultants and contractors conspiring with each other so that the particular consultant wins a bid to oversee the performance of particular tenders.

Anticipated developments

It is anticipated the HKCC will seek a number of enforcement actions in 2017, including the prosecution of cases in the Tribunal. The HKCC has not publically indicated the nature of its current investigations. However, it is expected some will include vertical restraints.

market, the risks of foreclosing certain types of retailer and collusion between major suppliers are more likely to arise.

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

There have been no decisions since the CO came into force.

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

This is dealt with extensively in the HKCC's SCR Guideline (ie, for cases where the supplier has a substantial degree of market power).

Absent market power, in relation to an analysis pursuant to the FCR, this will most likely be assessed in terms of whether it has any anticompetitive effects.

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

The HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed by the HKCC in terms of whether it has any anticompetitive effects in practice. However, it is of note that in a joint venture context, a non-compete clause between the parent entities and their joint venture might be regarded as directly related to and necessary for implementing the joint venture, and, if so, it would fall outside the FCR.

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

In the context of the FCR, the requirement that a buyer must purchase certain amounts of products from the supplier is dealt with in the context of franchise agreements. A franchise agreement may contain restrictions with the objective of maintaining the identity and reputation of the franchise network. Such restrictions may include, in certain circumstances, not to sell competing goods apart from those supplied by the franchisor. The HKCC indicates that such restrictions will not give rise to concerns under the FCR, where they relate directly to and are necessary for the implementation of the franchise agreement.

The HKCC's FCR Guideline is silent on the situation beyond the scope of franchise agreements. However, it is likely that similar principles will apply in other contexts.

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

This requirement is to be analysed in the same way as a restriction on the buyer's ability to stock products competing with those supplied by the supplier as set out in question 42.

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

The guidelines do not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

The HKCC's FCR Guideline does not specifically address this situation. This will most likely be assessed in terms of whether it has any anticompetitive effects.

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

No.

Notifying agreements

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

The CO provides that undertakings may apply to the HKCC for a decision as to whether an agreement or conduct is excluded or exempt from the conduct rules. Details of how such applications can be made are set out in the HKCC's Guideline on Applications for Decisions and Block Exemption Orders. In order to apply for such a decision, the undertaking concerned must submit an application for a decision to the HKCC, which will review the application, receive representations made by third parties, conduct inquiries and gather additional information. The HKCC will then issue a decision as to whether the agreement is excluded or exempt from the FCR.

Authority guidance

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

See question 47.

Complaints procedure for private parties

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

Section 37(1) CO provides that any person who suspects that a competitor, supplier, customer or any other party has contravened, is contravening or is about to contravene a competition rule may contact the HKCC to express their concerns and to make a complaint to the HKCC. The HKCC has the discretion to decide which complaints may warrant investigation (section 37(2) CO). The HKCC will consider what matters to pursue, having regard to the public interest in having a competitive market. The HKCC has published Guidelines on Complaints in which the HKCC indicates it will accept complaints and queries in any form including by telephone, email, post, by completing an online form or in person. After preliminary review of a complaint, the HKCC will either take no further action, recommend that the complainant refer the complaint to another agency, or review the matter further by conducting an initial assessment.

Enforcement

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

There have been no enforcement outcomes to date regarding vertical restraints. Therefore, it remains to be seen how actively the HKCC will enforce against vertical restraints. However, the HKCC has made it clear that it generally considers horizontal cartel agreements to be more egregious than vertical restraints. A number of investigations are ongoing relating to certain vertical restraints.

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

If the Tribunal determines a contravention of the CO has occurred, it has the power to make several orders including:

- an order prohibiting a person from making or giving effect to an agreement;
- an order requiring the parties to an agreement to modify or terminate that agreement; and
- an order declaring any agreement to be void or voidable.

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

Where the HKCC considers that a contravention of the CO has occurred or may occur, it may seek to prosecute such conduct before the Tribunal, which can impose financial penalties (among other sanctions) if it considers that there has been a breach of the CO. However, the HKCC has no powers to impose financial penalties itself.

Other sanctions that can be imposed by the Tribunal include (among other things):

- an order restraining a person from engaging in conduct that constitutes the contravention of the CO;
- an order requiring a person who has contravened the CO to restore the parties to any transaction to the position in which they were before the transaction was entered into; and
- a Director Disqualification order preventing a person from being, or continuing to be, a director, liquidator, receiver, manager of a company's property or in any way concerned in the promotion, formation or management of a company for up to five years.

Investigative powers of the authority

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

The HKCC has wide-ranging compulsory investigative powers including:

- the power to issue notices requiring a person to provide documents and information to the HKCC;
- the capacity to seek a search warrant from a Court of First Instance judge to enter and search premises for evidence (dawn raids); and
- the power to require any person to appear before it to answer questions relating to any matter the HKCC reasonably believes to be relevant to an investigation.

In addition, the HKCC has the power to conduct market studies into matters affecting competition in markets in Hong Kong. However the HKCC has no compulsory investigative powers regarding market studies.

Private enforcement

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

Private enforcement of the CO is possible in Hong Kong only in the form of follow-on damages actions where a contravention of the CO has already been found to have occurred. A person who has suffered loss or damage as a result of any act that has been determined by the Tribunal, the Court of First Instance, the Court of Appeal or the Court of Final Appeal to be a contravention of a conduct rule, or who has suffered damage as a result of an admission of a breach of the CO made by an undertaking in a commitment accepted by the HKCC, has a right of action against any person who has contravened or is contravening the rule, and any person who is, or has been, involved in that contravention.

The Tribunal has several potential powers in a follow-on action, including requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention of the CO or an order restraining or prohibiting a person from engaging in any conduct that constitutes the contravention, or both.

Stand-alone damages actions in the absence of a finding of a contravention of the CO are not permitted.

Other issues

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

No.

Linklaters

Clara Ingen-Housz **cih@linklaters.com**
Marcus Pollard **marcus.pollard@linklaters.com**

10th Floor, Alexandra House
18 Chater Road
Hong Kong

Tel: +852 2842 4888
Fax: +852 2810 8133
www.linklaters.com

Indonesia

HMBC Rikrik Rizkiyana, Anastasia Pritahayu R Daniyati and Wisnu Wardhana
Assegaf Hamzah & Partners

Antitrust law

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

The primary legal basis of antitrust law in Indonesia is Law No. 5 of 1999 concerning the Prohibition of Monopoly and Unfair Business Competition Practices (the Indonesian Competition Law, ICL). Chapters 3 and 4 of the ICL, which regulate restrictive agreements and restrictive activities, set out provisions prohibiting vertical restraint. In addition to the above, the relevant authority, the Komisi Pengawas Persaingan Usaha (KPPU, Indonesian Competition Commission), has issued several regulations serving as guidelines for interpreting provisions under the ICL.

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?

Although there is no definition on vertical restraints concept in the ICL, yet the KPPU delineates the concept in KPPU Regulation No. 8 of 2011 regarding Guideline of article 8 on Resale Price Maintenance (KPPU Regulation No. 8/2011) as 'a restriction of a transfer of entitlement upon a certain product or services during an economic exchange between two parties at different stages'.

The ICL stipulates the following prohibitions related to vertical restraints:

- Resale price maintenance (RPM) – any agreement obliging distributors to refrain from reselling or resupply goods or services below the set minimum price, creating an unfair business competition.
- Vertical integration – any agreement requiring manufacturers controlling the production which are products included the production chain of certain related goods or services where each product link is the end product of the production process or of further processing.
- Exclusive distribution agreement – any agreement requiring distributors to only supply or not supply such goods or services to certain parties and/or in particular places.
- Tying arrangement – any agreement requiring customers who purchase one product to purchase another different product (the tied product).
- Discount or rebate – any agreement offering certain prices or lower prices on goods or services that requires customers to purchase other goods or services from suppliers.
- Market control – any agreement requiring supplier engaging in discriminatory practices against certain undertakings.

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?

There is no mention in the ICL of any specific objective in prohibiting vertical restraint. However, the stipulation on vertical restraints is an inseparable part of the ICL itself, whereas the ICL's general objectives are: (i) to promote public interest and enhance the efficiency of national economics; (ii) to create a sound business environment ensuring an equal opportunity for all undertakings; (iii) to prevent monopolistic or unfair business practices or both; and (iv) to create effectiveness and efficiency in businesses. This being said, vertical restraints provisions will still serve the ICL's objective.

Responsible authorities

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

Established in 2010, the KPPU is the sole authority responsible for the enforcement of the ICL. The KPPU may initiate an investigation and case examination, decide a case and impose administrative sanctions against all violation of the ICL. For the purpose of the investigation, the KPPU has the power to summon undertakings, witnesses or experts to obtain, examine and evaluate documents or other pieces of evidence.

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 ICL will generally apply to conduct occurring outside Indonesia if one or more of the defendants is established and has domicile in Indonesia or directly or indirectly engages in business activities in Indonesia. If either condition is met, the KPPU may pursue the case when it considers that its action to enforce the ICL would be effective, for example, by enforcing its decision against local subsidiaries or affiliates of the foreign companies.

Further in this issue, there has been a precedent of the KPPU applying the extraterritorial doctrine in its investigation over violation of the ICL. This doctrine was raised in KPPU Decision No. 7/KPPU-L/2007 regarding the cross-ownership of Temasek Holding Pte Ltd (Singapore) (*Temasek* case). Other precedents on the implementation of this doctrine by the KPPU can be found in various KPPU Opinions relating to foreign merger notifications, essentially noting that such transactions are notifiable to KPPU despite being foreign ones.

Although the above precedents and the underlying regulations do not relate to vertical restraint case, the KPPU's position on the extraterritorial application of the ICL is worth noting as the most likely approach taken by the KPPU in any investigation of violation of the law in general.

Agreements concluded by public entities

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

The ICL is applicable to all undertakings. Meanwhile article 1 No. 5 further delineates undertakings as any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the state of Indonesia, either individually or jointly based on agreement, conducting various business activities in the economic sector. Therefore,

vertical restraint agreement is binding on all parties, including publicly traded companies or state-owned company.

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 is no industry-specific provisions or defence applicable under the ICL, except for small businesses and certain forms of cooperatives.

General exceptions

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

Exceptions or exemptions can be found in article 50 of the ICL, which includes agreements or activities:

- intended to implement any applicable laws and regulations;
- related to intellectual property rights;
- related to the application of technical standards of goods or services that do not inhibit or impead competition;
- a research cooperation agreement intended to improve the standard of life of the society at large;
- related to exports of goods or services that do not disrupt domestic supply;
- made by and between small business undertakings; and
- made by and between cooperatives aimed specifically at serving their members.

The KPPU issues several guidelines to set conditions that need to be satisfied by undertakings to enjoy the exemptions. In several cases, there were indications that the KPPU might decide discretionally on whether a condition would fall into a particular exemption. Thus, it is advisable for undertakings to maintain awareness even if they are running their business as apparently falling within a particular exemption.

Agreements

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

The ICL essentially defines the term agreement as an act of one or more undertakings to bind him or herself to one or more other undertakings under whatever names, either in written or verbal. In cartel cases, the KPPU often seemed to broaden the definition of agreement which also covers concerted practices, where the KPPU found guilty of practising cartel though there was no formal agreement.

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 some cases related to vertical restraint, the KPPU typically relied on a formal written agreement, such as distributorship agreement. Though, as often applied in cartel cases, the KPPU may expand the definition of agreement into concerted practices which focus on the existence of any 'parallel conduct', 'concerted action', or 'following the leader'.

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)?

Currently, there are no specific implementing regulation or guideline from KPPU related to agreements between parent company and related company. However, since its application to the *Temasek* case, KPPU has consistently applied the single economic entity doctrine (SEE) in any of its antitrust assessments, including but not limited in its competition litigation cases and merger notifications. It is worth noting that in the *Temasek* case decision, the KPPU adopted Alison Jones and Brenda Sufrin's approach on the definition of SEE and quoted it as:

> *A theory viewing a parent and subsidiary relation of which the subsidiary has no independence to determine the company's policy as an integrated economic entity.*

However, the above is unlikely to be applicable for undertaking holding dominant position and access to essential facility in the respective relevant market. The deal between PT Garuda Indonesia Tbk (Garuda), a national flag-carrier and the owner of 95 per cent shares of PT Abacus Indonesia (Abacus), with PT Abacus Indonesia, an Abacus system provider, regarding the ticket distribution within Indonesia which shall only be managed by dual access through Abacus terminal, examined in 2003 by the KPPU (*Garuda/Abacus* case) is an broad example of this. In the *Garuda/Abacus* case, , instead of the KPPU considering Garuda and Abacus as a single economic entity owing to Garuda's ownership of Abacus, it declared that Garuda had violated the vertical restraints provisions under articles 14 and article 15(2) of the ICL. Article 14 prohibits vertical integration which causes anticompetitive outcomes. Garuda has been considered violating this provision by imposing requirement for travel agents to use abacus system in order to be Garuda's domestic flight agents. Article 15(2) essentially prohibits undertakings from enter into a tying agreement. Garuda's action to require its agents to purchase the Abacus system in addition to the ARGA system has been considered as violating article 15(2) of the ICL.

The vertical restraints provisions are silent on the definition of related company. Nevertheless, such concept may mimic the affiliates concept described at length under the current merger control which is a relationship (i) of inter-companies, within which companies are directly or indirectly controlling or controlled by one company, and (ii) between two companies that are controlled, either directly or indirectly, by the same party (horizontal relationship). Meanwhile, a 'controlling company' refers to an undertaking owning shares or voting rights ownership in a company of more than 50 per cent, or shares or voting rights less than 50 per cent in a company yet still being able to influence and determine management policy of the company or influence and determine the management of the 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?

In general, according to article 50(d) of the ICL such agent-principal agreements are exempted from the application 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?

The ICL sets an exemption for 'agreement for agency purposes which does not prohibit the agent to resupply the contracted goods or services with prices lower than the agreed prices'. In KPPU Regulation No. 7 of 2010 regarding the Guideline on the exemption of agency agreement, the KPPU sets conditions of agency agreement that can enjoy the exemption:

- the agent acts for and on behalf of the principal;
- the selling price is determined by the principal;
- the principal will take responsibility from agreements entered by the agent and third party;
- the principal is a controlling party; and
- the agent receives commission or salary from the principal.

Therefore, agency agreements that state agents as not acting for and behalf of the principal or having the authority to determine the price of goods or services, are excluded from the exemption of article 50(d).

Intellectual property rights

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

KPPU Regulation No 2 of 2009 on Guideline of the exemption of IPRs-related agreements stipulates the exemptions on agreements related to

intellectual property rights. However, these exemptions are not absolute, that is, to be exempted under this provision, an agreement must fulfil the following requirements:

- exemption must be applied only for an issue that is not categorised as 'essential facilities';
- the agreement must be a licensing agreement related to intellectual property rights;
- the agreement must fulfil all requirements as stipulated by laws and regulations (ie, registered in Directorate General of Intellectual Property Rights); and
- the agreement must not contain any anticompetition clauses.

Analytical framework for assessment

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

When assessing vertical restraint under ICL, KPPU's should undertake an analysis of whether all of the elements of the related ICL article have been fulfilled. The KPPU should know the facts concerning the vertical restraint background and also the implications of the agreement on all parties. Further, the KPPU should stress its analysis on market structure and whether a dominant undertaking has the ability to abuse its market power. The KPPU may also consider whether there are any restrictions on an undertaking's strategy that forecloses access for potential entrants into upstream and downstream markets.

According to KPPU's guideline on article 15, a closed agreement will be declared a violation of article 5 of the ICL if the following conditions are met:

- such closed agreement has to substantially or potentially reduce the volume of trade;
- the closed agreement has been made by undertakings that have market power and the market power can be increased owing to the closed agreement;
- in a tying agreement, the tying products should be different from the main product; and
- a tying undertaking should have significant market power in order to force buyers to buy the tying products.

RPM (article 8), vertical integration agreement (article 14), and market control (article 19) of ICL are considered as rule of reason analysis. In order to declare a violation of such articles, the vertical restraint must be proved by (i) the emergence of a negative impact on the market, (ii) the motive and economic benefits gained by the undertaking to do such 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?

Vertical restraint may be used by an undertaking as wholesaler to the distributor. In these cases, identifying both undertakings' market share is relevant to determine whether the vertical restraint will reduce competition substantially. For example, wholesaler 'A', which has a dominant market share, made an exclusive agreement with X as distributor. Competitors of X will have difficulty in obtaining A's supplies. On the other hand, if X also has a dominant market share, the competitor of A also will have difficulty in selling their products. With the exclusive agreement, A and X would create additional cost and supply constraint for competitors in both relevant 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?

See question 16. To date there has been no case on vertical constraint in the online sales 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 is neither block exemption nor safe harbour applied for any of antitrust provisions under current ICL. However, on the contrary, KPPU Regulation No. 5 of 2011 concerning Guidelines for article 15 on Exclusive Dealing (KPPU Regulation No. 5/2011) set out without the need for further evidence, exclusive dealing that has met the criteria to be declared a violation of article 15 of ICL, as follows:

- such a closed agreement should substantially reduce the volume of trade;
- exclusive dealing has been made by undertakings that have market power and the market power can increase owing to the closed agreement. An undertaking is considered as having market power if the undertaking has a market share of 10 per cent or more;
- in a tying agreement, the tying products should be different from its main product; and
- a tying undertaking should have significant market power in order to force buyers to buy the tying products. The value of market power is having market share 10 per cent and above.

Despite the rise of the online-based market, there have up to now been no specific regulations regulating the online market or case precedents involving the online market in vertical restraint matters.

Types of restraint

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

Based on KPPU Regulation No. 8/2011, the ICL only prohibits minimum resale price and does not prohibit maximum resale price and specified resale 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'?

According to publicly available information and based on decisions published on the KPPU's website, there have been no precedents or investigation for such specific matter. The same also goes for guidelines or regulation. KPPU Regulation No. 8/2011, nevertheless, does not prohibit the application of maximum and specified resale price maintenance, as those will potentially benefit consumers. Yet caution must be applied to the specified resale price as the KPPU may see this as a facilitating device for a cartel.

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

Yes, KPPU Regulation No. 8/2011 addressed possible links to:

- abuse of dominant position (article 25 of ICL);
- minimum resale price maintenance will have a significant impact if it was set up by a seller, supplier or buyer who has dominant market share;
- price-fixing (article 5 of ICL);
- minimum resale price maintenance can be done by undertaking to facilitate collusion;
- price-fixing in an agency framework (article 50(d)); and
- minimum resale price maintenance can be used by price fixing in the agency framework.

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

KPPU Regulation No. 8/2011 and precedent on PT Semen Gresik (Persero) Tbk in 2005 (*Semen Gresik* case) are both silent on the efficiency aspect.

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 currently no exact guidelines provisioning the pricing relativity agreement. However, it is worth noting that as a rule of thumb, the buyer must be free to set the retail price to the consumer. In this particular circumstance, the price fixing behaviour of the hypothetical buyer colluding with supplier A's product and fixing the price would be likely to violate article 5 of ICL on price fixing.

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.

When suppliers provide a better service in terms of price and services only to certain buyer, then this may raise concern to discriminatory conduct against other buyers. Discrimination behaviour by suppliers to certain buyers is prohibited by ICL. The anticompetitive impacts of the suppliers conduct must depends on whether discriminatory conduct have any legal, social, economy, technical, or others justification. The suppliers' market power will be taken into account because the more powerful the suppliers, the more the suppliers will used their market power to exercise the market and put buyers in disadvantageous position.

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 this case, theoretically speaking, it is understandable when a supplier sets the same price in Platform A and Platform B as long as the price is the reasonable one. Reasonable price means that when the price which is set by suppliers is the normal price and instead of monopoly price. So, it is possible when pricing on Platform A will be equal to Platform B. Furthermore, supplier must be able to show that it does not engage in any discriminatory behaviour to any certain Platform. Here, the KPPU would most likely focus on the important rules in discriminatory conduct, among others but not limited to:

- whether there is any differences in the treatment of certain undertaking in the relevant market;
- market dominance of the suppliers or buyers or both;
- whether the different requirements is not justifiable in terms of, among others, legal, social, economy, technological, or other acceptable reason; and
- the discriminatory effects that will cause unfair business competition.

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

This condition depends on, among other things, the market dominance of both the supplier and the buyer. The KPPU may consider this practice as type of resale price maintenance (RPM) and, provided that there is no economic justification that such RPM policy is pro-competitive, the KPPU may well see such as an alleged violation of the ICL.

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.

Basically, it depends on the ability of buyers in the market. As long as the buyer has a dominant market share in the market, then the buyer will be able to ask suppliers to supply products to a specific buyer. This condition will create a discrimination against other buyers who will receive different treatment. The anticompetitive impacts of the buyer's conduct shall depend on whether such discriminatory conduct has any legal, social, economy, technical or other justification. The buyer's market power will be taken into account because the more powerful the buyer, the more it will use its market power to exercise the market and put suppliers in a disadvantaged position.

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?

This type of restriction is prohibited by the ICL. This restriction is a per se illegal approach. The ICL prohibits an undertaking from entering into an agreement with another undertaking by which the first undertaking imposes terms on the second undertaking, by which the second undertaking receiving goods or services is required to supply or to not resupply the goods or services to certain parties or certain places. But on the other hand, KPPU Regulation No. 5/2011 states that exclusive dealing may raise positive and negative impact for competition. Based on the positive impacts caused by exclusive dealing, an undertaking will not automatically be alleged to be violating the ICL. The KPPU will undertake further analysis to determine whether exclusive dealing results in a positive or negative impact in competition. Again, in an exclusive dealing market power plays an important rules to determine whether the agreement will raise competition issues.

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

KPPU has not taken any decisions or guidelines regards to this specific issue.

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

This case is also be considered as exclusive dealing, please see question 29.

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

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue.

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

The KPPU has not taken any decisions or guidelines regarding this specific issue.

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

The vertical restraints guidelines shall be applicable to all sectors in all platforms. However, there have to date been no decisions involving the internet sales channel.

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

This agreement may be considered an exclusive dealing agreement. In terms of a distribution scheme, products may only be distributed to one or several companies, such as the main distributor, authorised dealers, a shop and end consumers. If selective distribution were to raise efficiency issues for the company and customers, the agreement would be more likely to be considered as not opposing the ICL. The KPPU will undertake further analysis to determine whether exclusive dealing results in a positive or negative impact on competition. Again, in exclusive dealings market power plays an important role in determining whether the agreement will raise any anticompetitive issues.

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

Yes, selective distribution is lawful – such as in electronic appliances, motor vehicles (motors, cars), heavy equipment (mining cars and trucks) and other high-technology utility products. The manufacturers will require local companies to act as sole agent, main dealers and

Update and trends

Recent developments
Related to vertical agreement, in September 2016 the KPPU announced the decision regardinga fruit powdered drink that contains milk in a sachet packaging product. The KPPU imposed a fine of 11.4 billion rupiah on PT Forisa Nusapersada (Forisa), a local packaged food and beverage manufacturer under POP ICE brand name due to an incentive programme that is exclusively entered into by and between Forisa and its downstream outlet and stores (downstream channel) encouraging the downstream channel not to sell the competitors' products.

Anticipated developments
Currently, KPPU has been pushing for an amendment to ICL and the draft is still being discussed in the legislation council of the House of Representatives. Although the final draft has not yet been agreed, according to the latest publicly available draft, the proposed amendment will move the article related to vertical integration into prohibited activities, which were previously classified as prohibited agreement. This change means that fulfillment of 'agreement' is no longer needed to prove violation of vertical integration. Moreover, below are the proposed changes on the administrative sanctions regarding violation of vertical integration, namely:

- termination of activities;
- stipulation of compensation of losses;
- levying a fine at the lowest 5 per cent or 30 per cent from sales values from offending undertaking within the period of infringement;
- revocation recommendation of business licence to the Regulator; or
- publication as blacklisted undertakings.

dealers. Exclusive agreements between manufacturers and dealers will increase economies of scale of each party, while reducing the element of uncertainty in the distribution process.

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

The vertical restraints guidelines shall be applicable to all sectors in all platforms. However, there has to date been no decision involving this issue.

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

KPPU has not taken any decisions regards to this specific issue.

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

KPPU has not taken any decisions or guidelines regards to this specific issue.

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

KPPU has not taken any decisions or guidelines regarding this specific issue.

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

This agreement may raise competition issues where buyers shall not purchase the same or similar goods or services from another undertaking that became a competitor of the supplier undertaking and had a clause about price and discount from supplier to buyers. The KPPU will undertake further analysis to determine whether exclusive dealing result positive or negative impact in competition. Again, in an exclusive dealing market power plays an important role in determining whether the agreement will raise competition issues.

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

KPPU has not taken any guidelines in regard to this specific issue. Furthermore, there is no precedent on this specific issue.

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

See question 40.

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

Firstly, the market dominance and market power of both the buyer and supplier need to be concluded as those are crucial to determine whether the agreement will raise competition issues. The buyer's position when there was a requirement to purchase a certain amount of the contract products depends on the characteristics and value of the products. However, when the number of sales of contract products is not significant then the buyer should have the ability to buy other products with significant sales value. The requirement may raise competition issues because, according to the law, the undertaking is prohibited from creating a requirement that the buyer must be willing to buy goods and or services from supplier. KPPU will undertake further analysis to determine whether such arrangement will result in a positive or negative impact on competition.

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

Question 44 has the same approach as 16.

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

There is no prohibition in the ICL that prohibits suppliers from selling products directly to end consumers. It depends upon the ability of the company in the form of capital and human resources in making direct sales to end consumers. Direct sales to the end consumer may increase consumer benefits by cutting the distribution cost. This is as in the case handled by KPPU, where KPPU sought to reduce the cost from the distribution chain.

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

KPPU has not taken any decisions regards others than those covered above.

Notifying agreements

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

Not applicable under the current law. The procedure of leniency shall be further defined with a KPPU regulation under the draft amendment to the ICL.

Authority guidance

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

Not applicable under the current law. The procedure of leniency shall be further defined with a KPPU regulation under the draft amendment to the ICL.

Complaints procedure for private parties

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

Under the current legislations, private parties may file a complaint (or a report under the ICL) to the KPPU with procedures as follows:

- submission of report on alleged violation(s): the submission can be done at anytime and there is no particular form the reporting party needs to fulfil. The report must be addressed to the Chairman of the KPPU and must satisfy the administrative requirements, such as the following: clear identities of reporting and reported parties, any possible witnesses as well as preliminary evidences, and such report must be within the KPPU's jurisdiction, etc; and
- clarification of report on alleged violation(s): this is the stage of which the report will be administratively assessed by the report clarification team.

If all is satisfied, then the report will go further, to the investigation process, a stage of which the assigned investigators shall acquire at least two pieces of evidence of violation of ICL. If the requirements during Investigation process is fulfilled then the report will be a case that shall be examined in the examination process.

Investigation stage begins

The investigators shall report their investigation to the Commission Assembly no later than 60 working days from the date of record in the Investigation Registration Book. The Commission Assembly may extend the investigation period for the maximum of 60 working days after the end of the investigation. Undertakings that have allegedly violated the ICL will be named as a 'reported party'.

Filing stage begins

An investigation report with complete information can be submitted directly to the filing unit and transformed into report on the alleged violations. An incomplete investigation report will be returned to the investigators.

Preliminary examination stage begins

The Commission Council will summon the reported party; and the investigators will then read the report on the alleged violations. The reported party is allowed to submit a defence and submit list of witnesses, expert and or any other relevant documents. The hearing is open to the public. The examination must be concluded no later than 30 working days after it started. Within such period, the Commission Council and the registrar will draft a report on the preliminary examination (preliminary examination report) which will be presented before the Commission Assembly.

Further examination stage begins. The commission assembly will determine a further examination schedule. In this phase, the commission council will examine the evidences presented by the investigator and the reported party. The Commission Council will summon all the witnesses and experts to testify at the hearing. The reported party shall be duly informed on the hearing schedules in the further examination stage. The investigators and the reported party may cross-examine the witnesses and experts. Before further examination ends, the Commission Council will allow the investigators and the reported party a chance to present their written conclusion. Further examination shall end 60 working days after it was started, and can be extended for a period of 30 working days.

Following a further examination stage, the Commission Council will deliberate and shall decide the case within 30 working days of the end of the extended examination period.

Enforcement

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

Cases investigated by the KPPU are still dominated by bid-rigging cases, and recently there was an increase in other cartel cases. The number of vertical restraint-related cases, however, remains low. Few cases are related to tying or bundling provisions.

51 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 a prohibited vertical restraint will not automatically become null and void. The KPPU may enforce the violation of ICL regarding vertical restraint and the KPPU also may impose a sanction on the undertakings.

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

The KPPU may directly impose administrative sanctions to undertakings found guilty of violating the ICL. It may pass such orders as it deems fit, including annulment or adjustment of agreements and or order to discontinue any practice considered as monopolistic or unfair. The KPPU may also impose a penalty upon each undertaking involved in such violation up to 25 billion rupiah respectively.

ASSEGAF HAMZAH
& PARTNERS

HMBC Rikrik Rizkiyana **rikrik.rizkiyana@ahp.co.id**
Anastasia Pritahayu R Daniyati **anastasia.pritahayu@ahp.co.id**
Wisnu Wardhana **wisnu.wardhana@ahp.co.id**

Menara Rajawali 16th Floor
Jl DR Ide Anak Agung Gde Agung Lot # 5.1
Kawasan Mega Kuningan, Jakarta 12950
Tel: +62 21 2555 7800
Fax: +62 21 2555 7899

Pakuwon Center, Superblok Tunjungan City
Lantai 11, Unit 08
Jalan Embong Malang No. 1, 3, 5, Surabaya 60261
Tel: +62 31 5116 4550
Fax: +62 31 5116 4560

www.ahp.co.id

Investigative powers of the authority

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

The KPPU has the authority to receive complaints, summon parties and witnesses, make conclusions from investigations and hearings, request statements or clarification from related government institutions, determine and stipulate the existence of losses on undertakings or society, and impose administrative sanctions. The investigative powers are set out in broad wording such as 'conduct research', 'conduct investigation', 'obtain, examine or evaluate' letters, documents or other instruments of evidence.

Currently, the KPPU has no authority to conduct search and seizure, dawn raids or other commanding investigative powers. These may be amended once the new draft is passed.

Private enforcement

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

Private parties may file a report and seek damages. However, in such cases, the onus is on the plaintiffs to provide sufficient evidence of the offence and not on the KPPU. The procedures for filing a report and seeking damages are generally similar except the plaintiffs or reporting party will directly deal with the reported party and the KPPU will sit as the judges.

Other issues

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

None.

Ireland

Ronan Dunne and Philip Andrews
McCann FitzGerald

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) prohibits anticompetitive agreements between undertakings and is the Irish domestic law equivalent to article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 4(2) of the Act provides that an agreement falling within either: (a) section 4(5) of the Act (known as the 'general efficiency conditions') or; (b) section 4(3) of the Act (under a declaration made by the Competition and Consumer Protection Commission (the CCPC)) is not a prohibited agreement.

The general efficiency conditions are that an agreement must, having regard to all relevant market conditions, contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and must not: (i) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives; or (ii) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. The CCPC's discretionary power under section 4(3) to make written declarations applies where the CCPC forms the opinion that certain categories of agreement meet the general efficiency conditions. This is the equivalent at national level of the European Commission's block exemptions for categories of agreement that comply with the conditions set out in article 101(3) TFEU.

In 2010, the CCPC published both a notice and a declaration applicable to vertical restraints: (i) the declaration in respect of vertical agreements and concerted practices (Decision No. D/10/001) (the 'Declaration'); and (ii) the notice in respect of vertical agreements and concerted practices (Decision No. N/10/001) (the Notice). Both the Declaration and Notice expire on 1 December 2020.

The Notice is intended to provide practical guidance as to the application of the Act and the Declaration. The Notice expressly provides at paragraph 3 that reference may be made to the European Commission's Guidelines on Vertical Restraints (the European Commission Guidelines) for guidance as to whether an agreement is likely to fall outside of section 4(1) of the Act. There are two exceptions to this:

- the EU Vertical Block Exemption Regulation (EUVBER) provides an exception 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. The Declaration does not provide for this. However, in the CCPC's notice on activities of trade associations and compliance with competition law, N/09/002 dated 9 November 2009 the CCPC cited the approach indicated by the European 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); and
- there is no equivalent to the De Minimis Notice under Irish law.

Previously, the CCPC has published declarations in respect of agreements concerning motor fuel (Motor Fuels Category Declaration, Decision No. D/08/001) and cylinder liquefied petroleum gas (the Cylinder LPG Declaration, Decision No. D/05/001). These declarations served a similar purpose to block exemptions. Upon their expiry in 2010 and 2015 respectively, the agreements that were once subject to these declarations became assessable under the Declaration.

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 1 of the Declaration defines 'vertical agreements' 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'.

Examples of the types of vertical restraints that are subject to antitrust law in Ireland include:

- non-compete obligations: including any direct or indirect obligation causing the buyer: (i) not to manufacture, purchase, sell, or resell goods or services which compete with the contract goods or services; or (ii) 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;
- selective distribution systems: whereby the supplier undertakes to sell the contract products 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; and
- exclusivity provisions: including exclusive purchasing and supply obligations, and exclusive distribution agreements in respect of a given territory or customer group.

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?

Only economic objectives are pursued by Irish competition law. Within the scope of those economic objectives, the protection of consumer welfare is enshrined. Indeed, the Irish Supreme Court, in *Competition Authority v O'Regan & Others* [2007] IESC 22, has described the key purpose of Irish competition law as follows: '...the entire aim and object of competition law is consumer welfare.'

Responsible authorities

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

The CCPC (with the aid of the Irish courts) is responsible for enforcing prohibitions on anticompetitive vertical restraints. The Commission for Communications Regulations (ComReg) has competition powers in respect of vertical restraints in the area of telecommunications. The CCPC and the Director of Public Prosecutions are responsible for the criminal enforcement of Irish competition law before the Irish courts, prosecuting cases summarily and on indictment respectively.

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 determining whether a vertical restraint falls within the scope of Irish antitrust law, the test is whether the object or effect of the restraint in question is 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.

Vertical restraints have not been considered by the courts in an extraterritorial context.

To our knowledge, neither the CCPC, ComReg nor the Irish courts have as yet applied the rules on vertical restraints in a pure internet context. But we would assume an important factor in establishing jurisdiction in the Irish context would be the place where the goods or services are supplied to the customer.

Of relevance in this regard is the conclusion of an investigation by the CCPC in October 2015 pursuant to which Booking.com provided five-year commitments (see question 25).

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 'undertakings', defined in 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'.

The key factor is whether the entity charges for the product or service it is supplying; whether is provides the product or service 'for gain'. In *Island Ferries Teoranta v Minister for Communications, Marine & Natural Resources* [2011] IEHC 587, the court noted that 'the fact the Minister as a public authority is not required to operate the harbour on a profit making basis ... is irrelevant once the harbour facilities and services are provided for gain.'

Where a public entity comes within this definition, it is subject to Irish antitrust law in the same way that a private entity is. A public body may constitute an undertaking for the purposes of Irish antitrust law when it engages in certain activities (eg, pure administrative or official activities) but not when engaging in others (eg providing services for gain). The Irish Health Service Executive (HSE) was an undertaking for the purposes of the Act in instances where vehicles from the HSE's National Ambulance Service were used for the transfer of private patients (*Medicall Ambulance Ltd v HSE* (Irish High Court, 8 March 2011)) but not when using its ambulance fleet for emergency services and the transport of public patients (*Lifeline Ambulance Services v HSE* (High Court, 23 October 2012)).

Importantly, it has been found that even when performing a statutory function, state entities can be undertakings within the scope of the Act, where their services are provided for gain. In *Island Ferries Teoranta*, the court found that the Minister was an undertaking subject to competition law as the Minister 'operated a facility ... with commercial activities and purposes and does so by allowing a variety of operators provide commercial services ... in return for various dues, tolls and other charges imposed'.

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, no.

In April 2016, the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 came into force. These regulations are intended to prohibit certain 'unfair' supply chain practices by grocery retailers and suppliers. The regulations are designed to curb abuses due to buyer power held predominantly by retailers. The unfair practices covered in the Act relate to the form of contracts between suppliers and retailers, including how such contracts are varied, terminated or reviewed. However, the only quasi-vertical restraint that is dealt with by these regulations is a form of 'third line forcing' whereby large buyers are prohibited in certain circumstances from obliging their suppliers from sourcing the supplier's inputs from specified third parties. See 'Update and trends'.

Pursuant to section 4(3) of the Act, the CCPC has the power to issue sector-specific declarations which operate in the same way as a block exemption issued by the European Commission. See question 1 for details.

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 vertical restraint meets the general efficiency conditions (see question 1), it will be exempt from the section 4(1) prohibition. In particular, under section 4(3) agreements containing vertical restraints that comply with conditions of the CCPC's Declaration are exempt from the general prohibition in section 4(1). 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?

No definition of an 'agreement' is provided in the Act. However, the CCPC and the Irish courts have generally applied 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?

Irish antitrust law covers 'agreements' and 'concerted practices'. These concepts are interpreted broadly and are understood in terms of their function and effect rather than in formal terms. The phrases 'agreement' or 'concerted practice' do not impute any requirements of formality for an agreement or practice to come within the scope of the section 4(1) prohibition but rather serve to distinguish such coordination from unilateral conduct.

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 rules apply to agreements concluded between independent undertakings. Therefore, the meaning of 'undertaking' discussed at question 6 is of relevance. For this purpose, an undertaking, broadly speaking, includes all entities under the control of the same person(s). Entities under the control of different persons are independent undertakings and their relationships are subject to section 4 of the Act.

Case law has provided examples of where companies will be deemed to be related and therefore beyond the reach of Irish competition law. In *AGF Life Holdings* (Decision dated 14 May 1992), it was established that companies that are wholly owned subsidiaries of the same holding company are not independent undertakings.

As per the decision in *AGF-Irish Life/NEM Insurance* (Decision dated 9 June 1993), the test to be applied is whether parties are subsidiaries of a single parent (ie, are under the control of the same person(s)) and as a result of this relationship do not have real freedom to determine their own course of action on the market. There is also a helpful definition of 'connected person' in the CCPC's Declaration.

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 European Commission. As such, an agreement whereby a 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 bears no or only insignificant risk in relation to the contracts and in relation to market-specific investments for the field of activity will most likely fall outside the scope of section 4(1) of the Act (in accordance with paragraphs 12–21 of the European Commission Guidelines).

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 Notice specifically refers parties to the European Commission Guidelines and, thus, assistance regarding what constitutes an agent–principal relationship (as per question 12). There have been no definitive CCPC or Irish court decisions dealing specifically with 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)?

No. The Declaration applies to agreements containing provisions granting IPRs provided that those provisions do not constitute the primary object of such agreements.

Analytical framework for assessment

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

The initial assessment is a twofold test to determine whether the restraint comes within the scope of the prohibition in section 4(1) of the Act:

- the parties to the agreement must be independent undertakings; and
- the restraint must have the object or effect of preventing, restricting or distorting competition in Ireland.

If the agreement comes within the parameters of the Act, it is then necessary to look at whether the restraint in question falls within the scope of the express exemptions in the Declaration.

Hard-core restrictions such as vertical price fixing and certain sales restrictions are per se offences, 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 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.

If the restraint is subject to section 4(1) of the Act and does not benefit from the Declaration or satisfy the general efficiency conditions, the parties should consider whether they can sever the vertical restraint provisions from the rest of the agreement (see question 51).

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 relevant in assessing the legality of individual restraints. In order to come within the scope of the Declaration, the market share of the supplier on the relevant market on which it sells the contract goods or services must not exceed 30 per cent in each case (as well as meeting buyer criteria in question 17). The market positions and conduct of other suppliers may be relevant insofar as it may be necessary to evaluate that information in assessing the market shares of the buyer and supplier in their respective markets. Under article 8 of the Declaration, the CCPC has the power to amend the Declaration to disapply it to specific categories of goods or services where, in its opinion, access or competition in the relevant market is significantly restricted by the cumulative effect of vertical restraints implemented by competing suppliers or buyers covering more than 50 per cent of a relevant 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 addition to the supplier market share criteria, to come within the scope of 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. As noted in question 16, the CCPC can disapply the Declaration by amending it in certain circumstances.

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 CCPC's Declaration (like any declaration under section 4(3) of the Act) is equivalent to a block exemption or safe harbour and, where relevant, is subject to specific market share thresholds (which are referred to in further detail in questions 16–17). Thus the Declaration has the effect of providing certainty to companies as to the legality of their vertical restraints.

Types of restraint

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

A restriction on a buyer's ability to determine its resale price is a 'hard-core' infringement of the Act, regardless of the parties' market shares. The Declaration provides scope for suppliers to set recommended retail prices or maximum retail prices. However, agreements that involve fixed or minimum resale price maintenance cannot benefit from the Declaration.

Thus far, the CCPC has adopted a strict approach to resale price maintenance (RPM). The CCPC has set out its position on RPM in four enforcement decisions spanning 11 years: (i) the *Irish Times* decision (Decision No. E/03/004); the *Statoil* decision (Decision E/03/002); the *Independent Newspapers* decision (Decision No. E/03/003); and (iv) *FitFlop* decision (Decision E/13/01).

In the *Irish Times* and *Independent Newspapers* decisions, there was evidence that retailers were expected to sell the newspaper at 'cover price' (the price printed on the front page of the newspaper). The CCPC confirmed that the sending of circulars informing retailers of revised cover prices and reference to the retailers' margins amounted to encouragement or instruction to set the cover price as the resale price. In these cases, both the *Irish Times* and *Independent Newspapers* agreed to amend their agreements to remove the RPM element.

The *Statoil* Decision considered whether a price support agreement (PSA) between Statoil and motor fuel retailers, which provided for maximum resale prices, combined with a price-matching scheme and a price floor constituted RPM. Statoil provided financial support to its retailers to enable them to match the price offered by competitors. Under the PSA, Statoil's retailers were not allowed to exceed the recommended retail price and would cease to receive financial support from Statoil if they reduced their price below that of the selected competitor stations. Following the investigation, Statoil Ireland abandoned the PSA.

The *FitFlop* decision confirms that the CCPC maintains a strict approach to RPM. In its decision, the CCPC found that FitFlop's distributor had enforced RPM in Ireland. Among other requirements, the

CCPC found that FitFlop imposed minimum or fixed prices, a hard-core competition law infringement.

While RPM can be justified under the general efficiency conditions in section 4(5) of the Act, the above outlined decisions suggest that the CCPC is unlikely to take the view that RPM is permissible, save in 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.

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

The CCPC noted the possible link between RPM and tacit price collusion between suppliers in the *Statoil* decision (outlined at 19). As the financial support envisaged by the PSA was only receivable from Statoil when its retailers had not exceeded the maximum resale price or reduced their resale price below that of their competitors, the CCPC took the view that this form of 'price-matching scheme' may facilitate tacit price collusion between suppliers. Following the investigation, Statoil Ireland abandoned the PSA.

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

As noted above, the Commission Guidelines in respect of RPM are applicable in interpreting section 4 of the Act. However, although the Irish courts or the CCPC could analyse and find permissible an RPM agreement under section 4(5) of the Act, so far no such analysis has been carried out.

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 issue of 'pricing relativity' agreements has not been given specific consideration by the CCPC or the Irish courts. The CCPC has consistently shown reluctance to permit restrictions that affect the parties' pricing incentives (see question 19). However, any decision will naturally depend 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.

Wholesale MFN clauses do not give rise to competition issues where each party to the agreement has a market share within the threshold in the Declaration. Where the parties have greater market shares and where the CCPC has amended the declaration to exclude certain categories of contracts, wholesale MFN clauses may give rise to competition concerns.

In the case of a dominant supplier or buyer, price discrimination or wholesale MFN clauses could constitute an abuse of dominance, in breach of section 5 of the 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.

The basic approach to the issue of retail MFN clauses in the online environment has been one of proportionality. In this regard, the CCPC has sought to limit the scope of MFN clauses to narrow MFN clauses which the parties can justify as necessary. The investigation into Booking.com is illustrative of this principle.

In 2015, the CCPC concluded an investigation into alleged anti-competitive practices by Booking.com. Booking.com is a large Online Travel Agent (OTA) which provides a platform for use by both hotels and customers. Booking.com had required hotels that were listed on its website to agree to offer the Booking.com 'price parity'. This meant that a hotel could not offer lower prices elsewhere, through its own channels or by third party channels, whether offline or online. The CCPC considered this to be a wide MFN clause capable of restricting competition.

Following the investigation, the CCPC obtained an agreement and undertakings from Booking.com that it would alter the terms of its contracts. It now implements a 'narrow MFN' under which the only restriction is that a hotel will, in general, not be able to offer a price on its own website that is lower than the Booking.com price. The CCPC took the view that this was a proportionate restriction on hotels and it prevented a scenario whereby a hotel could use an OTA to attract custom only to by-pass it by offering a discounted price.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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. However, see 25 for a particular form of internet minimum advertised price clause which the CCPC accepted in specific circumstances. As noted above, RPM is generally considered to be a per se breach of Irish competition law. As indicated by its views in the *Irish Times* and *Independent* cases (at question 1), the CCPC is likely to scrutinise closely restrictions (including advertised prices) that affect the parties pricing incentives.

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 much the same way as the MFN clauses discussed above, 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?

Article 4(2)(b) of the Declaration permits, in much the same way as the EUVBER, the restriction of active sales into certain territories in the context of an exclusive distribution network within the terms of the Declaration. However, a retailer cannot be restricted in their ability to make passive sales or to meet unsolicited orders. In the *FitFlop* case, the suppliers gave commitments which were subsequently made a binding order of the court, not to restrict its retailers' freedom to make passive sales regardless of a customer's location.

In attempting to draw a distinction between passive and active sales, the High Court decision in *SRI Apparel Limited v Revolution Workwear Limited and Others* is instructive. Here, the court held that sales by an Irish company through a third party site that facilitated the sale constituted active sales within the meaning of the Declaration and, as such, could be lawfully restricted in a distribution agreement.

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

The CCPC or Irish courts have not yet considered the concept of 'geoblocking'. Geoblocking is a mechanism whereby online website sellers can either deny service to users in other EU member states or redirect users to a local website located in the customer's member state or another territory. The prices, services and offers may therefore vary in each member state.

In May 2016, the European Commission published proposals to prevent companies and online retailers, who sell in or into the EU, from engaging in 'geo-blocking' and other geographical restrictions and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC. We note these proposals are due to come before the European Parliament during the course of this year.

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

A restriction on the buyer's ability to sell contract products to certain customers falls within the scope of section 4(1) of the Act. There are certain circumstances under the Declaration where a supplier may restrict the customers to whom the buyer may resell products to, assuming the relevant market share thresholds are also met. These include:

- certain restrictions on active sales by the buyer outside a buyer's reserved area or customers;
- restrictions on sales by the buyer to end customers where the buyer is a wholesaler;
- scenarios which arise in the context of a permissible selective distribution network (considered below at 34); and
- restrictions on the buyer's ability to sell component parts to customers for use in the manufacture of products which compete with the supplier's products (article 4(2)(b) of the Declaration).

A supplier cannot restrict the buyer from making passive sales.

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

Restrictions imposed by the seller on the use to which a buyer may put a contract product may be prohibited under section 4(1) of the Act. Under article 4(2)(b) of the Declaration restrictions on the buyer's ability to sell component parts to customers for use in the manufacture of products which compete with the supplier's products may be permissible where the market share relevant thresholds are met.

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

Pursuant to the terms of the CCPC's Notice, those sections of the European Commission Guidelines that are relevant to internet sales are also applicable to the interpretation of section 4 of the Act. The *FitFlop* decision was the first time that the CCPC took action against a supplier for an alleged internet selling restriction (the allegation being that the relevant distributor 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). The decision of the High Court in *SRI Apparel Limited v Revolution Workwear*, which is considered in question 33, considered the distinction between active and passive sales via the internet.

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

The High Court case of *SRI Apparel Limited v Revolution Workwear* appeared to distinguish between use of a retailer's own website and third-party or 'platform' internet sales channel. A 'platform ban' was considered a ban on active sales only and therefore permissible. As noted above, the seller's ability to restrict the territories into which the buyer may resell goods can hinge on this distinction between an active and a passive sale. A seller cannot restrict a buyer's ability to make passive sales in any circumstances.

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

Selective distribution systems within the market share thresholds set out at 16 and 17 benefit from the Declaration. Suppliers can restrict buyers from supplying unauthorised distributors outside the network. The supplier may not 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 4(2)(d) of the Declaration). Irish law generally follows EU law regarding permissible qualitative and quantitative criteria for establishing a selective distribution network.

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

The safe harbour under the Declaration is not limited in respect of the types of products to which it applies. In assessing selective distribution systems exceeding the Declaration's safe harbour thresholds, it is likely that the CCPC would take into account the European Commission Guidelines which suggest that in order to fall outside of the scope of the prohibition, the nature of the product should necessitate a selective distribution system.

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

As per the Notice, sections of the European Commission Guidelines relevant to internet sales will be applicable to the interpretation of section 4 of the Act.

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

No relevant decision has been published by the Irish courts in relation to the enforcement of selective distribution agreements. In circumstances where the restrictions in such agreements come within the scope of the Declaration, Irish courts would likely find them enforceable against an authorised reseller.

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

As in 16, the CCPC can amend 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). The CCPC has not, thus far, amended the Declaration.

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

There are no specific decisions of the CCPC or Irish Courts regarding selective distribution agreements combined with restrictions on the territory into which approved buyers may resell the contract products. It seems likely, however, that the CCPC would follow paragraph 152 of the European Commission Guidelines prohibiting the combination of selective distribution systems with restrictions on active sales into other territories.

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

Exclusive purchasing obligations may fall within the Declaration where the buyer and supplier market shares 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. The CCPC is likely to follow the provisions of the European Commission Guidelines, which prohibit the use of exclusive purchase obligations in selective distribution systems.

41 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 decision in respect of restrictions on a buyer's ability to sell products considered 'inappropriate'. They would be likely to consider whether the restriction in question was justifiable, taking account of the nature of both the contract products and the products deemed by the supplier to be 'inappropriate'.

Update and trends

Recent developments

In April 2016, the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 were enacted to tackle 'unfair practices' in the supply chain in the groceries industry.

The regulations apply to all manufacturers, distributors and retailers of grocery goods in Ireland that have, or are a member of a group of related undertakings that has, an annual worldwide turnover of more than €50 million. An equivalent but much narrower scheme exists in the UK, which applies only to 10 specifically named retailers.

Under the regulations, relevant grocery businesses are under obligations, including: obligations to conclude grocery goods contracts in writing, setting out all the terms, conditions and agreements contained therein in plain, intelligible language, and with the signature of both parties; restrictions on unilateral changes to grocery goods contracts; compliance obligations monitored by the CCPC; obligations to provide information to suppliers in certain circumstances; obligations not to engage in certain practices (eg, charging for wastage) without specifically contracting for them.

The only vertical restraint-type clause dealt with is a form of 'third line forcing', whereby the agreement requires the supplier to obtain goods or services from a third party from whom the buyer receives payment for the arrangement, which is prohibited (with limited exceptions).

Although the regulations deal with vertical agreements in the grocery sector, they are largely silent on traditional vertical restraints and so the Declaration still applies to such agreements.

42 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 goods or services and their substitutes is covered by the Declaration, provided that the other conditions of the Declaration are met (eg, duration not exceeding five years; market shares; etc). Where the duration of the non-compete obligation is in excess of five years, the obligation will not automatically breach section 4, but may need to be justified by the parties. See also severability under question 51.

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

Under the Declaration, a restriction may be imposed on a buyer requiring them to purchase 80 per cent or more of its required stock of contract products or services from the supplier where:

- the market share of the supplier and the market share of the buyer on the relevant market(s) do not exceed 30 per cent; and
- the duration of the obligation is for a maximum period of five years.

Other less severe obligations can be justified under general efficiency conditions of section 4(5) of the Act. When looking at cases in this area, the CCPC pays particular attention to the level of commitment required including the duration and the buyer's level of demand. Obligations to buy a full range of products may cause concern where the supplier is dominant on any relevant market.

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

As under the EUVBER, exclusive supply obligations are not listed under the Declaration as either hard-core or excluded restrictions and are therefore generally permitted where the market share of both the supplier and the buyer does not exceed 30 per cent. Further, we would expect the CCPC to follow the approach of the European Commission under the European Commission Guidelines in respect of this issue.

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

The Declaration is mainly focused on restrictions that are imposed by the supplier on the buyer and is therefore more permissive in respect of restrictions imposed on the supplier. On that basis, the supplier may be restricted from selling to end users at or below the 30 per cent market share threshold. By way of exception, the Declaration lists as a hard-core restriction a restriction on a supplier's ability to sell the components as spare parts to end users (or to third-party repairers or other service providers not approved by the buyer) where it is a supplier of components and the buyer incorporates those components.

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

No decisions of the CCPC or Irish courts deal with restrictions on suppliers other than those already considered above.

Notifying agreements

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

Since 2002, it has not been possible to notify individual agreements to the CCPC for clearance. Parties must determine for themselves whether the agreement in question falls within the scope of section 4(1) of the Act and, if so, whether the 'general efficiency conditions' or the Declaration apply.

Authority guidance

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

The Declaration and Notice issued by the CCPC provide the primary sources in assisting undertakings to assess whether their particular agreement will breach section 4(1) of the Act. The CCPC has been prepared to discuss particular cases in limited circumstances but it is not obliged to do so. The CCPC has emphasised that it will not be able to give comfort to undertakings in this regard.

Complaints procedure for private parties

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

The CCPC takes competition complaints by phone, fax, post and email. The complainant can make the complaint in confidence and with anonymity. The CCPC will consider the matter and following a preliminary screening, may subsequently carry out a formal investigation, including the possibility of a dawn raid or of a witness summons being issued. The time frame for investigations varies according to the complexity of the issues concerned.

Enforcement

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

Since the commencement of the Act, vertical restraints have been at the centre of a relatively small number of published cases. The majority of these cases involved alleged RPM.

51 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 its entirety. In certain instances, however, it may be possible to disregard only the offending provisions. In this scenario, the remainder of the agreement would continue in full force and effect. This is the application of an Irish law principle called severance.

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

The CCPC does not have the power to impose penalties; such powers lie solely with the Irish courts. The courts have the power to impose civil or criminal sanctions having regard to the severity of the offence.

The CCPC does have the power to issue non-binding enforcement decisions declaring that, in its opinion, a restraint contravenes section 4(1) of the Act. The CCPC also has the power, under the 2012 Act, to accept commitments from an undertaking not to engage in anticompetitive behaviour. The CCPC may apply to the High Court to make such commitments binding and thereafter, any breach of those commitments would amount to contempt of court.

The civil sanctions that may be imposed by the court include a declaration that the conduct in question amounts to a breach of the Act and an injunction to prevent the undertaking from continuing to engage in such conduct.

The criminal sanctions available to the court for breach of the Act will, generally, only be pursued in cases of 'hardcore infringements'. An undertaking or individual found guilty of breaching section 4 of the Act will be liable:

- on summary conviction of a fine of up to €5,000; and
- on indictment of €5,000,000 or 10 per cent of the turnover of the undertaking/individual for the financial year ending 12 months prior the conviction (whichever is highest).

The court may impose fines of €300 per day on summary conviction and €50,000 per day on indictment for each day that the contravention continues.

The Act also provides for custodial sentences; imprisonment of up to 10 years for competition offences.

Criminal sanctions were imposed in the context of RPM in the *Estuary Fuels* case. However, the four more recent decisions outlined in 19 show a move away from this approach. *Modern Irish Competition Law*'s authors note that the CCPC indicated in a 2011 paper that the '[*Estuary*] case would probably not reflect current Competition Authority enforcement policy'.

Investigative powers of the authority

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

The CCPC has statutory powers to carry out investigations of alleged breaches of competition law. The CCPC's investigative powers are formidable. In particular the CCPC can enter business premises and private dwellings to search and seize evidence discovered; and summon witnesses to answer questions under oath or provide documentary evidence to the CCPC on pain of criminal sanction.

Before the CCPC exercises its powers of search and seizure (dawn raids) to search premises, the CCPC must obtain a warrant from the District Court. The judge will need to be satisfied that there is no other reasonable way of obtaining the information in question; that there is evidence or a reasonable suspicion that a criminal offence has been committed; and that the constitutional rights of the individuals involved will be protected.

The 2014 Act provides an even wider scope for these powers. The CCPC may enter and search 'any place occupied by a director, manager, or member of staff' where there are 'reasonable grounds' to believe that records relating to the business are being kept there.

It is a criminal offence to fail to attend before the CCPC in response to a witness summons or to obstruct the CCPC from exercising its search and seizure powers. These offences are punishable on summary conviction, with a fine of up to €3,000 or imprisonment for up to six months or both.

Private enforcement

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

Section 14(1) of the Act provides a right to any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse that is prohibited under sections 4 or 5 to seek relief against either or both the undertaking or 'any director, manager or other officer of such an undertaking'. An action may be brought in the Irish Circuit Court or the High Court. Under section 14(5), the court may grant the applicant '(a) relief by way of injunction or declaration; (b) damages, including exemplary damages'. Regulations to implement the antitrust damages Directive are pending.

The successful party will normally be able to recover legal costs in accordance with court rules.

Other issues

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

No.

McCann FitzGerald

Ronan Dunne **ronan.dunne@mccannfitzgerald.com**
Philip Andrews **philip.andrews@mccannfitzgerald.com**

Riverside One
Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 829 0000
Fax: +353 1 829 0010
www.mccannfitzgerald.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.

Until recently, article 2(b) applied not only to restraints between competitors but also to vertical restraints. However, a recent ruling of the Supreme Court of Israel has made a substantial change in the way vertical agreements are being examined. In the case of Shufersal v the State of Israel, the Supreme Court pointed out the differences between horizontal and vertical agreements, and recognised the necessity of the latter in the everyday running of many businesses. The court stated that some vertical agreements can even have a 'real competitive value', and therefore vertical agreements should not be subject to the law unless they fit the terms of article 2(a).

In other words, the Supreme Court's ruling was that article 2(b) of the Law and the non-rebuttable presumptions therein, will not apply to vertical agreements.

That being said, due to a difference of opinion between the judges, it has yet to be determined whether article 2(b) will never apply to vertical agreements. One of the Supreme Court judges held the opinion that vertical agreements, in general, should not be subject to article 2(b). However, to his opinion, there should be some exceptions that would subject vertical restraints to article 2(b), such as agreements in which the main goal is to harm competition. The second judge argued that article 2(b) should never apply on vertical agreements while the third judge chose to leave this question unresolved. Thus, while it is understood that generally article 2(b) will not apply to vertical restraints, it is yet to be determined whether the general rule would have any exceptions.

It is important to note that article 4 of the Law 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 (the General Director), or it falls within a block exemption.

Article 47(a)(1) establishes that violation of article 4 is a criminal offence.

The following questions would be answered in light of the above-mentioned decision, according to which vertical agreements would be examined solely in light of article 2(a), and thus would be considered as restrictive only in cases in which there is liability to eliminate or reduce business competition.

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 anticompetitive 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 its 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 'effects 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 effects doctrine is used in relation to both vertical and non-vertical restraints.

Recently the District Court rendered a decision that limits the possibility of filing an action in Israel against foreign companies that were parties to a cartel, since the cartel members did not perform 'an action or an omission' in Israel. The decision was issued in the case of a class action that was filed against five foreign companies – from Japan, Korea and Taiwan – on the basis of an argument that they were parties to a cartel involving panels for LCD screens. It should be noted that no person who was part of the class had purchased the alleged cartelised product directly from the defendants; rather, the product was installed as a component in end products, and the end products were sold, among other places, in Israel. The court expressly stated that there may well be situations in which Israeli law applies and the effect doctrine is a source for applying Israeli law to actions that were performed outside Israel. Nevertheless, on some cases, the rules of procedure do not allow an Israeli court to hear the proceeding, namely where the parties did not perform an action or an omission in Israel. Although this case regarded a cartel, the decision is important to vertical restraints when assessing the issue of extraterritorial jurisdiction.

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 businesses'. 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 considered as 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 a restrictive arrangement.

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 Law for Enhancement of Competition in the Israeli Food Sector 2014 (the Food Competition Law) came into force in January 2015. The Food Competition Law's main objective is to enhance competitiveness in the food sector in order to reduce product prices for consumers.

To do this, the Food Competition Law sets out a list of general prohibitions. For instance, it stipulates that a supplier in the food industry cannot intervene in any way with regards to the price or the terms the retailer sells a product of a different supplier. A similar prohibition also applies to the retailer.

The Food Competition Law also sets specific rules that apply to large retailers and suppliers (as defined by the Food Competition Law). In addition, article 3(4)(a)(3) of the Law stipulates that:

an arrangement involving restraints, all of which relate to growing and wholesale marketing of domestic agricultural produce of the following types: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry or fish when the parties to the arrangement are one or more growers and a purchaser of agricultural produce of that grower or those growers and all of his restrictions relate to the wholesale marketing of the agricultural produce which that grower or those growers have sold to the purchaser.

General exceptions

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

The law mentions a few types of arrangements, which shall not be deemed as restrictive:

- an arrangement involving restraints, all of which are established by law;
- an arrangement involving restraints, all of which relate to the right to use of any of the following assets:
- patents;
- designs;
- trademarks;
- copyrights;
- performers' rights; or
- developers' rights;
- 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 which the acquirer of the right is to engage in on such property;
- an arrangement involving restraints, all of which relate to growing and wholesale marketing of domestic agricultural produce of the following types: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry or fish (herein, 'agricultural produce');
- an arrangement entered into by a company and its subsidiary;
- an arrangement entered into by the purchaser of an asset or service and its supplier, involving restraints, all of which constitute a commitment of the supplier not to supply certain assets or services for marketing other than to the purchaser, and a commitment of the purchaser to purchase such assets or services only from the supplier, provided that both the supplier and the purchaser are not engaged in the production of such assets or the provision of such services; such an arrangement may apply to the entire area of the country or to a part thereof; and
- an arrangement involving restraints, all of which relate to international air transport, or combined air and ground international transport.

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 broader 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, as mentioned in question 8.

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 15 March 2021, and any agreement made after this date will not benefit from 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. Any agreement between the principal and the agent that is liable to reduce or eliminate the business competition would be deemed as restrictive in accordance with article 2(a) 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?

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)?

As mentioned in question 8, 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.

Generally, a vertical agreement is examined in the same manner as a horizontal one. According to article 2(a) of the Law, if an arrangement is liable to reduce or eliminate competition, it would be deemed as restrictive. However, while article 2(b), which sets some non-rebuttable presumptions for restrictive arrangements, applies to horizontal agreements, vertical agreements are no longer subjected to it. Therefore, each vertical agreement should first be examined in light of the terms of article 2(a). If the agreement is not liable to eliminate or reduce business competition, it would not be deemed a restrictive arrangement. If, however, the agreement is liable to eliminate or reduce the business competition, it would be deemed as a restrictive arrangement in accordance with article 2(a).

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 conditions: 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 competition. The second condition is that the arrangement has a legitimate business justification.

The 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 in other block exemptions, to substantive tests, which are identical to the standards set in article 14. In other words, the Vertical Block Exemption enables the parties to self-assess whether there is a commercial justification for the restraint (the restraint is ancillary), and its probable effect on 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 the 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.

Note that the *Shufersal* decision did not make the Vertical Block Exemption redundant, even though it may seem so at first glance. Some vertical arrangements, even if deemed restrictive, may still be exempted by the Vertical Block Exemption due to the different terms used in article 2(a) and the Vertical Block Exemption. Thus, an agreement might be deemed as a restrictive agreement in accordance with article 2(a) for being 'liable to reduce or eliminate competition' but still be exempted owing to the fact that the it does not restrict competition in a substantive part of the market, and if it is likely to do so, the possible damage to competition is minor. In other words, the standard set at the exemption is broader than the terms of article 2(a) and can capture arrangements that would otherwise be forbidden, unless receiving clearance.

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 relevant, first, in order to decide whether the arrangement meets the terms of article 2(a). Naturally, the bigger the market

share is, the more likely it is for the arrangement to be deemed as liable to reduce or eliminate competition.

If the arrangement at hand is indeed restrictive, the market share could also 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 favoured nation 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.

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.

As noted in question 15, the Vertical Block Exemption is still required, even after the *Shufersal* decision, because of the different standards set in article 2(a) and in the Vertical Block Exemption.

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 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 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 apply 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, if the arrangement is not liable to reduce or eliminate the business competition, it would not be deemed as a restrictive arrangement. If, on the other hand, the arrangement is liable to reduce or eliminate competition, it would be deemed a restrictive agreement. In such case, the agreement could be exempted. 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 owing to the efficiencies it brings. Nevertheless, the IAA's long-standing position is that fixed and minimum RPM would not be cleared.

For instance, in the request for the exemption of MH Elishar, an importer of a number of cigarette brands to Israel, the General Director mentioned that an RPM maximum restriction 'can be of a service to the public'.

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.

This kind of agreement would only be deemed as restrictive if it is liable to reduce or eliminate competition. If it is deemed as restrictive, the Vertical Block Exemption would not apply to such an agreement and such an understanding would not be cleared by the IAA. In its position 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 are not necessarily restrictive. Like with any other vertical arrangement, it should be examined whether an MFN provision is liable to reduce or eliminate competition. If not, it would not be deemed a restrictive arrangement. If, on the other hand, it is liable to reduce or eliminate competition, an MFN provision 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 need 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 be reviewed under the same analytical framework mentioned in question 19.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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?

This type of agreement should also, after the *Shufersal* decision, be examined in accordance with article 2(a). If the arrangement is liable to reduce or eliminate competition it would be deemed as restrictive. If, on the other hand, it is not liable to do so, it would not be deemed as restrictive.

If the arrangement at hand is restrictive, and the conditions are agreed upon by parties that have a vertical relationship, it 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

No.

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

As mentioned above, it would be deemed a restrictive arrangement only if the agreement at hand would be liable to reduce or eliminate competition. Nevertheless, when such agreements are agreed upon by parties that only have a vertical relationship, it could be exempted under the Vertical Block Exemption if there is a legitimate justification for such a restriction and the above-mentioned test with respect to the likely effect on competition is satisfied.

31 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 as mentioned in article 8.

With regard to other assets, such an arrangement would be deemed as restrictive only if it is liable to reduce or eliminate competition. In such case, it could 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.

32 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 would be deemed as restrictive if they would be liable to reduce or eliminate competition, they could be exempted depending on a substantive examination of their effect on competition if there is a business justification for their existence.

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

We are not aware of any such decisions or guidelines.

34 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 would not

necessarily be deemed a restrictive agreement, unless it would be liable to reduce or eliminate competition. In this case, the arrangement 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.

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

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).

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

There are no authority cases or guidelines regarding such cases.

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

We are not aware of any such cases.

38 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.

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

No such authority decisions or guidelines exist.

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

Such an arrangement would only be deemed as restrictive if it is liable to reduce or eliminate competition. 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's 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 that are not a part of a franchising agreement.

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

Such an arrangement would only be deemed as restrictive if it is liable to reduce or eliminate competition. If so, it would probably be exempted by the vertical block exemption. 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.

42 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 the previous cases. The arrangement would be deemed as restrictive if it is liable to reduce or eliminate competition. In such case, it could be exempted in accordance with the Vertical Block Exemption but a valid justification must be demonstrated.

Update and trends

In the past year, the IAA reached a consent decree with Harel Insurance Company and Madanes – an insurance agency, concerning an exclusivity and non-competition agreement between the parties regarding medical malpractice insurance. The Antitrust Tribunal approved the consent decree, and the parties undertook to abolish all exclusivity and noncompetition clauses in the agreement between them and pay the total sum of 6 million shekels, 4 million by Harel and 2 million by Madanes. This consent decree reflects a step up in enforcement of vertical restraints, since the total amount paid by the parties is relatively large.

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

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 that of the likely effect of such an arrangement on competition. This would be decided on a case-by-case basis depending on the specific circumstances at hand. If the arrangement in question is not liable to reduce or eliminate competition, it would not be deemed restrictive. If it is liable to do so, it would be deemed as a restrictive arrangement and could be exempted by the Vertical Agreement Exemption if it has legitimate commercial justifications and satisfies the above-mentioned test with respect to the likely effect on competition.

44 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.

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

While such a restriction could raise anticompetitive 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.

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

No.

Notifying agreements

47 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.

An alternative 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.

Authority guidance

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

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 had conducted an in-depth analysis of the agreement and the relevant market.

Complaints procedure for private parties

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

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

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

Since the Vertical Block Exemption and the *Shufersal* decision are both recent developments, 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.

51 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 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.

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

The 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

53 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.

For instance, the IAA has recently taken enforcement measures against Milano House for violations of article 46(b) of the Law, which allows the General Director to demand such information. In those cases, the IAA 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.

B.Golan law firm

Boaz Golan **boaz@bgolanlaw.com**
Nimrod Prawer **nimrod@bgolanlaw.com**

Moses House
76 Rothschild Blvd
Tel Aviv 657 8513
Israel

Tel: +972 77 8868999
Fax: +972 77 8868222
www.bgolanlaw.com

Private enforcement

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

Private enforcement is indeed possible for any person suffering damage from an agreement if it is found to be unlawful. Such suits can 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 can 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 can 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

55 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 various 'unfair trade practices', including some vertical restraint conduct, under article 19 thereof.

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, that 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 52).

'Private monopolisation' is prohibited under the first half of article 3 thereof, as defined under article 2, paragraph 5, of the JAMA, which is said to have some practical coverage sharing with said unfair trade practices (see question 2). For the interaction between these two, see question 2.

The latter half of article 3 prohibits 'unreasonable restraint of trade', which has been narrowly interpreted as horizontal restraint, including cartel or bid rigging, based on the historical developments of the law.

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) (see questions 20 and 22);
- *Meiji Shoji v JFTC*, 22 Shinketsushu 201 (Sup Ct, 11 July 1975) (see questions 20 and 22);
- *Toyo Seimaiki v JFTC*, 30 Shinketsushu 136 (Tokyo High Ct, 17 February 1984) (see question 42);
- *Shiseido v Fujiki*, 45 Shinketsushu 455 (Sup Ct, 18 December 1998) (see question 37);
- *Kao v Egawa Kikaku*, 45 Shinketsushu 461 (Sup Ct, 18 December 1998) (see questions 30 and 40);
- *Sekino Shoji v Nippon Gas*, 52 Shinketsushu 818 (Tokyo High Ct, 31 May 2005) (see question 46); and
- *Hamanaka v JFTC*, 58-2, Shinketsushu 1 (Tokyo High Ct, 22 April 2011) (see question 22).

Japan Fair Trade Commission (JFTC) precedents

- JFTC recommendation decision against Nordion, 45 Shinketsushu 148 (3 September 1998) (see question 43);
- JFTC recommendation decision against Tottori Chuo Agricultural Association, 45 Shinketsushu 197 (9 March 1999) (see question 45);
- JFTC recommendation decision against Auto Glass East-Japan, 46 Shinketsushu 394 (2 February 2000) (see question 46);
- JFTC recommendation decision against Himeji-shi Plumbing Business Cooperative Association, 47 Shinketsushu 263 (10 May 2000) (see question 45);
- JFTC recommendation decision against Sagisaka, 47 Shinketsushu 267 (16 May 2000) (see question 45);
- JFTC recommendation decision against Matsushita Electric Industrial, 48 Shinketsushu 187 (27 July 2001) (see question 30);
- JFTC hearing decision re Sony Computer Entertainment,48 Shinketsushu 3 (1 August 2001) (see questions 30 and 40);
- JFTC Keikoku (warning) against Johnson & Johnson (12 December 2002) (see question 32);
- JFTC recommendation decision against Intel, 52 Shinketsushu 341 (13 April 2005) (see question 43);
- JFTC hearing decision against Microsoft, 55 Shinketsushu 380 (16 September 2008) (see question 46);
- JFTC order against Oita Oyama-machi Agricultural Accociation, 56-2 Shinketsushu 79 (10 December 2009) (see question 44);
- JFTC order against Qualcomm, 56-2 Shinketsushu 65 (29 September 2009) (see question 46);
- JFTC order against Johnson & Johnson, 57-2 Shinketsushu 50 (1 December 2010) (see question 26);
- JFTC order against DeNA, 58-1 Shinketsushu 189 (9 June 2011) (see question 44);
- JFTC order against adidas, 58-1 Shinketsushu 284 (2 March 2012) (see question 19); and
- JFTC order against Coleman Japan, (www.jftc.go.jp/en/pressreleases/yearly-2016/June/160615.html) (June 2016) (see question 50).

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 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 16 categories. The following describes the major categories among them.

Tie-in sales, etc

Unjustly causing another party to purchase goods or services from oneself or from another designated by oneself by tying the purchase to the supply of other goods or services, or otherwise coercing the said party to trade with oneself or with another designated by 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 that is in a domestic competitive relationship with oneself with another of which oneself is an owner or an officer 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 superior bargaining position
Unjustly, in light of normal business practices, making use of one's superior 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; causing the said party in continuous transactions to provide money, services or other economic benefits; imposing a disadvantage on the said party regarding terms or execution of transaction, and so on. See question 55.

For the purpose of exclusive private monopolisation, the applicable JFTC's guidelines state that, while there is a wide variety of conduct deemed as exclusionary conduct, it lists four typical acts: below-cost pricing, exclusive dealing, tying and refusal to supply and discriminatory treatment (see page 5 of the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act, the Japan Fair Trade Commission, 28 October 2009).

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.

Responsible authorities

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

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, owing 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 certain effect on the Japanese market. With respect to the extraterritorial application of the law especially for the purpose of horizontal restraints, on 22 May 2015, the JFTC issued its hearing decision and found that the application of the law in that case should be justified if, at least, the competition in a particular field of trade is the competition over customers in Japan and the competition in a particular field of trade is substantially restricted by the conduct at issue (decision against five companies, including *MT Picture Display Co, Ltd* (price cartel case involving manufacturers and distributors of television cathode-ray tubes)). However, this is subject to judicial review, and the three competent appellate courts were split in their findings. So, it is expected that the Supreme Court will resolve it, but it is unclear whether the same finding also applies to vertical restraints. 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 that 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); see also *Earth Meishi Co, Ltd et al v Japan*, 45 Shinketsushu 467 (Sup Ct, 18 December 1998).

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 a superior bargaining position only (see question 55).

In addition, there are regulated industries, such as public transport and communications. 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 (relatively newly invented) items such as videotapes and digital video discs.

Agreements

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

There is no definition of 'agreement' for the purpose of vertical restraints. 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. Put differently, 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 or 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 bears 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 anticompetitive 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 42), 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, which the DSBP Guidelines states refers to cases where vertical restraints would be likely to create such circumstances where the said vertical restraint would impede competition among distributors and thereby enable a distributor to reasonably freely control its price by its own volition and thus maintain or raise its price of the product (see questions 28 and 30). 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 superior bargaining position (see question 55).

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 20 per cent. 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 38 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.

Notwithstanding the above, as far as the abuse of superior bargaining position is concerned, it is rather typical that such a 'power buyer' abuses its superior 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 anticompetitiveness 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 anticompetitive 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.

Among various types of vertical restraints, the DSBP Guidelines list substantially two types of conduct for which the issue of whether it is made by a firm that is influential in a market should be one of the key elements. They are: exclusive deal (ie, the restriction on its transaction counterpart not to deal with its competitor) or the restriction on distributors' handling of competing products; and certain types of restriction on the territory into which a buyer may resell contract products only passively (see question 28), for which said criteria of whether it has more than 20 per cent of market share (see question 16) is applicable. And the reverse aspect of this criteria works as a safe harbour for such vertical restraints. See also Update and trends.

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 have been three formal administrative orders issued by the JFTC within the past 10 years, including *adidas* (JFTC order, 2 March 2012). This 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 by making it easier than otherwise for its competition to raise the price of their products or services close to that level. 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. It is said that, while recently this matter was discussed at the DSBP Study Group (see question 33 below), a conclusion to make some definite changes about it was not reached.

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 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, according to the DSBP Guidelines, as amended in 2015, resale price maintenance is not illegal as an exception on the condition that it has 'justifiable grounds,' which might be granted within reasonable scope and reasonable terms, in the case where such a resale price maintenance by a manufacturer will result in actual pro-competitive effects and will promote interbrand competition, will increase demand for the product thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives other than the resale price maintenance at issue. It also states that, for example, when a manufacturer performs resale price maintenance, as above, it will be granted to have 'justifiable grounds' in the case where it actually results in pro-competitive effects through avoiding the so-called 'free-rider' problem, will promote interbrand competition, will increase the demand for the product, thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives.

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* (Tokyo High Ct, 22 April 2011)). 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.

Depending on the situation, some certain possible links with resale price maintenance may be found. See question 21. Otherwise, while there is no precedent regarding this issue at this stage, 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, or a supplier's warranting widely for its multiple dealers in the market)). That is, if it is found to have the aspects of avoiding competition, or that the price level of the product covered by the restriction is likely to be maintained, it may constitute the violation. Also, if it incentivises such a supplier not to deal with a new entrant buyer, one would need to examine whether aspects of excluding competitors exist.

It may also constitute the abuse of superior bargaining position. See question 55.

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 certain platforms lie within an authentic agent–principal relationship, 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 to subsequently 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, unless it in fact practically works as a cartel or other horizontal restraint (eg, among multiple suppliers to which such a buyer warrants similarly in parallel, or among multiple buyers which warrant similarly to said supplier in parallel). However, from the perspective of vertical restraints, unlike question 24, it is rather unlikely that aspects of the impediment of fair competition will be found, ie, whether or not a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, or whether or not the price level of the product covered by the restriction is likely to be maintained. See question 15.

It may also constitute an abuse of a superior bargaining position. See question 55.

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 ten 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 interbrand competition, actual conditions of intra-brand competition for the product, and so on. See also 'Update and trends'.)

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 questions 16 and 18).

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

While there is no precedent regarding this issue at this stage, it is likely that the same rule applies as in question 28 if the buyer sells via the internet, as opposed to via traditional distribution channels.

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

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 a case where said assessment criteria applied. On the other hand, even though vertical restraints may have a price maintenance effect to some extent, if it is to achieve something plausibly rational (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. In *Kao v Egawa Kikaku* (Sup Ct, 18 December 1998), it was found that as far as it is tailored to achieve a plausibly rational business purpose, in that buyers were only prohibited from selling the suppliers' products to unauthorised or non-contract dealers, and it is applied non-discriminatorily, restricting the customers to whom a buyer may resell contract products could usually be found permissible. See question 37.

In *Sony Computer Entertainment* (JFTC hearing decision, 1 August 2001), however, the JFTC differentiated the case from what was found in *Kao* above, and it was found that the price level of the product covered by the restriction is likely to be maintained, and the supplier's requiring a buyer not to resell products to the other wholesalers or retailers violated the law. See also question 40.

With respect to the prevention of the customer's ability to resell products to end consumers, the same rule applies as in question 28.

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

Restraints other than trading on exclusive terms and resale price restriction are classified as trading on restrictive terms. 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, if it is plausibly rational and non-discriminatory to the other distributor, it would usually be found to be permissible. See question 36. This issue may also require the analysis from the IP protection perspective.

32 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 30)).

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.

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

At this stage, there is no court decision or guidelines from the JFTC about this issue. Although this is not restricting the customers to whom a buyer may resell contract products, but just restricting the type of sales channel, it is likely that the same rule applies as in question 30. In December 2016, the Study Group on the distribution systems and business practices held at the JFTC issued its report (DSBP Study Report) stating that, among others, the DSBP Guidelines should be updated and amended to deal with the issues related to most favoured customer clause or across platform parity agreement (see Update and trends). In addition to the above, in September 2016, the Ministry of Economy, Trade and Industry of Japan (METI) issued The Cross-sectional System Study Group for the Fourth Industrial Revolution Complied Report, for which consecutive study sessions were held where the JFTC was also involved as an observer. Although the report does not provide for specific legal conclusions of its own, it states that, among other things, as business competitiveness in the digital market becomes more intense concerning issues surrounding data access or utilisation, the market dominated by some platformers has eclipsed traditional markets, and this situation raises the concern that such platformers will have a fixed, competitive superiority and maintain dominant positions in the market. Therefore, METI and the JFTC should closely watch the current situation in an appropriate manner, and if the JFTC discovers that any such platformer violates the JAMA, it should enforce the law in a strict and efficient manner.

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

The DSBP Guidelines, as amended in 2015, state that a manufacturer may set up certain criteria to limit the distributors that handle its product to those that meet the criteria, and in such a case, the manufacturer may prohibit distributors from reselling its product to other distributors that do not meet the criteria. This is called 'selective distribution', defined thereunder, which the Guidelines state may result in pro-competitive effects, and is generally not illegal in itself (even if such criteria of the selective distribution were to result in preventing certain incompetent price-cutters, etc, from handling the product) provided that the criteria are recognised to have plausibly rational reasons from the viewpoint of the consumers' interests, such as related to the preservation of its qualities and assuring appropriate use, and that such criteria are equally applied to other distributors who want to deal in the product.

However, in this regard, recent academic analysis has pointed out that the above is the case only 'generally', and depending on the nature of the applicable restrictions, it could also be assessed in the light of the restrictions on trading on restrictive terms as in questions 28 or 30. The DSBP Study Report also pointed out that there should be further consideration whether or how to clarify said criteria for selective distribution systems. See Update and trends.

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

At this stage, there is no authoritative precedent showing that selective distribution systems may be more likely to be lawful where they relate to certain types of product. However, generally speaking, from a practical perspective, it is possible that, for a certain product, such plausibly rational reasons from the viewpoint of the consumers' interests (eg, related to preservation of its qualities, assuring appropriate use) may be found more than in certain other products, by paying attention to whether or how such preservation of quality or assuring appropriate use could actually be an issue.

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

At this stage, there is no recent decision that deals with internet sales restrictions imposed on approved buyers in connection with selective distribution systems, and generally speaking, it is likely that the same rule could apply as in question 34. The aspect of the selective distribution systems could be analysed in light of the restrictions on trading on restrictive terms, and therefore, with respect to the restrictions on internet sales, question 32 is also applicable here. Also, it seems that the DSBP Study Group report takes the position of basically applying the same criteria to restrictions on both internet sales and offline sales. See Update and trends.

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

There is no decision specifically dealing with this issue.

Prior to the amendment of the DSBP Guidelines to introduce the concept of selective distribution systems therein in 2015, as far as the aspect of the restrictions on retailers' 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 plausibly rational 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 plausibly rational and non-discriminatory.

38 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 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 manufacturer, and therefore it may be more likely to be found illegal.

On the other hand, in connection with the restriction on trading on restrictive terms, although there is no decision or guidelines dealing with this issue, if interbrand competition does not work well due to the oligopolistic structure of the market or 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, such cumulative effects may lead the authority to find the likelihood of price maintenance. It is said that, while this matter was recently discussed at the DSBP Study Group, no conclusions were reached on taking a certain position or approach about it.

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

As analysed in questions 28, although there is no precedent from the past 10 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 questions 15 and 28 (whether or not the price level of the product covered by the restriction is likely to be maintained).

40 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 30). 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. As discussed above, 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, and, where it was restricted to buy and sell even between the qualified dealers, it was found to be anticompetitive. In this regard, the DSBP Study Group report reconfirmed the position that the current DSBP Guidelines take that, if the buyer's ability to 'provide' the products to a price cutter as its alternative source is to be restricted, it should be assessed from the same criteria as for resale price maintenance (see question 19).

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

As analysed in question 31, the restraints other than trading on exclusive terms and the resale price restriction are classified as trading on restrictive terms. So, 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, if it is plausibly rational and non-discriminatory to the other distributors, it would usually be found to be permissible.

42 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 questions 43 and 44).

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

This is to be assessed from the same perspective as stated in question 42, 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 *Nordion* (JFTC recommendation decision, 3 September 1998), the long-term, total amount of purchase obligation was found to be anticompetitive. Although it was found in the context of exclusionary private monopolisation (see questions 1 and 2), it is broadly understood that the foreclosure found therein should also be applicable to the trading on exclusive terms as unfair trade practices. In addition, 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 and 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.

Furthermore, such requirement for the buyer to purchase a full range of the supplier's product may constitute tie-in sales, etc, depending on the situation.

44 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 42 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'. 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, and was found anticompetitive. 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 anticompetitiveness 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 to whether, practically, making restraint of this kind illegal by such less strict scrutiny may be the case in the future.

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

In *Tottori Chuo Agricultural Association* (JFTC recommendation decision, 9 March 1999), while the same restriction was found anticompetitive, the reasoning was not necessarily clear. See also *Himeji-shi Plumbing Business Cooperative Association* (JFTC recommendation decision, 10 May 2000); and *Sagisaka* (JFTC recommendation decision, 16 May 2000).

While there is no guidance or authoritative precedents regarding this issue at this stage, the potential anticompetitive 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 from the perspective of whether or not a restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels. See questions 15 and 44.

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

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.

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 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 anticompetitive effect against such competing import products. In addition, if the application of different conditions is connected with the resale price maintenance or other restraints it is to be analysed all together as such. See question 21.

In addition, with respect to contractual restraints under IP licensing, the 'covenant not to sue', also known as 'non-assertion of patent' (NAP) if patent licensing is concerned, has been subject to discussion and analysis. In this regard, the IP Guidelines (see question 14) provide that, for the application of the trade on restrictive terms as unfair trade practices, this obligation could result in enhancing the influential position of the licensor in a product or technology market, or could impede the licensee's incentive to engage in research and development, thereby impeding the development of new technologies by restricting the exercise of the licensee's rights, etc, and therefore constitute an unfair trade practice.

In *Microsoft* (JFTC hearing decision, 16 September 2008), the issue whether or how to evaluate whether the licensee's incentive to engage in research and development was impeded was argued, and the JFTC retained its order by its hearing decision based on the facts specific to the case. The JFTC also found that in *Qualcomm* (JFTC order, 29 September 2009), the NAP at issue was anticompetitive essentially based on the same ruling, which is currently under an examination hearing at the JFTC.

Notifying agreements

47 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

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

It is possible to obtain guidance from the JFTC through the consultation procedure.

Complaints procedure for private parties

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

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

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

According to the JFTC's annual report for the year 2015 (April 2015 to March 2016) issued on October 2016, the JFTC issued eight formal orders regarding unfair trade practices within the past five years. Of these eight cases, five concern abuse of a superior bargaining position, two concern interference with a competitor's transaction, and one deals with resale price restriction. In addition, it was publicly reported that the JFTC issued its administrative order against Coleman Japan for its resale price restriction (JFTC Order, 15 June 2016). These reports show these are the three major enforcement priorities regarding vertical restraints.

Update and trends

Recent developments

In December 2016, the Study Group on the distribution systems and business practices held at the JFTC issued its report (DSBP Study Report). It basically states that the Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (DSBP Guidelines) should be amended to further clarify the assessment criteria and the analysis process for vertical restraints. It is also stated that certain analysis frameworks for online business practices should be incorporated.

Anticipated developments

It is expected that the JFTC will amend the DSBP Guidelines to reflect and incorporate the points suggested by the DSBP Study Report, maybe within this year. While it would therefore not drastically change the current analysis framework (see question 15), it is expected that the prospective draft amendments would be subject to the public comment solicitation procedure, and therefore some certain additional changes may possibly be made as a result of that.

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

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 explicit severability clause.

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

The 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 superior 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 five cases where a monetary sanction was levied on target companies in connection with unfair trade practices (abuse of superior 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*, 60-1 Shinketsushu 435 (3 July 2013); and *Direx*, 61 Shinketsushu 103 (5 June 2014) are all subject to the examination procedure with the JFTC's hearing examiner. For *Toys 'R' Us Japan*, the JFTC issued its hearing decision on 4 June 2015, whereby JFTC's order was partially reversed and partially retained.

See also question 55.

Investigative powers of the authority

53 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

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

Non-parties do not have standing in private enforcement unless it is found that the agreement at issue causes an anticompetitive 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.

Other issues

55 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 superior bargaining position. It has been commonly understood that the requirement of 'impediment of fair competition' for ascertaining the abuse of superior bargaining position is different for the other types of restraint. For example, the Guidelines concerning Abuse of Superior Bargaining Position, JFTC, 30 November 2010 (ASBP 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 ASBP Guidelines, a party shall be found to be 'in a superior 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 52.

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

Macedonia

Vesna Gavriloska
CAKMAKOVA Advocates

Antitrust law

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

The primary source of competition regulation is the Law on Protection of Competition (LPC) (Official Gazette of the RM, No. 145/10, 136/11, 41/14, 53/16). Vertical agreements are regulated by article 7 of the LPC, as well as with the Decree on block exemption of certain categories of vertical agreements (adopted by the government of Macedonia in 2012) and the Guidelines on vertical restraints (adopted by the Commission in 2015), which are harmonised with the Commission notice – Guidelines on Vertical Restraints, Official Journal C 130, 19 January 2010, p 1. The Guidelines elaborate in more details the provisions of the LPC and the Decrees, and gives instructions on the manner of proceeding and assessment of various competition issues. Also, the Guidelines on the application of article 7, paragraph 3 of the LPC (2012) are of relevance.

In 2012 the government of Macedonia adopted:

- the Decree on block exemption of certain categories of agreements on distribution and servicing of motor vehicles;
- the Decree on the detailed conditions for block exemption of certain types of agreements for transfer of technology, licence or know-how;
- the Decree on the detailed conditions for block exemption of certain types of research and development agreements;
- the Decree on the conditions for block exemption of certain categories of horizontal agreements for specialisation;
- the Decree on block exemption of certain categories of insurance agreements;
- the Decree on the detailed conditions on agreements of minor importance (de minimis);
- the Decree on the form and content of the notification for concentration and the documentation to be submitted with the notification; and
- the Decree on the detailed conditions and procedure under which the Commission for Misdemeanour Matters decides on immunity and the reduction of fines.

The competition regulation is harmonised with the EU Acquis and the competition authority accordingly applies the competition criteria and the rules (including the precedence) of the European Union.

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 restraints is generally defined in article 7(1) of the LPC. The agreements, decisions and concerted practices that have as their object or effect the distortion of competition are legally prohibited, and thus null and void, if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investments;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent or similar transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the procedural order of agreements 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 agreements.

Vertical restraints lead to restriction of competition in a vertical agreement falling within the scope of article 7(1) of the LPC.

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 regulating vertical restraints, the LPC focuses on the economic approach, aiming to prohibit the agreements, decisions and concerted practices that have as their object or effect the distortion of competition. Stimulating economic efficiency and consumer welfare to ensure free competition on the domestic market is one of the LPC's objectives.

However, the negative consequences to competition are considered eliminated under the terms provided in article 7(3) of the LPC. Based on this, block exemption of certain types of agreements, decisions and concerted practices is provided in the LPC, as defined in question 7.

Responsible authorities

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

The body responsible for implementing the LPC (including the enforcing prohibitions on anticompetitive vertical restraints) is the Commission for the Protection of Competition (the Commission), as an independent state body. A separate department within the Commission conducts a misdemeanour procedure and imposes sanctions (fines and bans) to undertakings that have concluded a prohibited agreement or participated in some other manner in agreement, decision or concerted practices leading to distortion of competition.

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?

Prevention, restriction or distortion of competition that produce an effect on the territory of Macedonia, even when they result from acts and actions carried out or undertaken outside of the territory of Macedonia, are caught by the LPC. It is not relevant whether the parties to vertical agreement are domiciled in Macedonia. The antitrust law on vertical restraints can be applied extraterritorially.

Agreements concluded by public entities

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

Agreements concluded by public entities are not excluded from the application of legal rules for vertical restraints. Public entities are caught by the definition of undertakings (any type of business venture, regardless of the manner of organisation or the form of management, including natural or legal persons or state authorities that perform economic activities, regardless of whether they are considered as traders or not).

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.

Block exemption of certain types of agreements, decisions and concerted practices is provided in articles 7(3) and 9(1) of the LPC, such as: (i) vertical agreements for exclusive right of distribution, selective right of distribution, exclusive right of purchasing and franchising; (ii) horizontal agreements for research and development or specialisation; (iii) agreements for transfer of technology, licence or know-how; (iv) agreements for distribution and repairing motor vehicles; (v) insurance agreements, and (vi) agreements in the transport sector. All of them are regulated by separate decrees, as listed in question 1.

General exceptions

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

Agreements (including decisions and concerted practices) that are not capable of appreciably restricting competition by object or effect are not caught with the provisions regulating prohibited agreements under article 7(1). The Decree on block exemption of certain categories of vertical agreements (Block Exemption Decree) applies only to vertical agreements containing vertical restraints that fall within the scope of prohibited agreements. Agreements of minor importance (market share threshold up to 15 per cent), agency agreements (when the agent does not bear any, or bears only insignificant, financial or commercial risks) and subcontracting agreements (whereby the subcontractor undertakes to produce certain products exclusively for the contractor provided that the technology or equipment is necessary to enable the subcontractor to produce the products) are usually exempted.

Agreements

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

Agreements and decisions are legally defined as legal acts that regulate issues related to the terms under which business activities are performed and whose object or effect is distortion of competition; this relates also to individual provisions of agreements or decisions which can be explicit or tacit. The concept of vertical agreements also refers to concerted practices or coordinated conduct 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?

Formal written agreement should not necessarily exist as evidence for the vertical agreement and vertical restraints; the Commission shall also consider the existence of an informal or unwritten understanding, and will have to prove that one party consents even tacitly with the unilateral policy of the other party and implements it in practice. A system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement its 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)?

LPC rules also apply to related undertakings (defined as controlling or controlled undertakings with separate law), which are not exempted from the application of the vertical restraints rules notwithstanding whether they act as a supplier or buyer.

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?

All obligations imposed on the agent in relation to the contracts concluded or negotiated on behalf of the principal fall outside the scope of article 7(1) of the LPC regulating prohibited agreements, if the principal bears all or significant commercial and financial risks related to the selling and purchasing of the contract goods and services (risks in relation to the contracts, to market-specific investments and other activities required to be undertaken in the same product market). If the agent incurs one or more of the above risks or costs, the agreement is not considered as an agency agreement. In that situation the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to article 7(1) of the LPC regulating the prohibited agreements as any other vertical 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?

The agent's obligations that impose: limitations on the territory and the customers to whom the agent may sell goods or services, the prices and conditions at which the agent must sell or purchase these goods or services, will be considered to form an inherent part of an agency agreement, as each of them relates to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services, which is essential if the principal is to take the risks and therefore to be in a position to determine the commercial strategy. In particular, the agency agreement may contain an exclusive agency provisions (preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory) or a single branding provision (preventing the agent from acting as an agent or distributor of undertakings that compete with the principal). If the agency agreement facilitates collusion it may also be prohibited even if the principal bears all the relevant financial and commercial risks; this could be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.

The Guidelines or the decisions do not deal specifically with agent–principal relationships 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 that contain provisions relating to the assignment to the buyer, or use by the buyer of IPRs (which will otherwise have as their object or effect the distortion of competition), are subject to block exemption provided that the agreement regulates purchasing, sale and resale of goods and services, those provisions on IPRs do not constitute the primary object of agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints that are not exempted under the Block Exemption Decree.

Analytical framework for assessment

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

Even if the agreements containing vertical restraints are often considered less harmful when compared to agreements with horizontal restraints, the Commission makes assessment of the vertical restraints and examines whether the individual case is treated as prohibited agreement under article 7 (1) or may benefit from the block or individual exemption under article 7 (3) of the LPC (in a four-step procedure as explained in question 18). The Commission makes a comparison between the real or the possible future situation of the relevant market on which vertical restraints exist with the situation that would have prevailed in the absence of such restraints. If the agreement would possibly create, maintain or strengthen the market power and have significant negative effect on competition, it is likely that the agreement containing such vertical restraints shall not fall under article 7(3) of the LPC as the consumers would not benefit from such agreement.

The Block Exemption Decree, which is fully harmonised with the EU Regulation on vertical agreements, provides an exhaustive list of types of restraints that are considered per se unlawful when integrated in an agreement and are considered as hard-core restrictions of competition. When such hard-core restrictions are included in the agreement, the block exemption is no longer applicable and the agreement is excluded from the Decree's scope. However, the parties to the agreement can call upon the 'rule of reason' and provide the Commission with sufficient evidence to prove the existence of pro-competitive impact in the agreement. For the exemption to apply, the following conditions need to be cumulatively met by the agreement: contribute to promoting the production or distribution of goods and services or promoting technical or economic development; the consumers shall have a proportionate share of the resulting benefit; the agreement does not impose restrictions which are not indispensable to the attainment of the above objectives; the agreement does not eliminate competition in a substantial part of the relevant products or services market.

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 applicability of the block exemption is determined by the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services. In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30 per cent or less. Article 4 of the Decree and the Guidelines provide how to define the relevant market and calculate the market shares.

Where in a multi-party agreement an undertaking buys the goods or services from one party to the agreement and sells them to another party to the agreement, the exemption shall apply should the market share of the party acting both as supplier and buyer complies with the market share threshold of 30 per cent. If in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer – a non-compete obligation – is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective downstream markets must not exceed 30 per cent and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30 per cent on their respective purchase markets in order to benefit from the block exemption.

The block exemption of vertical agreements shall remain applicable where, for a period of two consecutive fiscal years, the threshold of the total annual turnover is not exceeded by more than 10 per cent.

For the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account, even though in-house production (production of an intermediate product for own use) may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company.

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 held by the buyer should not exceed 30 per cent of the relevant market on which it purchases the goods or services in order for the block exemption of vertical agreements (which will otherwise have as their object or effect the distortion of competition provided) to apply.

The market share of the buyer is to be calculated on the basis of market purchase value data relating to the preceding calendar year, as explained 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.

When assessing a vertical restraint the Commission follows the four-step procedure:

(i) to establish the market shares of the supplier and the buyer on the market where they sell and purchase the contract products;
(ii) if the market share of each of them do not exceed 30 per cent threshold, the vertical agreement is covered by the Block Exemption Decree, subject to the hard-core restrictions and conditions set out in that regulation;
(iii) if the relevant market share is above the 30 per cent threshold for supplier or buyer, the Commission will assess whether the vertical agreement falls within the scope of prohibited agreements under article 7(1) of the LPC; and
(iv) if yes, it is necessary to examine whether it fulfils the conditions for exemption under article 7(3) considering the efficiencies and benefits for consumers.

Companies use various types of vertical agreements in order to place their products and services on the market they are targeting. Vertical agreements may look similar in form, but can have different effects on competition depending on the conditions and the strength the concerned parties have on the targeted market. The Block Exemption Decree provides a 'safe harbour' for agreements with presumption that a certain formal conditions are met, regardless of whether they may or may not have positive or negative effects on competition. The Decree applies to all types of vertical agreements such as exclusive or selective distribution, exclusive purchase, franchising or agency agreements.

Formal or informal, written or unwritten, the restraints within a vertical agreement that restrict, prevent or disrupt competition in significant extent are considered prohibited in accordance with article 7(1) of the LPC. Nevertheless, if the restraint does not contain hard-core restrictions as listed in article 5 of the Decree, a presumption for the legality of the vertical agreement is granted, depending on the market share of both supplier and buyer. This is feasible if the agreement's legality can be justified by showing countervailing competitive benefits to the Commission as listed in article 7(3) of the LPC, and therefore be exempted from the prohibition.

The applicability of the block exemption is determined with article 4 of the Decree which provides that the market share of the supplier and the buyer must each be 30 per cent or less, in order for the block exemption to occur.

If a vertical agreement fails to qualify for block exemption under the Decree, it can still be appraised favourably outside the scope of the safe harbour, and be subject to the case-by-case analysis where its pro-competitive offerings shall be presented in front of the Commission.

The Commission may at any time withdraw the block exemption under prescribed conditions.

Types of restraint

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

Resale price maintenance (RPM) or the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed

by the buyer is a hard-core restriction. Resale price can be directly established with contractual provisions or concerted practices, but it can also be achieved through indirect means, such as fixing the distribution margin or fixing the maximum level of discount the distributor can grant from a prescribed price level, granting rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, any threat to delay or withhold supplies if the buyer fails to respect certain price level, measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network who deviate from the standard price level. If the supplier provides the buyer with a list of recommended selling prices, maximum selling price, or supporting measures, it does not indicate that a hard-core restriction has been made, provided that this kind of list does not amount to fixed or minimum selling price as a result of pressure from the supplier.

The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is covered with the block exemption when the market share of each of the parties does not exceed the 30 per cent threshold, provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties.

In 2013 the Commission determined price fixing on the market of technical inspection of motor vehicles and trailers in Macedonia for a duration of minimum five years as a prohibited agreement and concerted practice.

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'?

This issue is not explicitly regulated by the Block Exemption Decree and the Guidelines, except as explained in question 22. The Guidelines include provisions on restriction of sales in case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product.

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

RPM may restrict competition in a number of ways:

- facilitate collusion between suppliers and between buyers (by enhancing price transparency in the market, particularly if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements; and by eliminating intra-brand price competition at the distribution level);
- soften competition between manufacturers or between retailers or both, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them;
- price increase and reducing the pressure on manufacturer's own margin, as all or certain distributors are prevented from lowering their sales price for that particular brand;
- foreclose of smaller rivals by the manufacturer with market power; and
- reduce dynamism and innovation at the distribution level.

Examples of methods of RPM are provided in question 19.

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

RPM may lead to efficiencies, in particular where it is supplier driven. When a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest in promoting the product. RPM may also provide the distributors with the means to increase sales efforts also for the benefit of consumers. Fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format and a coordinated short-term, low-price campaign (two to six weeks in most cases), which will also benefit the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) presales services, in particular in case of experience or complex products; RPM may help to prevent free-riding at the distribution level.

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.

Linking the prescribed resale price to the resale prices of competitors is considered as indirect mean of price fixing and thus as hard-core restriction, under the Guidelines, as it obstructs the buyer to determine its own retail price. The parties may try to prove the efficiencies arising from the agreement, under article 7(3) of the LPC, but it is doubtful that pro-competitive effects would prevail over the negative 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 Guidelines provide that direct or indirect price fixing can be made more effective when combined with measures that may reduce the buyer's incentive to lower the resale price, such as the supplier obliging the buyer to apply a most-favoured customer clause. Therefore, the system of most-favoured customer clause could be considered as a hard-core restriction. The parties may prove the efficiencies arising from the agreement, under article 7 (3) of the LPC.

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 system of most-favoured customer clause in the online environment is not explicitly regulated or practically assessed; the explanation to question 24 shall accordingly apply. If it would directly or indirectly lead to fixing of price or other terms of trading, it could be considered as hard-core restriction. The parties may prove the efficiencies arising from the agreement under article 7(3) of the LPC.

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

This issue is not explicitly regulated or practically assessed. Advertisement is a method of sale which can be restricted only in specific cases. If the Commission proves that the minimum advertised price policy or the internet minimum advertised price clause would directly or indirectly lead to fixing of price or other terms of trading, it could be considered as hard-core restriction. The parties may prove the efficiencies arising from the agreement, under article 7(3) of the LPC.

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 indicated in question 24, the system of most-favoured customer clause could be considered as hard-core restriction. The parties may prove the efficiencies arising from the agreement, under article 7(3) of the LPC.

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 partitioning by territory or by customer group is a hard-core restriction. It may be the result of direct obligations or indirect measures aimed at inducing the distributor not to sell to certain customers or to customers in certain territories. This hard-core restriction applies without prejudice to a restriction on the buyer's place of establishment; thus, market partitioning by territory shall be exempted if it is agreed

that the buyer will restrict its distribution outlets and warehouses to a particular address, place or territory.

As an exception, the supplier may validly restrict the buyer to make active sales to a territory or a customer group that has been allocated exclusively to another buyer or that the supplier has reserved to itself. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by appointing an exclusive distributor for a particular customer group in a certain territory. In any case, such restriction of active sales shall not affect the sales by the buyer's customers; also passive sales to such territories or customer groups must be permitted.

The supplier may also restrict both active and passive sales by the buyer in following cases:

- to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade separate; this also covers allowing the wholesaler to sell to certain end users, while not allowing sales to other end users;
- to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (or 'the territory reserved by the supplier to operate that system'); and
- to restrict a buyer of components, to whom the components (any intermediate goods) are supplied for incorporation (use of any input to produce goods), from reselling them to competitors of the supplier.

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

The distributor may be restricted in using the internet to the extent that promotion on the internet or use of the internet would lead to active selling into other distributors' exclusive territories or customer groups. Online advertising specifically addressed at certain customers is considered a form of active selling to these customers; territory based banners on third party websites are a form of active sales into the territory where these banners are shown; the same applies to paying a search engine or online advertisement provider to have advertisement displayed specifically to users in a particular territory.

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

Restriction of active or passive sales to end users (professional end users or final consumers), by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment, is a hard-core restriction.

Dealers in a selective distribution system cannot be restricted in the users or purchasing agents acting on behalf of these users to whom they may sell, except to protect an exclusive distribution system operated elsewhere.

The selective distribution system operated by the supplier on certain territory may not be combined with exclusive distribution as that would lead to a restriction of active or passive selling by the dealers; as an exception, restrictions can be imposed on dealers' ability to determine the location of their business premises. The supplier may also commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied.

Restrictions of passive sales when launching a new product or in the case of genuine testing of a new product are explained in question 20.

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

The supplier is permitted to restrict both active and passive sales by the buyer of components, to whom the components (any intermediate goods) are supplied for incorporation (use of any input to produce goods), from reselling them to the supplier's competitors. There is no precedent by the Commission for restricting the uses to which a buyer (or a subsequent buyer) puts the contract products assessed, and such a restriction could be treated as a hard-core restriction.

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

Online advertising when specifically addressed at certain customers is a form of active selling to these customers. Having a website is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor even outside their own territory or customer group.

Restriction on the use of the internet by a distributor is permitted to the extent that promotion on the internet or use of the internet would lead to active selling into other distributors' exclusive territories or customer groups. Passive sales through the internet cannot be restricted.

The hard-core restrictions on passive selling prevent the distributor from reach more and different customers, such as: agreeing that the distributor shall limit its proportion of overall sales made over the internet; agreeing on dual pricing (the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line), etc; in a particular case where a manufacturer agrees such dual pricing with its distributors, the agreement may fulfil the conditions of article 7(3) and the Commission will also investigate to what extent the restriction is likely to limit internet sales and hinder the distributor reaching more and different customers.

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

The supplier may require quality standards for the use of the internet site to resell his or her goods, in particular for selective distribution, but direct or indirect limiting the online sales by the distributors is not permitted.

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

Selective distribution agreements (mainly of branded final products) restrict the number of authorised distributors and the possibilities of any active and passive sale to other buyers, leaving only appointed dealers and final customers as possible buyers. The restriction on the number of dealers depends on selection criteria linked mainly with the nature of the product; selection criteria need to be specified, but there is no obligation to publish them in advance.

The selective distribution is block exempted regardless of the nature of the product concerned and regardless of the nature of the selection criteria.

Both qualitative and quantitative selective distribution are exempted as long as the market share of each of supplier and buyer do not exceed 30 per cent, even if combined with other non-hard-core vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. But, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such a distribution system does not generally bring about sufficient efficiency-enhancing effects to counterbalance a significant reduction in intra-brand competition. If appreciable anticompetitive effects occur, the benefit of the block exemption is likely to be withdrawn.

The exemption does not apply to selective distribution agreements if they fix resale price, or restrict active or passive sales to end consumers, or restrict the possibility of mutual supplies between the members of such system, which are all hard-core restrictions.

The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain types of distributors (other buyers cannot buy from a particular supplier), softening of competition and facilitation of collusion between suppliers or buyers.

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

The selective distribution is block exempted regardless of the nature of the product concerned and regardless of the nature of the selection criteria. The selection criteria are linked mainly with the nature of the product – the nature of the product in question must necessitate a selective distribution system to preserve its quality and ensure its proper use. The supplier may not impose an obligation causing the authorised dealers, either directly or indirectly, not to sell the brands of particular competing suppliers.

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

Within 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. It is a hard-core restriction any obligation that dissuades appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales that are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop. The criteria imposed for online sales do not need to be identical to those imposed for off-line sales, but rather they should pursue the same objectives and achieve comparable results.

As mentioned in question 33, the supplier operating a selective distribution system may require quality standards for the use of the internet site to resell his or her goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general; the supplier may require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system; subsequent changes to such a condition are also possible unless these changes are aim at directly or indirectly limiting online sales by the distributors.

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

There is no precedent.

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

Yes, as the possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to cumulative effects. Cumulative effects are considered as a relevant factor to establish whether a vertical agreement brings about an appreciable restriction of competition (notwithstanding whether the agreement imposes restrictions or obligations on one party or both parties accept such restrictions or obligations).

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

Market partitioning by territory or by customer group is a hard-core restriction. However, the supplier may restrict both active and passive sales by the appointed distributor in a selective distribution system, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (or 'the territory reserved by the supplier to operate that system').

The restriction of cross-supplies (active or passive selling) between appointed distributors within a selective distribution system at any level of trade is also a hard-core restriction. Selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. Within a selective distribution network no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers. However, if appointed wholesalers located in different territories have to invest in promotional activities in their territories to support the sales by appointed retailers and it is not practical to agree by contract effective promotion requirements, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers' territories to overcome possible free riding may in an individual case fulfil the conditions of article 7(3) for block exemption.

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

The buyer may be obliged or induced to concentrate its orders for a particular type of product with one supplier, or not to buy or resell competing products or services. Such single branding is exempted when the both supplier's and buyer's market share each do not exceed 30 per cent and subject to a time limit of five years for the non-compete obligation. This restriction can be found in non-compete obligations of the buyer (obligation or incentive scheme that makes the buyer purchase more than 80 per cent of its requirements on a particular market from only one supplier; it does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services) and quantity-forcing on the buyer (where incentives or obligations agreed make the buyer concentrate its purchases to a large extent with one supplier).

The possible competition risks of single branding are foreclosure of the market to competing and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. All these restrictive effects have a direct impact on inter-brand competition.

In general, non-compete obligations are covered with the block exemption when their duration is limited to five years or fewer and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. The five-year limit does not apply when the goods or services are resold by the buyer 'from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer'; in such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer.

Above the market share threshold or beyond the time limit of five years, the Commission set a guidance for the assessment of individual cases in which it will decide whether the relevant provision is excluded from the block exemption.

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

Non-compete obligations on the buyer after the term of the agreement are not covered by the block exemption, unless the obligation refers to goods or services that compete with those subject to the agreement, is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period, is limited to a maximum period of one year after the termination of the agreement, is of unlimited duration when it refers to the use or disclosure of know-how that is not publicly available.

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

This situation is covered by non-compete obligations, as elaborated in question 40, and is not subject to block exemption, except in the cases explained above.

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

This situation is also covered with the non-compete obligations (if the buyer is obligated to purchase more than 80 per cent of its requirements on a particular market from only one supplier), as elaborated in question 40, and is not subject to block exemption, except in cases explained above.

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

The prevention or restriction imposed to the supplier of components to sell those components as spare parts to end users or repairers or other service providers not entrusted by the buyer (who incorporates these parts into his or her own products) with the repair or servicing of its goods, is a hard-core restriction.

But in general, exclusive distribution (the supplier agrees to sell its products only to one distributor for resale in a particular territory) and exclusive supply (the supplier is obliged or induced to sell the contract products only or mainly to one buyer, in general or for a particular use) is subject of block exemption when both the supplier's and buyer's market share each do not exceed 30 per cent, even if combined with other non-hard-core vertical restraints, such as a non-compete obligation limited up to five years, quantity forcing or exclusive purchasing. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding, except when the single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. Foreclosure is mainly a risk in the case of weak exclusive suppliers and strong buyers.

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

It is permissible to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade separate. This exception also covers allowing the wholesaler to sell to certain end users, for instance, bigger end users, while not allowing sales to (all) other end users.

But the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network that deal on a resale level, is a hard-core restriction. Dealers in a selective distribution system cannot be restricted in the users or purchasing agents acting on behalf of these users to whom they may sell, except to protect an exclusive distribution system operated elsewhere. Dealers in a selective distribution system should be free to sell, both actively and passively, to all end users, including with the help of the internet.

The selective distribution system operated by a supplier on certain territory may not be combined with exclusive distribution as it would lead to a hard-core restriction of active or passive selling by the dealers. But the dealer's ability to determine the location of his or her business premises could be restricted; selected dealers may be prevented from running their business from different premises or from opening a new outlet in a different location.

In addition, the supplier may commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied.

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

No.

Notifying agreements

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

No formal procedure for notification of vertical agreements to the Commission is prescribed in order to benefit from the block or individual exemption under article 7 of the LPC. Vertical agreements that do not contain restrictions of competition by object and in particular hard-core restrictions or which fulfil the conditions of article 7(3) of the LPC (the positive effects and efficiencies) are valid and enforceable. The parties shall make their own assessment of the vertical agreement for its compliance with article 7(3).

If a vertical agreement will be individually examined by the Commission, the authority will bear the burden of proof that the agreement in question infringes article 7(1) relating to prohibited agreements. Undertakings claiming the benefit of article 7(3) need to prove that the conditions are fulfilled and that the consumers will benefit without eliminating competition.

Update and trends

In 2015, in three cases the Commission determined prohibited agreements or concerted practices (focused on fixing the prices). Two of the cases referred to concerted practices in public tenders in the pharmaceutical sector, and the last one referred to price fixing by a professional dental practice. The total fines imposed amounted to approximately €800,000.

Anticipated developments

The regulation is harmonised with the EU Acquis, therefore no major changes are expected from a legislation point of view. The expected better equipment (human and financial) of the Commission will also improve practice with regard to vertical agreements.

When assessing a vertical restraint the Commission shall follow the four-step procedure as explained in question 18. The Commission adopts a decision following the conducted procedure of assessment of the vertical agreement if any misdemeanour is determined (the duration of the procedure is not limited to certain time period), which is published on the Commission's website, the same as decisions on interim measures, decisions for measures for reinstatement of effective competition (behavioural and structural measures) and the judgments adopted by the administrative court.

Authority guidance

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

Upon a request by the undertakings or ex officio, the Commission may provide expert opinions on issues in the area of competition policy and protection of market competition (including particular vertical agreement).

A declaratory judgment can be obtained under the civil procedure rules, by which the court determines the existence or non-existence of certain legal right or legal relation, or the authenticity or non-authenticity of some document, provided that the plaintiff shall prove its legal interest. The general rules of the law on obligations provide for prohibition of the parties to misuse their monopoly position.

Complaints procedure for private parties

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

Yes, the private parties (an individual or legal entity having a legitimate interest) can complain to the authorities in misdemeanour procedures about alleged unlawful vertical restraints. The procedure can also be initiated by the Commission ex officio. The misdemeanour procedure is conducted by a separate department within the Commission with active participation of the undertakings.

Enforcement

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

The Commission's practice with vertical restraints is substantial, although it is mainly focused on concentrations and misuse of dominant position.

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

There is no severability for hard-core restrictions. If there are one or more hard-core restrictions, the entire vertical agreement is not exempted. Vertical agreements are subject to block exemption under

condition that they do not include any hard-core restriction or no such restriction is practised with the agreement.

But the rule of severability applies to the excluded restrictions. Therefore, contract provisions that do not comply with the conditions set out in article 6 of the Block Exemption Decree shall be null and void.

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

The Commission has authority to determine that a vertical agreement falls under the scope of prohibited agreements under article 7(1) of the LPC, in a misdemeanour procedure. Concluding a prohibited agreement or participating in some other manner in an agreement, decision or concerted practices leading to distortion of competition within the meaning of article 7 of the LPC is a serious misdemeanour and is sanctioned with a fine of up to 10 per cent of the value of the total annual turnover in the last business year, plus a temporary ban on the performance of a specific activity by the undertaking for between three and 30 days, and a ban on the performance of an occupation, activity or duty for between three and 15 days for an individual.

When the misdemeanour is committed by an association of undertakings and refers to the activities of its members, the fine shall not exceed 10 per cent of the sum of the aggregate annual turnover calculated in absolute and nominal amount of each member of the association acting on the relevant market.

The party in the misdemeanour procedure may offer commitments to overcome distortion of competition; in urgent cases the Commission may impose interim measures (order cessation of certain actions, fulfilment of certain conditions or other measures) and, if necessary modify their duration. When the misdemeanour is determined, the Commission may impose the necessary behavioural and structural measures to eliminate the harmful effects of the distortion of competition and to reinstate effective competition.

Investigative powers of the authority

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

The Commission is authorised to collect from the undertakings (directly with inspection and dawn raid in their premises or voluntarily) data regarding their economic–financial condition, their business relations, their statutes and decisions, the number and identity of the persons affected by such decisions and other data. Failure to provide requested data or providing of incorrect, incomplete or misleading data, or hindering the inspection, is considered as a misdemeanour and is sanctioned with a fine of up to 1 per cent of the total value of annual turnover in the last business year.

The participants in the procedure have a right to state their opinion regarding the facts and circumstances relevant for establishing the actual state of affairs as defined by the Commission in the preliminary and in the final statement (before adopting a decision on misdemeanour).

The Commission may demand information from suppliers domiciled outside its jurisdiction.

Private enforcement

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

Private enforcement is subject to the general rules for damage compensation under the law on obligations. If any action constituting a misdemeanour in accordance with the provisions of the LPC causes damage, the damaged party may seek indemnification (follow-on claim) in a regular court proceeding.

Consumers and non-parties to the agreement can act as applicants or interested parties in the administrative procedures (and may be consulted in specific phases of the procedure). They may initiate a court procedure on the basis of the law on obligations that imposes a ban on the misuse of a monopolistic position, even before the Commission determines misdemeanour liability of undertakings; however, the burden of proof (misuse of a monopolistic position) in this case shall be on the consumer.

In both cases, the consumer may request the regular court to issue some interim measures against the undertaking, subject to making the consumer's claim probable and credible. During the court procedure, the consumer will need to prove its legal interest or the damage suffered by it or both. The successful party is entitled to recover its legal costs from the opponent. The procedure will take a minimum of one year.

Other issues

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

No.

ČAKMAKOVA ADVOCATES

Vesna Gavriloska **v.gavriloska@mlca.com.mk**

8-ma Udarna brigada 43/3
1000 Skopje
Macedonia

Tel: +389 2 3233 599
Fax: +389 2 3111 521
www.cakmakova.com

Malaysia

Sharon Tan and Nadarashnaraj Sargunaraj
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, the Energy Commission Act 2001 in relation to the energy sector and the Malaysian Aviation Commission Act 2015 in relation to the aviation services sector. The Malaysian Aviation Commission Act 2015 is the first legislation in Malaysia to introduce a voluntary merger control regime in addition to prohibiting anticompetitive agreements and abuse of dominance in the Malaysian aviation services market. 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.

In addition, the Postal Services Act 2012 introduced general competition law applicable to the postal market, which is also under the purview of the Malaysian Communications and Multimedia Commission. Following public consultation, the Malaysia Competition Commission (MyCC) issued the following guidelines:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive 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);
- 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 Anticompetitive Agreements and Guidelines on Abuse of Dominant Position give a non-exhaustive list of anticompetitive 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 anticompetitive conduct.

While the Act does not expressly promote other interests, agreements that may on the face of them be anticompetitive 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. In addition, MyCC will also assess whether the benefits are passed on to consumers. As the benefits are widely described, these may well include other interests.

Responsible authorities

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

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 sectors excluded from the application of the Act (described in question 1). The Malaysian Communications and Multimedia Commission enforces competition law in the communications sector, while the Energy Commission oversees competition in the energy sector. In addition, the Postal Services Act 2012 introduced general competition law applicable to the postal market, which is also under the purview of the Malaysian Communications and Multimedia Commission. Competition in the aviation services market comes under the purview of the Malaysian Aviation Commission pursuant to the Malaysian Aviation Commission Act 2015.

In order to coordinate the enforcement of competition law between the above regulators, MyCC has established a special committee and inter-working 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 charged with the responsibility for matters concerning domestic trade and consumer affairs 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.

Extraterritorial 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).

Since the Act 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 and state-owned corporations. 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 Anticompetitive Agreements and Guidelines on Abuse of Dominant Position, which apply generally to all vertical restraints; however, MyCC has indicated in its Guidelines on Anticompetitive 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. The Malaysian Aviation Commission Act 2015 which came into force on 1 March 2016, among other matters, regulates competition in the aviation services market. The Malaysian Aviation Commission Act 2015 prohibits anticompetitive agreements, abuse of dominance and has built-in procedures for voluntary notification for mergers in the aviation service market.

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 Anticompetitive Agreements that in general, certain agreements are not likely to be considered to have significant anticompetitive 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 find it anticompetitive, 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 anticompetitive 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 that 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 anticompetitive 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 anticompetitive effect, then MyCC may find the agreement to have an anticompetitive object. Where an agreement is not anticompetitive 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 anticompetitive 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 Anticompetitive 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, 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. For more details on the safe harbour threshold, please see question 8.

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 anticompetitive by object.

Other forms of resale price maintenance, including maximum pricing and recommended retail pricing, that serve as a focal point for downstream collusion, will also be considered anticompetitive. 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 anticompetitive.

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 Anticompetitive 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 proposed 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 five 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. 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 anticompetitive effects than non-price restraints, and considers resale price maintenance to be anticompetitive. 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 resale price maintenance. MyCC has not indicated whether it will characterise price relativity agreements as anticompetitive by object – it should be noted that it is not precluded from doing so. In any event, where there are anticompetitive effects, this will be of interest to MyCC.

Price relativity agreements potentially soften interbrand competition between suppliers who may take less aggressive pricing strategies and are likely to be scrutinised by the MyCC. Intra-brand competition may also be reduced 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 'most favoured nation' (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 resale prince maintenance and anticompetitive 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 difficulty achieving lower input prices and having to offer deeper discounts. However, where it is possible to show pro-competitive benefits that 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 the expected 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 for this 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 to subsequently 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 anticompetitive 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 anticompetitive 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 anticompetitive 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, interbrand 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 interbrand 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 anticompetitive 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 anticompetitive.

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

Currently, there are no decisions or guidance on vertical restraints that relate specifically to the restrictions on the territory into which a buyer selling via the internet may sell its products. However, the Guidelines on Anticompetitive Agreements state that generally exclusive distribution agreements covering a geographical territory, for example, where a supplier gives an exclusive geographical territory to a buyer which limits intra-brand competition, may raise competition concerns if there is no effective competition from other brands.

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

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 interbrand 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).

31 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 Anticompetitive 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 anticompetitive effects (see question 15).

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

Same as question 31. There is at present no guidance on internet sales.

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

No.

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

Similar to question 31, 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.

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

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 that meet certain objective qualitative criteria.

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

There are no guidelines on internet sales.

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

No.

38 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.

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

No.

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

It is not considered to be anticompetitive by object, and MyCC will consider the effects of such restraint on the market. MyCC's Guidelines on Anticompetitive Agreements 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.

Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

41 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 interbrand 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. Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

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

MyCC's Guidelines on Anticompetitive Agreements do not address this point. MyCC will need to assess whether this restriction forecloses the market to competitors of the supplier.

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

It is assessed similar to the approach in question 40.

44 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 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). Anticompetitive non-price vertical agreements may not be considered to have a 'significant' anticompetitive effect if the individual market share of the seller or buyer does not exceed 25 per cent of their relevant market.

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

It is assessed similar to the approach in question 44.

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

No. There have been no cases or guidance on this issue thus far.

Notifying agreements

47 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

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

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

49 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

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

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.

In June 2016, MyCC issued its decision against an information technology service provider to the shipping and logistics industry and four container depot operators for price fixing. The final decision states that Containerchain (M) Sdn Bhd, the information technology service provider, had engaged in concerted practices with the container depot operators, resulting in the operators increasing the depot gate charges from 5 ringgit to 25 ringgit. MyCC also concluded that the concerted practice resulted in the container depot operators offering a rebate of 5 ringgit to hauliers on the agreed depot gate charges.

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

The Competition Act does not mention the consequence of infringement of the prohibition on the validity of contracts. However, where the consideration for a contract is unlawful, the contract will be void and unenforceable under the Contracts Act 1950. Therefore, an anticompetitive agreement under the Competition Act will be rendered unenforceable by virtue of the Contracts Act 1950. Typically, parties to an agreement would include a severability clause, which can work to sever the anticompetitive 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 anticompetitive, thus illegal. The second set of illegal promises will be void, but the first set will remain enforceable.

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

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 247,730 ringgit to 20 million ringgit. In relation to non-financial remedies, MyCC also issued directions to cartelists (namely, the floriculturist association and lorry transport enterprises) to refrain from anticompetitive practices. Although not all infringing enterprises have been fined with financial penalties, it appears from recent trend that MyCC is taking a stricter stance in terms of deterrence. The following table is a summary of infringement decisions issued by MyCC to date and the total financial penalties imposed.

Update and trends

MyCC's final decision in 2014 against Malaysian Airline System Bhd and AirAsia Bhd was overturned on appeal by the Competition Appeal Tribunal in February 2016 and the 20 million ringgit fine imposed on the two airlines was set aside. MyCC has now filed for a judicial review in the High Court to challenge the Competition Appeal Tribunal's decision.

In June 2016, MyCC issued its final decision against an information technology service provider to the shipping and logistics industry and four container depot operators for price fixing. The final decision states that Containerchain (M) Sdn Bhd, the information technology service provider, had engaged in concerted practices with the container depot operators resulting in the operators increasing the depot gate charges. The concerted practice resulted in the container depot operators offering a rebate to hauliers on the agreed depot gate charges. MyCC imposed a total financial penalty of 645,774 ringgit on Containerchain and the four container depot operators and an additional penalty for any non-compliance with its directions on remedial actions.

In the same month, MyCC finalised its decision against MyEG Services Sdn Bhd (MyEG) concluding that the company had, together with its subsidiary MyEG Commerce Sdn Bhd (MyEG Commerce), abused its dominant position in the provision and management of online foreign workers permit renewals by not ensuring a level of playing field or by applying different conditions to equivalent transactions with other competitors to the extent that it has harmed competition in the downstream market. MyCC imposed a 2.27 million ringgit fine on MyEG after making a finding of infringement against MyEG.

Anticipated developments

MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010 and had carried out a public consultation on 16 May 2016 on the proposed amendments, but the proposed amendments have yet to be tabled in Parliament.

Infringing enterprise(s)	Anticompetitive conduct	Financial penalty
Cameron Highlands Floriculturist Association	Price fixing	None
Malaysia Airlines and AirAsia This decision was overturned on appeal by the Competition Appeal Tribunal and the financial penalty has been set aside. MyCC has filed for an application for judicial review to the High Court against the Competition Appeal Tribunal's decision.	Market sharing	20 million ringgit in total
Ice manufacturers (24 enterprises)	Price fixing	252,250 ringgit in total
Sibu Confectionery and Bakery Association (15 enterprises)	Price fixing	247,730 ringgit in total
Containerchain (Malaysia) Sdn Bhd and four other container depot operators	Price fixing	654,774 ringgit in total
My EG Services Berhad	Abuse of dominance	2,272,200 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 anticompetitive conduct.

On 14 October 2014, MyCC 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 anticompetitive 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 24 ice manufacturers on which financial penalties totalling 252,250 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

53 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 or her 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 anticompetitive conduct is not a crime, there is no privilege against self-incrimination.

Information requests

MyCC may, by written notice, require any person (including third parties to the agreement) that 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 MyCC 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

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

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

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

No.

ZICOlaw

Sharon Tan **sharon.suyin.tan@zicolaw.com**
Nadarashnaraj Sargunaraj **nadarashnaraj@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

Mozambique

Fabrícia de Almeida Henriques and Pedro de Gouveia e Melo

Henriques, Rocha & Associados | Morais Leitão, Galvão Teles, Soares da Silva & Associados

Antitrust law

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

The main piece of legislation regarding the application of competition law to vertical agreements in Mozambique is Law 10/2013, of 11 April 2013 (the Competition Law), which was complemented by the Competition Law Regulation of 31 December 2014 (the Competition Law Regulation).

Both Law and Regulation broadly follow the provisions of Portuguese competition law, especially of Law 19/2012, of 8 May 2012 (the Portuguese Competition Act in force), and are therefore inspired by the competition law rules of the EU, in particular article 101 of the Treaty on the Functioning of the European Union (TFEU), although there are a number of important specificities, which will be detailed below.

Additional regulations and guidelines, notably on the procedure for exemption of (vertical and horizontal) agreements and practices restrictive of competition, will likely be adopted by the Competition Regulatory Authority (CRA) of Mozambique, once it becomes operational. Ministerial Decree 79/2015, of 5 June 2015, determines the fees payable to the CRA by applicants of exemption for restrictive 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?

Article 18 of the Competition Law expressly prohibits agreements between undertakings in a vertical relationship that have the object or effect of appreciably impeding, distorting or restricting competition in the whole or part of the Mozambican market.

The concept of 'vertical relationship' is defined in the law as the relationship between an undertaking producing or supplying goods or services and other undertakings throughout the supply chain, including consumers. The inclusion of agreements between undertakings and consumers in the Mozambican Competition Law prohibitions constitutes a significant departure from EU and Portuguese competition law, which is only applicable to relationships between undertakings.

The vertical restraints expressly prohibited by the Competition Law are the following:

- applying, systematically or occasionally, discriminatory conditions (on price or other) regarding equivalent transactions;
- refusing, directly or indirectly, without just cause, the purchase or sale of goods or the provision of services;
- making the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- conditioning the sale of goods or the provision of services to the acceptance of payment conditions which are different from or contrary to commercial usage;
- making commercial relationships subject to the acceptance of clauses and commercial conditions that are unjustifiable or anticompetitive;
- imposing on distributors resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins or any other commercial conditions in their dealings with third parties;
- discriminating suppliers or consumers of goods or services through the fixing of differentiated prices or commercial conditions;
- conditioning the sale of a good or the provision of a service to the acquisition of another good or the procurement of a service; and
- imposing excessive prices, or increasing without just cause, the price of a good or a service.

Vertical agreements and practices restrictive of competition may nevertheless be exempted from the prohibition of the Competition Law by the CRA (see question 18).

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?

While the main objective of the Competition Law is the protection of competition, the law also pursues other public interests.

In particular, agreements restrictive of competition may be exempted, inter alia, if they:

- incentivise the technological development of Mozambican companies;
- promote national goods or services;
- promote exports;
- promote the competitiveness of small and medium-sized national companies; and
- contribute to the consolidation of national companies.

However, agreements that pursue the public interests above cannot be exempted if they result in the elimination of competition or contain restrictions that are not indispensable to the attainment of such interests (see question 47).

Responsible authorities

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

The Competition Law prohibitions are enforced by the CRA.

The authority is an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers, pursuant to which it is able to interview relevant persons, request documents and conduct searches and seizures and the sealing of business premises.

As set out in the Statute of the Authority (approved by Decree 37/2014, of 1 August 2014), the authority is headed by a five-member board, appointed by the government to serve for a five-year term, which may be renewed once. The board is the decision-making body for decisions of substance. The board is assisted by the directorate general, which is composed of the restrictive practices, merger control and economic studies departments (as well as other administrative bodies). The directorate general is responsible, in particular, for investigating anticompetitive behaviour and analysing merger notifications.

The authority is directed to closely coordinate its activities with those of the other Mozambican sectoral regulatory authorities, such as the banking, insurance, communications, oil, water, land transport and civil aviation regulators.

The authority may assign different priorities to certain practices or sectors, and in the last quarter of each year should publish its enforcement priorities for the following year.

As of 9 January 2017 the authority is not yet fully operational, as the government is yet to appoint the president and the members of the board.

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 is applicable to all economic activities exercised or producing effects in Mozambique. Although enforcement of the law by the CRA is yet to begin, it would be expected that the main nexus for application of the law is the effects of the vertical restraint in Mozambican territory, which may ultimately mean that the Competition Law prohibitions may apply to agreements between parties not domiciled in Mozambique.

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 applies to both private and state-owned undertakings, and accordingly agreements concluded by public entities that restrict competition and cannot benefit from exemption under the law may be prohibited by the CRA.

However, the Competition Law lists a number of agreements to which it is not applicable (see question 8) and these may involve state-owned undertakings.

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.

At present there are no competition laws or regulations applying to specific sectors of 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 Law is not applicable to:

- collective agreements entered into with workers' organisations under the applicable labour laws;
- practices intended to address a non-commercial objective;
- agreements resulting from international obligations that do not harm the national economy; and
- cases where there is a need for protection of a specific sector of the economy, in benefit of the national interest or the interest of consumers.

The article 18 prohibition only applies to vertical agreements that have the object or effect of appreciably restricting competition in the national market or a substantial part of it. For this reason, agreements with a minor impact on competition or the market (for instance, where the parties to the agreement have very low market shares) are outside the scope of the prohibition.

However, at present there are no guidelines for de minimis agreements, and in any event the most serious vertical restraints may be considered restrictions by object (as in EU and Portuguese competition law, on which the Competition Law is broadly inspired), and be prohibited regardless of the market shares of the parties or impact on the market.

Agreements

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

The Competition Law does not define what constitutes an agreement for the purposes of article 17, which prohibits horizontal agreements and practices, and article 18, which prohibits vertical agreements and practices. Clarification on what constitutes an agreement will result from the future enforcement practice of the CRA, but it is likely that, as in EU and Portuguese competition law, it will be subject to broad interpretation, to which the form of the agreement will not be relevant.

However, articles 17 and 18 also prohibit 'concerted practices' between undertakings, which would likely cover any coordinated conduct between two or more independent undertakings that is not considered to constitute an agreement.

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?

While article 18 has not yet been enforced in Mozambique, it is likely that an informal or even unwritten understanding between two or more independent undertakings, from which a concurrence of wills can be inferred and demonstrated by the CRA, will be deemed to constitute an agreement (see question 9).

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)?

Two or more entities forming a single economic unit are considered as a single undertaking for the purposes of the Competition Law, regardless of their distinct legal personality.

The Competition Law also expressly provides that agreements between two companies within the same economic unit, that regard the distribution of tasks or other internal matters to the economic unit, do not constitute agreements in the meaning of articles 17 and 18.

Under the Competition Law, an economic unit is deemed to exist when the entities are interdependent, as a result of:

- a majority participation in the share capital;
- a participation to which veto rights are associated on strategic matters, such as business plans, investment policy, budget and appointment of the management;
- the holding of more than half the votes conferred on equity participations;
- the possibility to appoint more than half of the members of the management or supervisory body; or
- the power to manage the activity of the 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?

Pursuant to the Competition Law, an entity that cannot independently determine its commercial strategy is considered to be integrated in a single economic unit with the entity on which it depends. This rule can be applied in principle to agent–principal agreements where the agent does not incur in any commercial or financial risks in relation to the activities for which it has been appointed an agent by the principal, in terms equivalent to those in force in EU competition law, which directly inspired this Mozambican provision. The concrete interpretation of the law will depend, like in other areas of Mozambican competition law, on the future practice of the CRA.

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.

Intellectual property rights

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

One of the public interest criteria that allows a vertical agreement that appreciably restricts competition to qualify for exemption is the promotion of protection of intellectual property, and the law expressly provides that holders of IPRs may request an exemption for an agreement or practice related to the exercise of IPRs.

Analytical framework for assessment

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

The CRA, which has exclusive competence to impose sanctions for the violation of the article 18 prohibition and to issue exemptions, is yet to commence operations, and for that reason the analytical framework that it will apply is not known at present.

However, given that the Competition Law is broadly based on EU and Portuguese competition law, one would hope that the CRA will apply an analytical framework similar to that of article 101 TFEU and its national equivalents in EU member states.

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?

See question 15.

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 15.

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 Regulation provides that the CRA will approve regulations defining categories of prohibited practices that benefit from automatic (block) exemption.

However, since the authority is not yet operational, at present there is no block exemption or safe harbour that gives legal certainty to companies with activities in Mozambique as to the legality of their agreements and practices that contain vertical restraints.

Furthermore, since Mozambican law on vertical restraints is broadly inspired by EU and Portuguese competition law, in the present transitory period and until the CRA adopts decisions shedding light on its enforcement practice or issues guidelines, it may be helpful to assess the lawfulness of vertical restraints with an impact in Mozambique using the methodology and standards of the European Commission's Vertical Restraints Guidelines (2010/C 130/01).

Types of restraint

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

One of the prohibited vertical restraints expressly established in article 18 is the imposition on distributors of resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins or any other commercial conditions in their dealings with third parties.

The broad wording of this prohibition certainly includes minimum resale prices and possibly maximum prices as well (although this would constitute a departure from EU and Portuguese competition law). The mere suggestion or recommendation of resale prices does not appear to be prohibited, unless it can be inferred from the concrete conduct of the parties that the recommendation is accompanied by other measures that amount to an indirect strategy of resale price-fixing – either by incentivising the implementation of the recommendation or dissuading the buyer from applying different resale prices. The imposition of rebates or profit margins is also a prohibited conduct.

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'?

As the CRA is not operational at present, there are no relevant guidelines or decisional practices in this regard.

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

See question 20.

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

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.

See question 20.

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 20.

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 20.

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

See question 20.

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 20.

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 and practices 'that result in limiting or controlling the production or distribution of goods or the provisions of services' are only prohibited by article 17, which applies to horizontal agreements (those between undertakings competing in the same economic sector), and article 18 does not contain a similarly worded prohibition.

However, one cannot exclude that the CRA may interpret the very broad prohibition in article 18 with regard to imposing on the distributor 'any commercial conditions' with third parties as also including restrictions as to the clients, or territory, to (or into) which the buyer may resell the contractual products.

Therefore, the question of whether, and in which circumstances, territorial and customer restrictions in vertical agreements are admissible in Mozambican competition law will only be clarified by the future practice of the CRA.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

See question 28.

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

One of the prohibited vertical restraints expressly established in article 18 is the imposition of 'minimum or maximum quantities' on distributors in their purchases of contractual products, which, given its broad wording, is also likely to cover obligations to purchase a certain percentage of the buyer's requirements of such products. Such restrictions may benefit from exemption if all the legal criteria are met.

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

See question 28.

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

See question 28.

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

See question 20.

Notifying agreements

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

The Competition Law establishes an administrative procedure for the issuance by the CRA of an exemption to the prohibitions in the law, including the article 18 prohibition of vertical agreements.

The request for exemption should be submitted by one or more of the undertakings that are party to an agreement, according to a form to be approved by the CRA.

A notice of the request is subsequently published in a national newspaper, and the directorate general examines the request and whether the conditions for individual exemption are met.

Such conditions are set forth in article 21 of the Competition Law and are as follows:

- the agreement should pursue one of the following objectives:
- contributing to improving the production or distribution of goods and services;
- reducing prices to consumers;
- accelerating economic development;
- incentivising the technological development of Mozambican companies;
- enabling a better allocation of resources;
- promoting national goods or services;
- promoting exports;
- promoting the competitiveness of small and medium-sized national companies;
- contributing to the consolidation of national companies; and
- promoting the protection of intellectual property;
- the agreement must not eliminate competition or contain restrictions that are not indispensable to the attainment of the relevant public interest objectives above.

Professional associations recognised by the government may also request exemption for its internal rules that have the effect of appreciably restricting competition. The exemption is granted when the rules in question are essential to maintain the 'professional standards' or the 'specificities of the profession'.

The directorate general submits its report to the board, which will then issue a reasoned decision granting the exemption, refusing the exemption, or declaring the agreement not covered by the Competition Law prohibitions. An exemption decision also states the duration of

the exemption and any conditions that should be complied with by the parties. The decision is published in the Mozambican official journal Boletim da República.

The CRA may revoke an exemption, after having heard the parties, if it concludes that:

- the conduct produces effects which are incompatible with article 21;
- the exemption was granted on the basis of incorrect or misleading information;
- the market conditions in force at the time of the granting of the exemption have been altered; or
- the parties to the agreement did not comply with the conditions included in the exemption decision.

The law does not establish a time period for the CRA to decide on an exemption request.

The submission of an exemption request is subject to the payment of a fee of 200,000 meticais, and of an annual fee for the duration of the exemption of 150,000 meticais.

Authority guidance

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

Not applicable.

Complaints procedure for private parties

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

While a formal complaint procedure is not provided for in the Competition Law, complaints will likely be one of the main sources of investigations opened by the CRA.

The law nevertheless provides that the complainant must previously be heard if the CRA intends to close the investigation without adopting a prohibition decision or imposing a fine.

Enforcement

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

Since the CRA has not yet started operations, the prohibitions of article 18 are not presently enforced.

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

Pursuant to article 294 of the Mozambican Civil Code, agreements concluded in breach of imperative legal provisions, such as article 18 of the Competition Law, are null and void, and may be so declared by a court of law at the request of any interested party.

General civil law rules on severability apply, meaning that the declaration of nullity of part of an agreement does not determine the invalidity of the whole agreement except when the illegal clauses are essential to the agreement (ie, it is shown that the agreement would not have been entered into without such illegal clauses).

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

Violation of the article 18 prohibition makes infringing firms liable to heavy fines, which may amount to up to 5 per cent of the turnover of each company in the previous year.

Where the parties breach a prohibition decision or a decision requesting information, the law also provides for penalty payments. Penalty payments may reach up to 5 per cent of the average daily turnover of the infringing companies in the previous year.

Update and trends

As of 9 January 2017 the CRA is not yet fully operational. The government is yet to appoint the president and the members of the board, and it is hoped these appointments will take place in the coming months.

Ancillary sanctions may also bring serious consequences to infringing companies, not only because the offender may find itself excluded from participating in public tenders for five years, but also because it can even find itself confronted with the possible breakup of the offending undertaking or mandatory divestitures, if such measures are deemed necessary to eliminate the restrictive effects on competition.

Investigative powers of the authority

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

In terms of procedure, investigations can be initiated by the board of the CRA ex officio or following a complaint. After an investigation is opened, it is conducted in three stages. During the first stage the authority carries out all necessary inquiries, within the scope of its broad investigative powers, to identify the relevant anticompetitive conduct and the relevant parties and to collect evidence.

In the context of an investigation, the authority can:

- request information from the parties under investigation, as well as from any other private entities and associations it considers necessary;
- question the legal representatives of the undertakings involved or of other undertakings and any other persons whose declarations it deems relevant;
- search and seal the premises of the undertakings involved, provided that a warrant is previously obtained from the competent judiciary authority; and
- collect all documents deemed relevant for the investigation.

The authority may require any other public or administrative entities, including criminal police, to provide the necessary cooperation.

At the end of the investigative stage the director general takes a decision to either close the investigation or to issue a statement of objections to the defendant and open the second stage of the procedure. The defendants may then submit their defence, present evidence and request additional inquiries to be made, and may also request an oral hearing.

At the end of these proceedings, and following final allegations by the defendants, the director general issues a decision to either close the investigation (with or without conditions or issuing a warning), or to submit the case to the board for a final decision, opening the third stage.

One of the members of the board will be the case rapporteur and may conduct further inquiries, as well as hear the competent sectoral regulator (in the case of a regulated sector), which must be involved throughout the procedure. The full board must then adopt a final decision on the case, either declaring the existence of an infraction (imposing fines and ancillary sanctions (discussed below), or issuing a warning), or authorising an agreement, with conditions and obligations. Decisions imposing fines and other sanctions may be appealed to the Judicial Court of the City of Maputo.

Private enforcement

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

Damages actions for loss suffered as a result of breach of the Competition Law follow general civil law and civil law procedures.

Injunctions or claims can be brought before the Mozambican civil courts by any person who has suffered harm due to a breach of article 18.

The scope of claims that may be brought before the Mozambican courts for infringing the Competition Law include actions to obtain a declaration of nullity of the illegal agreement; actions to obtain compensation for the damages suffered in consequence of a specific clause or practice considered to be anticompetitive; and actions to obtain interim relief before the court.

Article 81 of the Constitution of Mozambique enshrines the rights for a representative action, which could be exercised in the context of damages actions for the breach of the Competition Law. However, at present the specific legislation implementing the representative action procedure has not yet been adopted.

The right to compensation under the tort liability regime is subject to a time limitation of three years from the moment that the injured party becomes aware of his or her right to make a claim for damages.

Other issues

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

No.

HENRIQUES, ROCHA & ASSOCIADOS
Sociedade de Advogados, Lda.

Fabrícia de Almeida Henriques
fahenriques@hrlegalcircle.com

Edifício JAT V-1
Rua dos Desportistas, 833, 6º
fracção NN5 Maputo
Mozambique
Tel: +258 21 344000
Fax: +258 21 344099
www.hrlegalcircle.com

MORAIS LEITÃO GALVÃO TELES SOARES DA SILVA

Pedro de Gouveia e Melo
pgmelo@mlgts.pt

Rua Castilho, 165
1070-050 Lisbon
Portugal
Tel: +35 1213 817 400
Fax: +35 1213 817 499
www.mlgts.pt

Romania

Carmen Peli and Cătălin Suliman
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 and usually takes into account the EU rules and interpretations of the VBER.

In 2016, the Competition Council took into account the provisions of the VBER when analysing vertical restraints on prices and distribution of products.

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 anticompetitive object and are therefore analysed as per se restrictions whose anticompetitive 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 ensure, protect and enhance competition, as well as 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. However, recently the Romanian Competition Council started to include economic assessments of the impact of the restriction in its sanctioning decisions.

Responsible authorities

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

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.

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 (or potentially 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. However, taking into account the recent sector inquiries on the internet sales, we expect that the authority to cover also pure internet vertical restrictions that could have an effect on the Romanian market.

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 such as those limiting freedom of trade or undertakings' autonomy or 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 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 but informally the Competition Council aims to have similar application of the EU rules as the European Commission.

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 anticompetitive 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*).

Also, in 2015, the Competition Council imposed a sanction against Metro, Real, Selgros and Mega Image, as well as 21 of their suppliers with fines amounting up to approximately €35 million in the investigation on the food retail market which revealed that the companies were involved in price fixing agreements between 2005 and 2009. The fine was based on specific promotional forms (not part of the distribution agreements) which were concluded for each promotional activity.

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. However, in case when the agreements between companies part of the same group have a 'spill-over' effect, namely could have an effect on other third-party companies, such effect may be analysed by the Competition Council on the 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?

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 anticompetitive 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.

In its recent approach, the Competition Council is analysing rather formalistic the fulfilment of all the conditions for a genuine agency agreement. For example, it considered some agreements where the insurance of the product or part of the risk of non-payment was covered by the agent as not being genuine agency agreements.

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 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 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. Such analysis was partially taken over in the sanctioning decision issued in 2015 in the retail sector. However, the Competition Council was more focused on an infringement by object analysis and the effects analysis was rather reduced. This was one of the points used by the sanctioning parties to challenge the fining decision (the court cases being still pending).

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.

In a 2015 decision on the energy market, the Competition Council analysed the effects of the long-term contracts concluded by Hidroelectrica with several traders and industrial consumers and reached the conclusion that such contracts had a foreclosing effect on the Romanian energy market. Also, the authority considered that these long-term agreements blocked other electricity suppliers, producers and eligible consumers from the market, thus slowing down the market development process during the market liberalisation period. The total fine imposed was around €37 million.

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*). The same was covered in the investigation of possible violations of the Competition Law on the market of pastry and bread products manufacturing and marketing in Romania by Fornetti Romania and its contractual partners (Competition Council Decision 50/2012, *Fornetti Romania*).

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 anticompetitive 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*).

At the beginning of 2015, the Competition Council announced the sanctioning of 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.

The Competition Council's focus on RPM practices seems to have increased in 2015, and both sanctioning and commitments decisions have been issued in this regard. The Council sanctioned 82 companies on the market for paints and varnishes (4 producers and 78 distributors), within four investigations concerning anticompetitive agreements between each of the four producers (Deutek SA, National Paints Factories Company SA, Policolor SA, Swarco Vicas SA) and their respective distributors for setting the resale price for products and/or market sharing during 2004–2010. Following the investigations, the Competition Council found that some of the agreements contained clauses whereby the producers and their respective distributors established the resale price (for retail or wholesale or both).

In 2016 the Competition Council sanctioned with fines amounting to €6.32 million 41 companies active on the distribution market of doors, thermal plants and boilers for concluding anticompetitive agreements. The fines were imposed within cartel investigations on fixed prices for Porta KMI Romania (doors) and Ariston Thermo Romania (thermal plants). The Competition Council found that between each of the two undertakings and their distributors, there were signed contracts by which they set the resale prices or trade allowance quotas. Thus, the distributors' capacity to set their own resale price was limited resulting to a restriction of any competition based on resale 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'?

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 took pains to report the 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 same approach was taken in the four commitments decisions issued by the Competition Council in 2015 addressing RPM practices (commitments undertaken by each of Eurogenetic SRL, Sistemgas SA, Rompetrol Gas SRL, Bulrom Gas Impex SRL), whereby the Competition Council expressed its concerns with regard to certain contractual provisions functioning as monitoring mechanisms (and in some cases even sanctioning systems) for the observance of RPM obligations.

Of particular interest is the Competition Council's sanctioning decision in the FMCG sector, announced at the beginning of 2015 but however not yet published. According to publicly available information, this decision tackles the issue of RPM practices in conjunction with exclusivity during promotions.

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, Hidroelectrica*) 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. However, the Competition Council constantly considers that RPM is a restriction by object and should not analyse any potential pro-competitive effects of such practice.

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 its retail prices independently 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.

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 anticompetitive 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 for committing an administrative offence.

In the retail investigation, the Competition Council considered that the MFN clause combined with an exclusivity in promotion leads to an imposing a minimum prices and applied sanctioned both to the retailers and the suppliers having such clauses in the promotional forms or purchase 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.

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

There are no decisions or guidelines issued by the Competition Council with regard to internet sales restrictions. However, the Competition Council launched a sector inquiry on internet sales for electronics and fashion products and the results of such inquiry are expected to be issues by the end of 2017.

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

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.

31 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.

32 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 emails.

No national competition practice or case law has been developed so far with respect to internet sales restrictions. However, this is one of the aspects currently under investigation in the sector inquiry.

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

There are no guidelines, decisions 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.

34 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.

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

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.

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

The 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.

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

To our knowledge, the Competition Council has not issued such decisions.

38 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).

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

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.

40 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 anticompetitive effects on the market.

41 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 anticompetitive 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.

42 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.

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

The assessment of such restriction is now performed in accordance with 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.

44 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.

45 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.

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

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

47 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

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

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 latest practice is to be available for informal consultations on more complex matters. However, in such cases, usually the authority does not issue any conform letter or document to the undertakings concerned.

Complaints procedure for private parties

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

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 working days of the date when the claimant receives confirmation that his or her 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. The Competition Council can also respond to the claimant through a written letter when the latter's complaint does not fall under the Competition Law, as regards the denounced facts, or when the Competition Council will not investigate the complaint due to the fact that the European Commission or another competition authority is investigating or has investigated the denounced facts. 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.

Update and trends

In 2016, significant amendments were made to the secondary competition legislation, especially to the rules applicable to settlement procedures. Currently, the settlement procedure allows informing of all undertakings concerned and granting them the possibility to follow such route in case of a pending investigation.

As regards the Competition Council's practice in 2016, special attention must be paid to the decisions whereby the authority sanctioned with fines amounting to €6.32 million 41 companies active on the distribution market of doors, thermal plants and boilers for concluding anticompetitive agreements. These fines were imposed within cartel investigations on fixed prices for Porta KMI Romania (doors) and Ariston Thermo Romania (thermal plants). In both cases the RPM was dealt as an infringement by object.

Anticipated developments

In 2017, in respect to vertical agreements, we expect the Competition Council to continue its investigation in the retail sector (regarding Carrefour, Cora, Auchan and Kaufland and their suppliers) and to issue preliminary findings in the online sector inquiry. Also, it may be expected that the authority to follow up on some former sector inquiries (for example, in the beer and pharma sector) to assess whether there are reasons to intervene on such markets.

Enforcement

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

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.

According to the publicly available information, 66.6 per cent of the cases finalised in 2015 by the Competition Council (14 out of 21) concerned vertical agreements. The Competition Council focused its attention on by object infringements, especially price fixing practices. This trend was also maintained in 2016.

51 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.

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

For infringement of article 5(1) the Competition Council may order the termination of the anticompetitive practice and 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 fine may be increased or decreased depending on any aggravating or mitigating circumstances identified in the case.

The Competition Council can ascertain the nullity of the anticompetitive clauses or agreements, make recommendations or request that the parties comply with certain conditions or obligations. When ordering the termination of an anticompetitive practice, the Competition Council can impose any behavioural or structural corrective measures which are proportionate with the infringement and necessary for the effective termination of such infringement. Structural corrective measures are imposed when there is no equally effective behavioural corrective measure or when such equally effective behavioural measure would be more onerous for the company than a structural corrective measure.

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.

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 anticompetitive behaviour during promotions.

Also in 2015, the Competition Council sanctioned Hidroelectrica SA and 10 contractual partners – mostly electricity traders – with fines amounting to approximately €37 million, mainly for concluding long-term agreements having anticompetitive effects on the electricity producing and trading market.

Investigative powers of the authority

53 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 take interviews, 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 inspection; 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 anticompetitive 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 limits the Competition Council's investigative powers by defining the documents that may not be taken during an inspection (namely documents subject to legal professional privilege). In 2015, the Competition Council exercised its inspection powers and performed eight dawn raid actions, at 61 premises and working points.

Also, there is a new practice of the Competition Council to take during dawn raids documents in electronic format and analyse them in a forensic procedure at the office of the Competition Council. The opening of such electronic data requires authorisation from the Court of Appeals (as far as we are aware, there were no cases when the Court of Appeals rejected such a request of the Competition Council).

PELIfILIP

Carmen Peli **carmen.peli@pelifilip.com**
Catalin Suliman **catalin.suliman@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

Private enforcement

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

Any party that has suffered loss as a result of an anticompetitive 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. In 2016 the Competition Council issued for debate the new guidelines for private enforcement with an aim to boost such practice in Romania.

Other issues

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

Under the Romanian law, leniency is available in case of vertical agreements or concerted practices having as object the restriction of the buyer's freedom to determine its selling price.

Serbia

Guenter Bauer, Maja Stankovic and Marina Bulatovic
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 to 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).

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.

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 is economic.

Responsible authorities

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

The Commission for the Protection of Competition (the Commission) is the agency responsible for enforcing prohibitions on anticompetitive 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.

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 anticompetitive 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.

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 for the Commission to investigate a particular sector of the economy (or a particular type of agreement across various sectors) if prices or other circumstances suggest that competition may be restricted or distorted in a certain market. The Commission has carried out several such inquiries, primarily in the petrol and petrol derivatives sectors as well as in the milk sector; it did not, however, find restrictive agreements in these sectors. The Commission pointed out that it would continue to closely monitor these sectors following, in particular, the liberalisation of the regulation of the petrol sector.

The Commission recently announced that it had started to work on proposals of block exemption regulations for the insurance sector, the transport sector, the distribution of spare parts for motor vehicles as well as technology transfer. Furthermore, in 2016, the Commission conducted a sector analysis of the after-sales markets for motor vehicles and home appliances in 2015 and a sector analysis of the insurance sector in the period from 2012 to 2015.

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 anticompetitive 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 question 47).

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 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 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.

In 2016, the Commission issued an opinion on the application of article 10 of the CPL to related companies in public procurement proceedings. The opinion states that agreements between related companies as defined by the CPL are not deemed restrictive.

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

We are not aware of decisions or guidelines of the Commission that have specifically dealt with restrictions on the territory into which a buyer selling via the internet may resell contract products.

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

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.

31 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.

32 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.

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

To date, no decisions or guidelines of the Commission have specifically addressed the question of the differential treatment of different types of internet sales channel or platform bans.

34 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.

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

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 to be 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).

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

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.

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

We are not aware of decisions of the Commission that have specifically dealt with this question. In an opinion issued in 2014, the Commission held, however, that in a public procurement tender a contracting authority may require bidders that are wholesalers of pharmaceuticals to provide a written statement in which the manufacturer of these pharmaceuticals, which operates a selective distribution system, approves of the wholesaler's participation in the tender. The Commission found that the manufacturer can refuse to grant such an approval to wholesalers which are not members of its selective distribution system.

38 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.

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

To the best of our knowledge, the Commission has not yet taken an official view in this regard.

40 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 42).

41 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.

42 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).

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

An obligation on the buyer to purchase more than 80 per cent of its total demand of the contract products from the supplier would be regarded as a non-compete obligation (see question 42). In an opinion published in the Commission's activity report for 2015, the Commission explained it would assess all relevant circumstances of the case in this situation, in particular the fact whether the buyer's total annual demand was known to the supplier and whether the supplier took this total demand into account when determining the minimum quantity requirement that exceeded 80 per cent of the buyer's total demand. To the best of our knowledge, the Commission has not yet taken an official view regarding minimum quantity requirements of less than 80 per cent.

44 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.

45 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 44). 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.

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

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

47 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 need 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

Update and trends

Recent developments

While it should be noted that the Commission's activity report for 2016 has not yet been published, the authors are not aware of major developments in the area of vertical restraints in 2016. In comparison to other areas of competition law such as horizontal agreements (eg, bid rigging), the Commission's activities were more limited in the area of vertical restraints. In 2015, the Commission carried out six investigations of restrictive agreements, out of which only two concerned vertical restraints.

It is noted that the Serbian parliament has recently adopted amendments to the Criminal Code, which will enter into force on 1 March 2018 and introduce a new criminal offence referred to as 'conclusion of a restrictive agreement'. The law provides that the conclusion of restrictive agreements that relate to price fixing, limitation of production or sales, or sharing of markets (and are not individually exempted by the Commission) amounts to a criminal offence; this may also concern certain types of vertical restraints. The sanctions for concluding such restrictive agreements are imprisonment from six months to five years and fines. Furthermore, the law provides that the offender may be granted immunity from sanctions if he or she qualifies for immunity from fines under competition law rules (ie, under the leniency regime).

Anticipated developments

In its activity report for 2015, the Commission announced that it will continue working on proposals of block exemption regulations for the insurance sector, the transport sector, the distribution of spare parts for motor vehicles and technology transfer. Furthermore, the Commission announced that it will publish guidelines in order to assist undertakings in assessing whether agreements fulfil the conditions for block exemption or should be notified for individual exemption. In addition, the Commission intends to conduct a sector inquiry regarding the retail sector in non-specialised stores for food, beverages and tobacco.

Besides, it is expected that the CPL will be amended in the course of 2017. The focus of these amendments is expected to be on the rules of procedure in front of the Commission.

market shares (including the main competitors and their market shares). Also, the request must include information on 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 that 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.

In 2016, the Commission published guidelines regarding requests for individual exemption. The Commission explains in these guidelines that if the Commission determines in investigative proceedings that an agreement (which has previously not been notified to the Commission for an individual exemption) is restrictive of competition, it is not possible to suspend these investigative proceedings for an individual exemption procedure even if the undertakings proved that the conditions for an individual exemption are met. The Commission also recommends in its guidelines that undertakings submit the signed version of the agreement together with the request for individual exemption and make the validity of the agreement conditional upon granting of the individual exemption. Furthermore, the Commission explains it will grant the individual exemption starting from the date of submission of the complete request for individual exemption and not from the date of conclusion of the restrictive agreement. The Commission announced that it will issue further guidelines in order to assist undertakings in assessing whether agreements fulfil the conditions for block exemption or should be notified for individual exemption.

Authority guidance

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

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

49 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 a 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 2015, the Commission received a total of 43 complaints, six of which resulted in the opening of an investigation. Out of these six investigations, two concerned vertical restraints and four concerned horizontal restraints.

Enforcement

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

According to the Commission's activity report, in 2010, the Commission dealt with 14 cases involving restrictive agreements, five of which related to an individual exemption. For reasons of comparison, it should be noted that the Commission dealt with six cases relating to an abuse of a dominant position and 67 merger control notifications in the same period.

In 2011, the Commission dealt with 22 cases involving restrictive agreements (14 of which related to an individual exemption). In the same period, the Commission dealt with four cases relating to an 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). In the same period, the Commission dealt with nine cases relating to an 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. In the same period, the Commission dealt with six cases relating to an abuse of dominance and 106 merger control notifications.

In 2014, the Commission dealt with four cases involving restrictive agreements and 23 individual exemption cases. In the same period, the Commission dealt with six cases relating to an abuse of dominance (all six dating back to 2013) and 100 merger control notifications.

In 2015, the Commission dealt with nine cases involving restrictive agreements and 35 individual exemption cases. In the same period, the Commission dealt with two cases relating to an abuse of dominance and 107 merger control notifications.

At the time of writing, the statistics for 2016 were not yet available.

51 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).

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

The 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 50, 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

53 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

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

Private 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 because of anticompetitive 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.

Other issues

55 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 to the Commission information and evidence that 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**
Marina Bulatovic **marina.bulatovic@wolftheiss.com**

PC Ušce, Bulevar Mihajla Pupina 6
11000 Belgrade
Serbia

Tel: +381 11 3302 900
Fax: +381 11 3302 925
www.wolftheiss.com

Sweden

Mats Johnsson
Hamilton Advokatbyrå

Antitrust law

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

Chapter 2, sections 1 and 2 of the Swedish Competition Act (Konkurrenslagen, SFS 2008:579) (the Competition Act) correspond to articles 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU), prohibiting agreements between undertakings that may affect trade within Sweden and have as their object or effect the prevention, restriction or distortion of competition within Sweden, as well as providing for exemption under certain criteria. This includes vertical agreements. Chapter 2, section 7 of the Competition Act sets out a prohibition of abuse of a dominant position equivalent to article 102 TFEU, which may in some instances be relevant to vertical relationships.

EU law on vertical restraints is an important source of guidance when applying the Competition Act; its preparatory works expressly state that guidance shall be sought in EU competition law when applying the Competition Act.

As a practical matter, there have been relatively few decisions on vertical restraints under the Competition Act since the early 2000s.

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 Act contains no definition of vertical restraints; any agreement or concerted practice among undertakings active at different levels of trade that restricts competition is liable to be covered. In practice, this has concerned various forms of vertical agreements – distribution, franchise, agency – or provisions such as price maintenance and territorial protection.

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 the main objective of the Competition Act is to safeguard efficient competition, it is also intended to promote the interests of consumers and SMEs. In practice, safeguarding competition takes priority over all other objectives.

Responsible authorities

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

The Swedish Competition Authority (The Competition Authority) has sole responsibility for the enforcement of competition law in Sweden. The Competition Authority has the power to issue cease-and-desist orders against conduct infringing the competition rules. It may impose fines where such imposition is not contested. In contested cases, the Competition Authority must lodge an action with the Patent and Market Court requesting that fines be imposed. An appeal lies with the Patent and Market Court of Appeal, subject to leave to appeal. Subject to approval by the Patent and Market Court of Appeal, issues of significance may be appealed to the Supreme Court.

If a complaint is rejected by the Competition Authority, a party concerned by the complaint may apply to the Patent and Market Court of Appeal for a cease-and-desist judgment.

No role is played by the government and ministers in the enforcement of competition law; on the contrary, the Swedish Constitution bars them from becoming involved in individual 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?

The preparatory works of the Competition Act confirm that its application is determined on the basis of the effects doctrine, whereby conduct that produces material effects within all or part of the Swedish market is subject to the Competition Act, regardless of, for example, the location of the parties to the infringing agreement. This is, however, subject to generally accepted principles of international law. In the *Booking.com* case, which concerned an internet-only booking portal, jurisdiction appears to have been based on hotels located and active in Sweden being party to the investigated arrangements.

Agreements concluded by public entities

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

The Competition Act is fully applicable to public entities in respect of conduct by those entities that constitutes economic activities (as opposed to exercise of public authority). The Patent and Market Court of Appeal made clear in its *Vägverket* judgment that the Swedish Road Authority could be liable for participation in a cartel, even though it had at the same time acted as purchaser on the relevant market.

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 terms of the European Commission Motor Vehicle Block Exemption regulation have been brought into Swedish law by a separate Act (see below).

General exceptions

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

The terms of the European Commission's Vertical Block Exemption, Motor Vehicle Block Exemption and Technology Transfer Block

Exemption have been brought into Swedish law by a separate Act, and equivalent exemption is thus available in Swedish law.

Moreover, there is a general de minimis exception for conduct otherwise falling within the Competition Act, where:

- the annual turnover of each of the parties to the conduct does not exceed 30 million Swedish kronor;
- the parties' aggregate market share does not exceed 15 per cent of the relevant market; and
- the agreement or conduct includes none of the hard-core restraints listed in the European Commission's Notice on agreements of minor importance, such as resale price maintenance, sharing of markets or customers, or bid rigging.

Agreements

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

The definition of 'agreement' under the Competition Act follows the definition in EU 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?

Swedish law follows EU law: no formal or legally binding agreement is required for the Competition Act to apply, and an oral agreement or concerted practice based on a tacit or informal understanding or 'gentlemen's agreement' is sufficient, provided that the parties have manifested a common will to act in a certain way in the market. A unilateral statement by one party is, however, normally not sufficient.

For example, in the *Uppsala Taxi* case a company had contacted one of its competitors, asking how it intended to act in a certain situation. The competitor did not reply to those questions, and there was no evidence that it had in any other way acted in response to the first company's questions. The Stockholm City Court found that there was no agreement in the terms of the Competition Act.

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 Competition Act follows the principles set out in EU law, and hence applies as soon as the two companies do not form part of the same economic entity.

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 Authority made clear in its *AGA Gas* decision that the principles for applying competition law to agency relationships set out in EU competition law apply also under the Competition Act. The decision even makes reference to the relevant parts of the Commission's Guidelines on Vertical Restraints.

In that decision, the Competition Authority also analysed the agreement under the rules on both restrictive agreements and abuse of dominant position; the Market Court, in a previous AGA Gas judgment, found that in casu an exclusivity clause in an agency agreement did not constitute an abuse of the principal's dominant position, on the basis of absence of foreclosure.

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 indicated above, the Competition Authority and courts can be expected to seek guidance in EU 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)?

The presence of IPRs in a vertical agreement does not alter the competition analysis as such. Such agreements may be exemptible by virtue of the Swedish equivalents to the Vertical Block Exemption, if directly related to the use, sale or resale of goods or services, or the Technology Transfer Block Exemption, if the IPR does not 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.

The analytical framework followed under the Competition Act will be virtually identical to that under EU competition law. It is hence very likely that the Competition Authority or courts would regard typical hard-core vertical restraints, such as resale price maintenance, export bans and market-sharing as per se unlawful.

In the absence of object restrictions, the Competition Authority or courts will engage in an analysis of the possible restrictive effects of the vertical restraint in question, taking into account conditions on the relevant market. So, for example, in the *Månadens Bok* case, the Market Court assessed whether the recommended price at issue was liable to restrict pricing on the market (and found that it was). In the *AGA Gas* and *Interflora* cases, the Market Court analysed whether an exclusivity clause was liable to cause foreclosure in light of market conditions. In *Ticnet*, the Competition Authority accepted, after an in-depth analysis of market conditions, that certain vertical exclusivity obligations did not constitute abuse of a dominant position.

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 determination is likely to be identical to EU law.

Market share is relevant for the determination of whether the Competition Act de minimis rule is applicable. Market shares also determine the applicability of the Swedish equivalents of the Vertical Block Exemption, the Motor Vehicle Block Exemption and the Technology Transfer Block Exemption.

For example, in its *Interflora* judgment, the Market Court analysed the restrictive effects of a non-compete clause in the light of prevailing market conditions.

In its *13:e Protein Import* decision the Competition Authority decided not to proceed with a case of retail price maintenance (minimum price) with regard to online distribution, with reference to the low (less than 3 per cent) market share of the supplier and the presence of numerous competitors.

The Market Court's application of the market share thresholds in the Swedish equivalent of the Motor Vehicle Block Exemption in the *Sveriges Bildelsgrossisters Förening* case appears questionable in this respect. In the case, the Market Court found the block exemption inapplicable, on the basis of the aggregate aftermarket market share of all relevant dealers, rather than the individual market share of each individual dealer. On this basis, the Market Court found the market share thresholds in the block exemption to be exceeded. Should this reasoning be extended to the general Vertical Block Exemption, its scope of application could be materially limited.

Market shares of parties, their competitors and others may of course also become relevant in an individual assessment of the agreement, in the same way as in EU 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?

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 noted above (cf. question 8), the terms of the European Commission's Vertical Block Exemption, Motor Vehicle Block Exemption, and Technology Transfer Block Exemption have been brought into Swedish law, and are thus applicable mutatis mutandis to the prohibition in Chapter 2, section 1 of the Competition Act. As noted, the case law also occasionally relies on the Commission's Guidelines on Vertical Restraints.

Types of restraint

As noted above, over the past decade case law on vertical restraints under the Competition Act has been scarce. At the same time, the case law has routinely made reference to EU law principles and legal instruments. It is thus safe to assume that the determination under Swedish law on the points below would follow EU law, including the European Commission's Block Exemptions and Guidelines.

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

Vertical price fixing, whether in the form of fixed prices, minimum prices or equivalent measures, is clearly illegal under the Competition Act. On the other hand, the Competition Authority has stated that maximum prices are acceptable in principle.

As regards recommended prices, in the *Reitan, GB* and *Make Up Store* cases the Competition Authority challenged systems of recommended pricing where the practical difficulties of diverging from the recommendation resulted in most resellers following the recommended price. Interestingly, in these cases the Competition Authority referred to a high degree of compliance with the recommended price in practice as well as, in the *Reitan* case, the existence of technical facilities enabling the supplier to monitor compliance with the price.

In its *Månadens Bok* decision, the Market Court analysed a non-binding recommended price for books, finding that on the facts it was liable to produce restrictive effects and hence infringed the Competition Act. Again, reference was made to the practical difficulties of diverging from the recommendation and the apparent high compliance with the recommended 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'?

When the Competition Authority has been confronted with such pricing in the past (such as the *Seiko Sweden* case) it has been considered an infringement; it is unclear what its position would be at the present time.

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

We are aware of no such decisions or guidelines.

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

We are aware of no 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.

To our knowledge the issue has not been considered.

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 case law on such clauses is unclear – in at least one decision the Competition Authority has found such provisions restrictive of competition and not exemptible, while appearing to accept them in other decisions.

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.

These issues have been considered in the Competition Authority's *Booking.com* and *Expedia* decisions. The *Booking.com* case concerned price parity clauses whereby hotels agreed to offer rooms over Booking.com, an online reservation site, at no less favourable conditions than those at which they offered rooms in other distribution channels. The Competition Authority found the clauses restrictive of competition, inter alia, since they resulted in price uniformity over all online reservation sites, independently of the level of commission charged by the individual site, reducing the incentive for a site to reduce its commissions. The case was ultimately settled on the basis of commitments coordinated among the Swedish, French and Italian competition authorities.

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

The Competition Authority has to our knowledge not considered such a 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 Competition Authority has to our knowledge not considered such a clause.

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 Competition Authority will apply EU law principles in this assessment. For example, in the *Hemglass* case, the Competition Authority exempted a distribution agreement featuring territorial exclusivity for sale to private households. In the *Amylum* case, the Competition Authority found prima facie restrictive an obligation on the reseller to refrain from selling to other customers and to consult the supplier before selling to certain others. The agreement was, however, considered de minimis.

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

The issue has to our knowledge not been considered.

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

See question 28.

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

In its practice the Competition Authority has found such clauses restrictive and impossible to exempt.

Update and trends

In terms of general developments it will be interesting to see what effects the changes to the competent Courts, by way of the formation of the Patent and Market Court and the Patent and Market Court of Appeal, will affect the way competition cases are handled. In addition, it will be interesting to see if the introduction of the Competition Damages Act will result in more damages actions being brought.

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

The issue has to our knowledge not been considered. See question 25.

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

The question has to our knowledge not been considered.

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

The Competition Authority's practice on selective distribution systems follows EU law as regards products which may be the subject-matter of a selective distribution system, admission of members, etc. In the *Step in Watch Center* case, the Competition Authority declined to intervene where a retailer had been excluded from a qualitative selective distribution system, following the supplier's inspections and written warnings of the risk of exclusion if failures to comply with the selective criteria were not addressed.

The position on quantitative selective distribution is unclear – in at least one decision the Competition Authority did not accept a limitation on the number of selective distributors per geographic area.

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

The Competition Authority has taken into account in its analysis whether the contract products were of such a nature as to justify a selective system.

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

To our knowledge no such restrictions have been assessed.

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

We are aware of no such decisions.

38 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 the issue having been considered, but the Competition Authority can be expected to take such effects into account.

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

No such decisions have been taken.

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

The issue has to our knowledge not been considered.

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

The issue has to our knowledge not been considered.

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

The Competition Authority has on numerous occasions (in decisions such as *Interflora, AGA Gas* and *Ticnet*) accepted non-compete obligations under both Chapter , section 1 and Chapter 2, section 7 (restrictive agreements and abuse of dominance respectively).

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

Such clauses have been found not to be restrictive in the Competition Authority's practice.

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

There is little case law on the subject. In the *Lundgren* case, an agreement between the supplier and distributor not to supply certain companies was found restrictive, and (moderate) fines were imposed. In the *Geomatik* case the purchaser of a service included a clause to the effect that if the supplier provided the same services to one of Geomatik's (the purchaser) competitors, the latter could terminate the agreement. Geomatik declared that it had ceased to apply the clause, and the Competition authority closed the file. A similar clause was the subject of the *Apphero* case; it provided that if a restaurant which had contracted with the company Onlinepizza's online food order platform started working with a competing platform, Onlinepizza could terminate the agreement. Although on the facts as described in the decision it is unclear on which basis an infringement existed, the clause was amended to cover only cases of disloyal competition.

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

As far as we are aware the issue has not been considered.

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

No.

Notifying agreements

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

There is no formal possibility of notifying an agreement to the Competition Authority.

Authority guidance

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

The Competition Authority provides no mechanism for formal guidance in regard to particular cases or on general issues.

Complaints procedure for private parties

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

Complaints can be lodged with the Competition Authority's complaints unit. While there is no mandatory format for complaints, complainants are encouraged to use a form supplied by the Competition Authority. There is no legal time limit for the processing of complaints, but the Competition Authority states that it normally aims to issue a decision

on whether or not to investigate within one month or, at the most, four months. The Competition Authority may then decide not to take any further action, or to proceed with an investigation that may have the results set out in question 4. If the Competition Authority decides not to initiate an investigation, an interested party may lodge an action with the Patent and Market Court of Appeal for a cease and desist judgment against the conduct complained of.

Enforcement

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

The Competition Authority and courts have taken limited enforcement action in regard of vertical restraints in recent times. The principles and priorities of enforcement are likely to mirror those following from EU law, in particular the European Commission's Block Exemptions and Guidelines.

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

Agreements or concerted practices that are prohibited under Chapter 2, section 1 of the Competition Act are invalid according to section 6 of that chapter. The invalidity has effect ex tunc (ie, from the time the infringement commenced, or, if the agreement originally fell under the de minimis exception, from the time when it had a material effect on the market).

The effect of the invalidity is that the agreement or practice cannot be invoked according to its content or enforced before the courts.

The invalidity can be claimed both by the contracting parties or a third party. In the *ALIS* case, the Stockholm City Court found that the collecting rights association ALIS had no right to claim remuneration from Mediearkivet, since ALIS's agreement with the individual right holders constituted an infringement of the Competition Act.

The invalidity catches as a rule only those parts of agreements that constitute an infringement of the competition rules. However, other parts of the agreement, or the agreement as a whole, may be modified or the whole agreement set aside under section 36 of the Contracts Act if the infringing parts are deemed essential to the agreement as a whole.

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

The Competition Authority may issue a cease-and-desist order in regard of conduct found to infringe the competition rules. In addition, it may impose a fine in cases where the undertaking in question does not contest such imposition. If the authority otherwise wishes to impose fines, it must lodge an application with the Patent and Market Court, requesting that the court impose such a fine. As yet, while cease-and-desist orders have been issued, no fines have been imposed in respect of vertical restraints.

Albeit not a sanction as such, in recent years the trend in respect of vertical restraints cases has clearly been to settle, or to close the investigation following voluntary remedies by the parties.

Investigative powers of the authority

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

The Competition Authority has powers of investigation similar to those of the European Commission under Regulation 1/2003. The principal powers of investigation are requests for information, unannounced on-site inspections – the Competition Authority may carry out inspections at the premises of undertakings or in private homes – and the right to summon persons to be interviewed.

Private enforcement

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

On 27 December 2016 a new Act, the Competition Damages Act (Konkurrensskadelagen), entered into force in Sweden. The Act implements the EU Competition Damages Directive, and broadens the scope for actions for damages resulting from competition law infringements. Any party having suffered injury is entitled to claim damages (including parties to the agreement themselves). Claims under the Act are heard by the Patent and Market Court. All remedies available to secure a claim in the Code of Judicial Procedure (such as retention) are available to such a claimant. The general rules in the Code of Judicial Procedure on costs apply, mainly providing that the losing party shall pay for the successful party's reasonable costs (including legal fees).

Other issues

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

No.

hamilton

Mats Johnsson **mats.johnsson@hamilton.se**

Hamngatan 27
Box 715
SE-101 33 Stockholm
Sweden

Tel: +46 8 505 501 00
www.hamilton.se

Switzerland

Franz Hoffet, Marcel Dietrich and Martin Thomann

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 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, section 1. Vertical agreements include binding or non-binding agreements and concerted practices between two or more enterprises at different levels of the market that have as their object or effect a restraint of competition and that 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 is also a Notice of 19 December 2005 regarding agreements with limited market effects meant to provide a safe harbour for small and medium-sized enterprises (the SME Notice). The Verticals Notice takes precedence over the SME Notice (VN, section 9(2)).

Responsible authorities

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

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 anticompetitive 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 anticompetitive 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 and examined, inter alia, potentially anticompetitive most favoured nation (MFN) clauses with hotels. The investigation was closed in October 2015 and the ComCo decided that the 'broad' MFN clauses applied by hotel booking platforms in the past were unlawful and prohibited their use. The ComCo further held that hotel booking platforms may make use of 'narrow' MFNs (see question 25).

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 Elmex 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. In June 2016, the Federal Supreme Court confirmed the decision upon appeal of one of the two companies, which is headquartered in Switzerland (see Update and trends); the appeal of the company headquartered in Austria is still pending before the Federal Supreme Court.

In May 2012, the ComCo fined BMW AG, which has 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 in Germany. The Federal Administrative Court confirmed the decision of the ComCo in November 2015 and held that the said contract clause was an unlawful vertical agreement regarding the allocation of territories. The decision is currently under appeal before the Federal Supreme Court.

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 (MV Notice). The ComCo issued an updated version of June 2015, which entered into force on 1 January 2016, as well as explanatory comments of the ComCo thereto, replacing the previous notice and explanatory comments of 21 October 2002. This notice takes precedence over the Verticals Notice (MV Notice, article 13).

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 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 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 had been appealed to the Federal Supreme Court by the Swiss Federal Department of Economic Affairs, Education and Research (EAER) and was set aside and remitted for reconsideration in January 2015. The Federal Supreme Court held that the CartA does apply in this case considering that the regulatory framework for pharmaceutical products does not exclude competition. On that basis the Federal Administrative Court has to issue a new decision.

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) 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. As the decision of the Federal Administrative Court was set aside by the Federal Supreme Court for its part and remitted for reconsideration (see question 8), it may be clarified whether relying on such criteria 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 in the *French-language Books* case that the agreement at stake was not an agency 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?

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 that 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 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. In a recent landmark decision of June 2016 regarding the parallel import of Elmex toothpaste (see Update and trends), the Federal Supreme Court held that these two types of vertical restrictions constitute significant restraints of competition solely because of their type and quality and regardless of their actual effects on the relevant market. Accordingly, in case the presumption of elimination of effective competition can be rebutted, agreements on fixed or minimum resales prices and agreements in distribution contracts on absolute territorial protection constitute significant restraints of competition (except in unspecified de minimis- cases) and are unlawful unless they can be justified on grounds of economic efficiency. In the mentioned *Elmex* decision, the Federal Supreme Court further confirmed the ComCo's position that article 5(4) also applies to absolute territorial protection in a licence agreement.

Other vertical agreements that significantly affect competition in a 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, 15 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.

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 and the agreement is considered to constitute an insignificant restraint of competition only (pursuant to a recent decision of the Federal Supreme Court, this will be the case only in unspecified de minimis cases; 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; see also question 10).

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 was set aside by the Federal Administrative Court in December 2015 The Federal Administrative Court held that the vertical agreement on minimum resale prices did not significantly affect competition from a quantitative aspect. The decision is under appeal. Due to the recent decision in the *Elmex* case with the finding that agreements in the sense of article 5(4) CartA constitute significant restraints of competition regardless of their actual effects on the relevant market (see question 15), it appears likely that the Federal Supreme Court will uphold the appeal and reinstate the ComCo decision.

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.

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 that 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 (ie, 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 interbrand 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 that held the public price recommendations for specific non-reimbursable pharmaceutical products to constitute an agreement on fixed prices (see questions 10, 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 were 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 specific 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 specific 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.

In October 2015 the ComCo closed its investigation against several hotel booking platforms regarding potentially anticompetitive contract clauses with hotels. The ComCo decided that the MFN clauses that were recently modified by certain hotel booking platforms and under which hotels are free to offer better prices than those quoted on online booking platforms (for example, on other platforms or via direct marketing such as email or telephone), are not prohibited. The ComCo further held that hotel booking platforms, in order to prevent free riding, may make use of 'narrow' MFNs and prohibit that hotels advertise better prices on their own website. The ComCo prohibited the 'broad' MFN clauses applied by hotel booking platforms in the past (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 to subsequently offer discounts to its customers) is assessed.

So far ComCo has not addressed minimum advertised price policy (MAPP) or internet minimum advertised price (IMAP) issues. According to the conception of article 5 CartA, it seems that MAPP and 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 anticompetitive 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

As a general rule the ComCo considers online sales to be passive sales, which shall not be restricted (see questions 2, 5 and 30). Therefore a buyer must not be restricted from passively selling its products into the exclusive territory reserved to the supplier or granted by the supplier of another buyer (see question 28), but a buyer may be restricted in online sales efforts specifically targeted at customers outside of the allocated territory (VN, section 3; see question 32).

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

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)).

31 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)).

32 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, 5 and 30), 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 has 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.

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

There are no precedents and there is no guidance yet with respect to distinguishing between different types of internet sales channels. The question of 'platform bans' has not yet been approached in practice.

34 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)). Authorised dealers within a selective distribution system may, however, 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 (see VN, section 4 (2)), 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 35).

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

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 34).

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).

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

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 32).

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

No such decisions have been published by the ComCo so far.

38 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).

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

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 Federal Administrative Court confirmed the decision (but reduced the fine to approx. 12 million Swiss francs) upon appeal (see Update and trends). This appeals decision was not appealed further to the Federal Supreme Court and is hence final.

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. 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. In November 2015 the Federal Administrative Court confirmed the decision of the ComCo and held that the contract clause was an unlawful vertical agreement regarding the allocation of territories. The decision is currently under appeal. Due to the recent decision in the *Elmex* case and the finding that agreements in the sense of article 5(4) CartA constitute significant restraints of competition regardless of their actual effects on the relevant market (see question 15), it appears likely that the Federal Supreme Court will reject the appeal and confirm the ComCo decision.

40 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 (VN, section 6 in conjunction with section 12(2) (f), (g)). If the buyer is obliged to exclusively purchase in Switzerland, such obligation may be qualified as a means of indirectly providing for absolute territorial protection, which conduct is subject to fines (see decision of the Federal Administrative Court regarding Nikon, Update and trends).

41 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 35).

42 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 40).

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

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 40). If the buyer is obliged to exclusively purchase from the supplier in Switzerland, such obligation may be qualified as a means of indirectly providing for absolute territorial protection, which conduct is subject to fines (see also question 40 and decision of the Federal Administrative Court regarding Nikon, Update and trends). 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 35).

44 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)).

45 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)).

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

No.

Notifying agreements

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

Agreements that are potentially subject to a fine (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

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

Besides the notification possibility and the ensuing opposition proceedings (see question 47), 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

49 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 make 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 54).

Enforcement

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

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. Between 2004 and 2014, the Swiss authorities conducted 71, 90, 80, 46, 39, 39, 42, 61, 55, 51, 41 and 48 (preliminary) investigations in a given year. The figures for 2016 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 such decision in 2010, one decision in 2011, two decisions in 2012, one decision in 2013, no decision in 2014, one decision in 2015 and two decisions in 2016.

51 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.

Update and trends

Recent developments

In a public deliberation in June 2016, the Federal Supreme Court confirmed the decision of the Federal Administrative Court that had in turn confirmed the ComCo decision fining two companies for the prohibition of parallel imports of Elmex toothpaste. The Federal Supreme Court held that a ban on passive sales, which was agreed on by the appellant with a licensee, constituted a significant restraint of competition that can be sanctioned directly. In the *Elmex* decision, the Federal Supreme Court held that price-fixing, quantity-limiting and market-allocating agreements pursuant to article 5(3) and 5(4) CartA qualify as per se significant also where the statutory presumption of elimination of effective competition can be rebutted. The court noted that these agreements constitute significant restraints of competition solely because of their type and quality and regardless of their actual effects and found that quantitative elements such as market shares were of no importance, respectively only inasmuch as they should be considered to exclude de minimis cases (which were not specified further, however). Further, the court concluded that such types of agreements can be sanctioned with a fine also where the statutory presumption of elimination of effective competition can be rebutted (unless they can be justified on grounds of economic efficiency). Finally, the court confirmed the ComCo's reading that absolute territorial protection falls within the scope of article 5(4) CartA also where it is included in a licence agreement (rather than a distribution contract, which only is explicitly mentioned in the provision). At the time of writing, the reasoned *Elmex* judgment, which should provide further guidance, was not published yet. Furthermore, the mentioned decision only concerns the appeal of one of the two parties to the agreement in dispute; the appeal of the other party remains pending before the Federal Supreme Court.

In September 2016, the Federal Administrative Court confirmed a decision of the ComCo fining the camera manufacturer Nikon for impeding parallel imports in all material aspects, but reduced the amount of the fine from 12.5 million to approximately 12 million Swiss francs. The Federal Administrative Court protected the wide-reaching territorial scope of application applied by the ComCo, which had held that distribution agreements in any country that contain export restrictions are within its jurisdiction, regardless of whether Switzerland is specifically targeted or affected by such export restriction or not. This wider territorial scope of application is all the more significant because, due to the *Elmex* decision of the Federal Supreme Court mentioned in the preceding paragraph, clauses foreseeing absolute territorial protection are considered to be significant (and unlawful unless justified on grounds of economic efficiency) regardless of their actual effects. Further, the Federal Administrative Court confirmed the ComCo's reading that the pertinent provision, article 5(4) CartA, is not limited to direct allocations of territories, but also encompasses indirect allocations such as a link of contractual services (eg, warranties) with the place where the product is bought, or exclusive purchasing obligations requiring Nikon retailers to source products in Switzerland. This wide reading of article 5(4) CartA appears to go beyond the legal situation under EU competition law, where exclusive purchasing requirements are not blacklisted. The appeals decision of the Federal Administrative Court was not appealed further to the Federal Supreme Court and is hence final.

Anticipated developments

While the courts have decided a couple of important cases in the area of vertical restraints in the year 2016 (see Recent developments), appeals against several other ComCo decisions in this area remain pending. The Federal Supreme Court will have to decide in last instance on appeals against ComCo decisions regarding parallel imports of BMW and Mini vehicles into Switzerland (where the Federal Administrative Court had confirmed the ComCo decision) as well as retail price maintenance agreements in relation to alpine sports products (where the Federal Administrative Court had set aside the ComCo decision). The recent *Elmex* decision of the Federal Supreme Court with its finding that agreements in the sense of article 5(4) CartA constitute significant restraints of competition regardless of their actual effects on the relevant market makes it appear likely that the ComCo decision will ultimately be confirmed in both cases. The Federal Administrative Court will have to decide on the merits of the case whether public price recommendations for specific non-reimbursable pharmaceutical products constitute unlawful resale price maintenance, although no pressure or incentives were established. All these decisions are expected to be rendered in the course of 2017.

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

The 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 had been appealed to the Federal Supreme Court by the EAER and was set aside and remitted for reconsideration in January 2015. The Federal Supreme Court held that the CartA does apply in this case considering that the regulatory framework for pharmaceutical products does not exclude competition. On that basis the Federal Administrative Court has to issue a new decision (see Update and trends); and
- fines of 4.81 million Swiss francs were imposed for an agreement prohibiting parallel imports of Elmex toothpaste. The Federal Administrative Court approved the decision of the ComCo. This decision was confirmed by the Federal Supreme Court in the decision on one appeal (see Update and trends); the other appeal is still pending.

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 confirmed by the Federal Administrative Court, which reduced the fine to approximately 12 million Swiss francs, and not appealed further; see Update and trends). In 2012, the ComCo fined BMW 156 million Swiss francs for impeding direct and parallel imports into Switzerland (decision confirmed by the Federal Administrative Court in November 2015; currently under appeal; see Update and trends) and imposed a fine of 470,000 Swiss francs for retail price maintenance agreements in relation to alpine sports products (decision set aside by the Federal Administrative Court in December 2015; under appeal before the Federal Supreme Court.). 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 (still pending). 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. No decision in which a fine was imposed in cases of vertical restraints was issued by the ComCo in 2014. In 2015 the ComCo fined an importer and wholesaler of stringed instruments with 65,000 Swiss francs for fixing maximum rebates to be applied by the resellers, thereby imposing minimum resale prices. In 2016, the ComCo fined the manufacturer and the Swiss general importer of warning flashlights for the prohibition of parallel imports.

Investigative powers of the authority

53 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. Correspondence exchanged with Swiss attorneys or attorneys in EU or EFTA member states is generally protected by legal privilege. However, the scope of legal privilege in Switzerland is narrower than in other jurisdictions.

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.

Private enforcement

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

Private 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

55 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 interbrand 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.

Homburger

Franz Hoffet **franz.hoffet@homburger.ch**
Marcel Dietrich **marcel.dietrich@homburger.ch**
Martin Thomann **martin.thomann@homburger.ch**

Prime Tower
Hardstrasse 201
8005 Zurich
Switzerland

Tel: +41 43 222 1000
Fax: +41 43 222 1500
www.homburger.ch

Turkey

Bora İkiler
Moroğlu Arseven

Antitrust law

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

The primary legislation outlining antitrust law applicable to vertical restraintvs 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.

A range of secondary legislation supports article 4 of Law No. 4054 to form the backbone of Turkish antitrust laws applicable to vertical restraints. Turkish secondary legislations reflect 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.

The Turkish Competition Authority (the Authority) has issued guidelines to clarify the specifics of each piece of secondary legislation.

English versions of the legislation can be found on the Authority's website 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?

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 (article 2 of Communiqué No. 2002/2).

Communiqué No. 2002/2 does not provide an exhaustive list of vertical restraints that are sensitive from a competition law point of view. However, 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 primary objective of the law on vertical restraints is economic; to protect competition. However, the preamble to Law No. 4054 emphasises that protection of competition also serves social interests, such as protecting consumers. In addition, the 'Method of Analysis' section of the Guidelines on Vertical Restraints (the Guidelines) indicates that the economic benefits must be considered in terms of the benefit to the contract parties, as well as to consumers at large.

Responsible authorities

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

The Turkish Competition Authority is responsible for enforcing prohibitions on anticompetitive vertical restraints. It 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 Board's final decision. Legal actions against the Board's final decisions are brought before administrative courts.

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 are subject to Turkish antitrust laws to the extent that such restraints may prevent, distort or restrict competition in the relevant markets and thus affect the goods and services markets within Turkey's territory. 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 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 applies to undertakings and association of undertakings. It defines an undertaking as an economic unit (either a natural or a legal person), that acts independently in the markets to produce, market and sell goods or services. Law No. 4054 does not distinguish between public and private entities in the application of antitrust law. Provided they are party to an agreement containing vertical restraints and satisfy the competition law criteria for being considered an 'undertaking', public and private entities will be subject to the same scrutiny.

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, 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.

No general or de minimis exceptions apply to 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 define 'agreement' for antitrust law purposes. However, paragraph 6 of the Guidelines on the General Principles of Exemption (the Exemption Guidelines) states that any and all kinds of understanding, whether oral or written, are considered to be an agreement. Board precedents 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?

A formal written agreement is not necessary to engage antitrust law in relation to vertical restraints (see question 9). Any kind of informal or unwritten understanding is enough 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 regulating the conduct that the Board is investigating, the conduct itself will be considered sufficient to form a vertical agreement due to 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)?

Turkish antitrust law has no explicit definition of 'related company'. However, companies within the same chain of control are considered to be a single economic unit and thus a single undertaking. Therefore, agreements between a parent company and a related company, as well as agreements between related companies of the same parent company, would fall outside the scope of antitrust law and thus also outside rules for vertical restraints.

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', provided the agreement relates to contracts that the agent negotiates or concludes on behalf of its principal.

The decisive factor for whether a genuine principal–agent relation exists is the commercial or financial risk that the agent bears 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. Accordingly, the antitrust law on vertical restraints would apply to the 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, the agent–principal relationship is outside the scope of article 4 of Law No. 4054 if the agent does not bear any commercial or financial risk in the contract that it concludes or negotiates on the principal's behalf. In such a case, the agent's purchase or sales activity is deemed to be an activity by the principal. Accordingly, antitrust rules will not apply to such relationship.

Risk is assessed on a case-by-case basis. However, the Guidelines provide a non-exhaustive list of risk types that require antitrust rules be applied:

- the agent contributes to the costs associated with the purchase or sale of goods or services, including transportation costs;
- the agent is required to directly or indirectly contribute to sales-building activities;
- the agent bears risks such as financing the contract goods kept in stock or the cost of lost goods, and the agent is unable to return unsold goods to the client;
- the agent is required to provide aftersales service, repair or guarantee services;
- the agent is required to make investments necessary to operate in the market in question, and which may solely be used in this market;
- the agent is liable to third parties for losses caused by the product sold; and
- the agent bears responsibility other than its inability to receive its commission resulting from the failure of customers to fulfil the conditions of the contract.

Neither the Guidelines nor Board precedents specifically deal 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 the buyer's use of IPRs would benefit from the protection of Communiqué No. 2002/2, provided the provisions do not constitute the primary object of such agreements, are directly related to the use, sale or resale of goods or services by the buyer or its customers and are compliant with Communiqué No. 2002/2. However, if the primary object of the vertical agreement is assignment of IPRs, it would be outside 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 Authority's analytical framework is very similar to the framework of the European Commission (EC). Agreements and concerted practices are illegal and prohibited if their object or effect (or likely effect) is to prevent, distort, or restrict competition, either directly or indirectly, in a particular market for goods or services.

Restrictive agreements 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 conditions for granting individual exemptions, which must all be met. Accordingly, the agreement must:

(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 must 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 suppliers' market shares. 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. However, when analysing individual exemptions, 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 an exclusive supply obligation, the block exemption applies also on condition that the buyer's market share does not exceed 40 per cent in the market where it purchases the goods and services subject to the vertical agreement.

In the *Eczacıbaşı Baxter* decision (dated 20 August 2014, numbered 14-29/592-258), the Board examines the buyer's market share, as well as the supplier's. 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 will be exempt from article 4 of Law No. 4054.

First, the relevant agreement must 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.

Block exemption will apply to vertical agreements where the supplier's market share in the relevant market (ie, the market for the contracted goods or services) does not exceed 40 per cent (see questions 8, 15, 16 and 17). Where agreements relate to 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 supplier's market share (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.

The following are excluded from the scope of the safe harbour provided by Communiqué No. 2002/2:

- non-compete obligations imposed on buyers that exceed five years;
- post-term non-compete obligations that exceed one year; and
- obligations imposed on the members of the selective distribution system not to sell the branded products of designated competing providers.

A vertical agreement that does not qualify for a block exemption could still be individually exempted from article 4 of Law No. 4054, provided it fulfils the criteria for individual exemptions under article 5 of Law No. 4054 (similar to article 101(3) of the TFEU).

The Authority reserves the right to withdraw an exemption if circumstances change from those in which the exemption was 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 an object violation exists, there is no need to look into the effects of the conduct in question. In this regard, resale price maintenance is considered one of the hard-core competition restrictions.

Communiqué No. 2002/2 explicitly states that agreements that prevent buyers from determining their own sale prices would not benefit from the exemption granted by Communiqué No. 2002/2. However, suppliers are at liberty to set maximum resale prices or recommend resale prices from which the buyers can deviate without any deterrent, provided these do not become fixed or minimum sale prices.

Indirect means of resale price maintenance would also be outside the scope of block exemption safe harbour. For example, 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.

That being said, when the Board's decisions are analysed, the Board sends mixed signals in looking for the effects of object violations (eg, resale price maintenance). The Board's decisions are inconsistent and there are also decisions in which the effects of object violations were not looked into.

In the *Dogati* decision (dated 22 October 2014, numbered 14-42/764-340), related to resale price maintenance in a franchise agreement, the Board discussed the effects of such restraints in detail. The Board analysed the structure of the fast food market and noted that a vast number of competitors existed. However, the Board stated that the actual competitors of the franchisees are not the other franchisees of the same franchiser. The actual competitors are considered to be 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 resale price maintenance in these circumstances.

On the other hand, in its Samsung decision (dated 23 June 2011, numbered 11-39/838-262), the Board did not go into the details about the effects of resale price maintenance. Without any effects analysis, the Board concluded that an outright infringement existed on the basis that the supplier had intervened in its distributors' pricing behaviour.

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 resale price maintenance. The Guidelines provide various examples of frequently used methods by undertakings for monitoring and controlling distributor resale prices.

The Guidelines state that direct or indirect 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 supplier control 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?

The Guidelines do not address the efficiencies of resale price maintenance. However, in the Board's decisions, it discusses efficiencies that can arguably arise from 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 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.

There is no guidance or Board decision concluding that price relativity clauses would outright violate article 4 of Law No. 4054. Therefore, such clauses should benefit from the block exemption safe harbour, provided other criteria are met for application of Communiqué No. 2002/2. However, the effects of price relativity clauses must be assessed on a case-by-case basis before conclusively deciding 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.

There is no guidance concluding that most-favoured customer clauses at a wholesale level would outright violate article 4 of Law No. 4054.

However, in Board's *Yemeksepeti* decision (dated 9 June 2016, numbered 16-20/347-156) the Board recognised for the first time the exclusionary effects of most favoured customer clauses. Accordingly the Board issued an administrative monetary fine and also ordered the undertaking in question to revise its agreements with restaurants and terminate the implementation of any most favoured customer clauses. At the time of writing, the reasoned *Yemeksepeti* decision is not available. Detailed analyses of the subject can only be made following the reasoned decision.

Also, as indicated in the *Arcelik/Sony* Board decision (dated 8 December 2010, numbered 10-76/1572-605), most favoured nation (MFN) clauses could have anticompetitive effects depending on the specific circumstances. The Board indicated that such clauses may give rise to competitive concerns in low-competition markets and where the parties to such agreements have significant market power. However, after considering the limited scope of the MFN clause in the case at hand, the characteristics of the relevant market, as well as product features, the Board concluded that the MFN clause did not violate antitrust law.

Accordingly, the effects of MFNs must 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 Authority decision 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 to subsequently offer discounts to its customers) is assessed.

Advertisements are one of the most important tools for undertakings to create demand and thus sales. Considering the Authority's approach, 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 to violate 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.

Although there are no guidance on the subject, the Board's recent *Yemeksepeti* decision implies that from now on the Board's approach on the subject has changed. Therefore, the explanations under questions 23 and 24 also apply 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 where the buyer may sell the contracted goods are considered among the object restrictions. According to the Exemption Guidelines, if an object violation exists, 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 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Decisions and Guidelines have not dealt with geo-blocking issues.

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

Customer restrictions are considered object restrictions. Therefore, the main rule and its exception (see question 28) also apply to restrictions on 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 intend to use them to manufacture the same type of products as those produced by the supplier.

Vertical agreements containing restrictions on the above issues would also benefit from the protection of the block exemption.

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

The Authority has not made any decisions on the restriction of such uses. Most probably, such prevention would be considered to be outside the scope of the block exemption, since this kind of restriction is not mentioned in the exceptional circumstances mentioned under questions 28 to 30 above. Thus, if it does not fulfil the criteria for an individual exemption, it would be qualify as a competition restriction under article 4 of Law No. 4054.

32 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 is prohibited. However, sending emails to customers in the exclusive territory, or to groups of customers of another buyer, is considered to be an active sales method, provided the customer in question does not solicit such contact.

In the *Yatsan* decision (dated 23 September 2010, numbered 10-60/1251-469), although the supplier argued that the aim of its

restriction on internet sales was to protect its brand image, the Board indicated that internet sales are mostly considered as passive sales and outright restrictions on the buyer's internet sales cannot benefit from the block exemption under Communiqué No. 2002/2.

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

Neither the Guidelines nor any Board decision has specifically dealt with the distinction between different types of internet sales channels. The Turkish Competition Authority conducted an investigation into Booking.com in 2015. The outcome of the investigation and its implications for marketplace websites remains to be seen.

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

Establishing selective distribution systems is permitted by the Turkish competition law regime, subject to certain conditions being met. Accordingly, Communiqué No. 2002/2 states that a selective distribution system can benefit from the block exemption safe harbour under Communiqué No. 2002/2 if there is no:

- resale price fixing;
- restriction on active or passive sales to end users; or
- 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 for selective distribution systems must be designated, but suppliers are not required to publish them.

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

The Guidelines state that to establish a selective distribution system, the contract products must require such system be established in order to preserve their quality or to ensure their proper use.

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

A complete restriction on internet sales is prohibited since they are considered to be passive sales. However, the Authority can allow such restrictions if there are objective and reasonable justifications. The Authority follows the EC's conduct on internet sales prohibitions (mentioned in the *Yatsan* decision). The Authority states that some quality standards for internet sales by resellers can be justified. The Board did not allow internet sales restrictions in the *Yatsan* decision because these restrictions were not considered reasonable. The Board referred to EC decisions on this point and indicated that suppliers may also require approved distributors to maintain a bricks-and-mortar store to qualify for conducting online sales.

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

The Authority has not been faced with this issue in any decision.

38 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 the cumulative restrictive effects of multiple selective distribution systems and that these may prevent accessibility to the market. Accordingly, the Board takes into account competitors' market shares when analysing cumulative restrictive effects.

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

The Guidelines permit the combination of selective distribution systems with other restrictions, such as non-compete or exclusive restrictions, provided these additional restrictions are not hard-core restrictions, the relevant market share thresholds (ie, 40 per cent) are not exceeded, and resale to the authorised distributors and end users are not restricted. Such agreements benefit from the block exemption under Communiqué No. 2002/2.

40 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. However, if such an arrangement is combined with other restrictions, it may raise competition concerns regarding market partitioning. Moreover, if the supplier and buyer's market shares are both below 40 per cent, the restriction would fall under the block exemption safe harbour.

41 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 would be considered as a hard-core restriction, and therefore outside the scope of the block exemption. Therefore, to qualify for an individual exemption, the justifications and related efficiencies of such restriction must be clearly argued to the Board.

42 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 fall under article 4 of Law No. 4054, unless they meet 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, as well as post-term non-compete obligations that do not exceed one year following termination of the contract may benefit from safe harbour protection, provided the contract meets other block exemption conditions. Non-compete obligations that are tacitly renewable beyond a period of five years 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 article 4 of Law No. 4054. The individual exemption analysis for such non-compete clauses would depend on the parties' market positions (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.

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

Any obligation imposed on the buyer to purchase more than 80 per cent (based on the buyer's purchases in the previous calendar year) of its purchases of the contracted goods or services from the supplier (or from any other source designated by the supplier) is considered a non-compete obligation. Thus, such obligation would be subject to the same assessment as discussed in question 42.

44 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 anticompetitive 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.

45 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.

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

No.

Notifying agreements

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

Undertakings are currently not required to notify vertical restraints, so there is no penalty imposed for failures to notify the Board of agreements containing vertical restraints.

Undertakings are free to conduct a self-assessment regarding their agreements containing vertical restraints. If the self-assessment reveals that the vertical restraints meet the block or individual exemption requirements, there is no need to notify the Board.

If the undertaking's self-assessment does not reveal concrete results, the Guideline for Voluntary Notification provides guidance regarding notifications 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. However, in practice it takes approximately three to six months for the Board to decide on individual exemptions. After its review, the Board can either:

- 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 fulfilling certain conditions); or
- grant a negative clearance.

Reasoned decisions by the Board are published on the Authority's official website.

Authority guidance

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

Apart from the procedure explained under question 47, no other procedure exists for obtaining guidance from the Board or a declaratory judgment from a court.

Complaints procedure for private parties

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

The Board can launch an investigation into alleged unlawful vertical restraints ex officio, or as a result of a complaint. The Board can reject the complaint if it is not deemed serious. If the Board finds the complaint serious, it will conduct a preliminary investigation. The preliminary investigation is conducted by a team of case handlers appointed by the Board. After the case team submits a preliminary report, the Board should decide within 10 days whether to launch a formal investigation.

If the case proceeds to the investigation stage, the process must be completed within six months. The investigation stage 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 written phase is complete, the Board can decide to have an oral hearing ex officio or upon the request of the undertakings concerned. After the oral hearing, the Board must render its final decision within 15 calendar days.

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

Board decisions regarding vertical agreements constitute a significant portion of its jurisprudence.

The Board's decisions tend to focus on agreements containing territorial restrictions and resale price restrictions.

51 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 an agreement 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. Administrative monetary fines may be imposed on the undertakings concerned.

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

The Board is directly authorised to impose penalties without requiring approval from any other entity.

If there is a violation of article 4 of Law No. 4054, the Board can impose administrative monetary fines on the undertakings concerned up to the value of 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision. If this amount 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 creating the violation, may also be individually fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.

However, the Board does not always impose administrative monetary fines for vertical restraints. Rather, the Board sometimes closes investigation at the preliminary investigation phase by issuing decisions conditioned on structural or behavioural remedies. If the undertaking concerned does not comply with the relevant remedies, a full-blown investigation about the conduct in question will occur, which may lead to an administrative monetary fine.

Investigative powers of the authority

53 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 investigatory tools available 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

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

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, must compensate injured third parties for any damages. Injured parties (including parties to the agreement, third parties, or both) are entitled to litigate compensation claims arising from violations of Law No. 4054 through the civil courts, and request up to three times the amount as damages. The duration of any civil lawsuit depends on the complexity of the case.

Other issues

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

No.

MOROĞLU ARSEVEN

Bora İkiler **bikiler@morogluarseven.com**

Abdi İpekçi Cad. 19-1
Nişantaşı 34367
Istanbul
Turkey

Tel: +90 212 377 47 00
Fax: +90 212 377 47 99
www.morogluarseven.com

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.oecd.org/countries/ukraine/2381565.pdf (this version is not the most recent 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 (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 (anticompetitive 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 or markets.

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;
- limiting 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 anticompetitive 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 anticompetitive vertical restraints.

Also, prohibitions on anticompetitive vertical restraints may be enforced by commercial courts.

The Cabinet of Ministers of Ukraine (the Cabinet) is not directly involved in the enforcement of prohibitions on anticompetitive vertical restraints. However, it may authorise certain concerted practices that were prohibited by the AMC if the practices have an overwhelming positive effect on public interests. 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 sense provided in the Competition Law, which stipulates 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 that 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. It is worth nothing that 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 (though the regulation does not specifically address vertical restraints):

- 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 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' as actions aimed at the 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 anticompetitive practices generally applies to any concerted practices irrespective of their form (eg, formal written agreements, informal oral arrangements, gentlemen's agreements and mutual understandings).

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 anticompetitive concerted practices, including anticompetitive 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 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 (though, the AMC included drafting vertical guidelines in its 2017 agenda) and the AMC practice on the issue is rather limited. The Competition Law generally prohibits any anticompetitive 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 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, severe territory restrictions), 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.

Although the legislation does not provide for specific rules on block exemption of the vertical restraints the AMC has expressed its position on analysis of antitrust concerns back in 2012 when it 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 in general 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. Nevertheless, the AMC tends to follow the approaches laid down in the draft in its assessment of vertical restraints. Besides, in 2017 the AMC intends to continue work on the verticals block exemption regulation fine-tuning its approach aiming to closely align it with EU competition rules and practice.

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, anticompetitive 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.

The Competition Law lacks the proper definition of substantial restriction of competition and a great degree of discretion is vested, in this respect 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 AMC tends to see these as serious violations of Ukrainian 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 publicly available AMC decisions 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 are no publicly available AMC decisions on the issue, 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 anticompetitive, it is likely 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 anticompetitive 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 the AMC's regional division (although this decision is not publicly available), where very similar practices were found to be anticompetitive, 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.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently 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. 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 by territory is considered an anticompetitive concerted practice and, as such, is prohibited, unless it relates to:

- 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,

and provided the 20 per cent market share test is met (see question 8).

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

The antitrust aspect of internet sales is not specifically regulated by the Competition Law. There are also no publicly available AMC or court decisions in relation to restrictions on internet sales.

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

Generally, division of customers or consumers by the territories or by any type of classes is considered an anticompetitive concerted practice and as such, is prohibited. However, 20 per cent market share-based exemption (see question 8) may apply and the following may be permissible (provided the market share test is met):

- 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.

In 2017 AMC intends to adopt detailed rules applicable to vertical restrictions, which will most likely follow the EU approach.

31 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).

In addition, the market share-based exemption (see question 8) may apply.

32 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 the 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.

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

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.

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

The Competition Law does not specifically address selective distribution systems and there are no clear guidelines in this respect. According to the position earlier communicated by the AMC, the authority tends to prohibit 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.

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.

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

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, healthcare and cosmetics) will be justified.

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

There is no legal guidance on the issue.

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

There is no public record of such decisions.

38 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. It is the AMC's position that vertical restraints may have cumulative restrictive effects if selective distribution systems cover more than 50 per cent of the market.

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

There is no public record of such decisions and there is no official guidance on the issue. The AMC takes the view that the combination of selective distribution with territorial restrictions, except for permissible restriction from selling to unauthorised distributors or unauthorised points of sale located in the territory of the selective distribution system, is generally prohibited.

40 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.

41 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, market allocation by products, 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.

42 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 'product 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.

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

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 pose competition concerns, especially if the supplier's market position is strong or it is an important source of supply for other reasons. As such, these practices will be assessed similarly to restrictions discussed in question 41.

44 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 AMC guidelines or any other publicly available enforcement practice in this respect. The regulation detailing rules applicable to vertical restrictions (expected by the end of 2017) will likely follow the relevant EU rules and practice. Currently only the 20 per cent 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 anticompetitive by the AMC if any of the parties enjoys some degree of market power in any of the markets concerned.

45 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 that allows a supplier to keep the wholesale and retail level of trade separate. However, the AMC is likely to consider such restriction anticompetitive if any of the parties enjoys some degree of market power in any of the markets concerned.

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

No. Generally speaking, there are no guidelines or public record of the AMC decisions that would set out the general principles for the antitrust assessment of vertical restraints by the AMC.

Update and trends

At the end of 2016 the AMC fined several pharmaceutical companies and distributors for anticompetitive concerted practices, asserting that vertical arrangements between the manufacturers/importers and distributors resulted in restriction of competition and price increase for pharmaceuticals purchased through public procurement procedures (in several cases the prices at tenders were much higher than prices for pharmacies). Here, the AMC gives a new look at the use of retroactive payments (rebates), raising discussions as regards their allegedly adverse effect on competition. Some of the AMC decisions have already been appealed to the commercial court and if the authority's approach survives judicial scrutiny, this may significantly restrict possibilities to use retroactive payments (rebates) in pharma.

Anticipated developments

Adoption of the regulation detailing rules applicable to vertical restrictions (including to technology transfer agreements) is among the major policy priorities of the AMC for 2017. The text of the document is not available yet. Though, it is expected that the document will closely follow the relevant EU rules and practice.

Notifying agreements

47 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 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. Since mid-2015 the AMC publishes non-confidential versions of its decisions.

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

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

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

49 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

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

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.

51 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.

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

The 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 is available. According to the AMC Fining Guidelines of 2016 (recommendatory, but the authority committed to strictly follow), the basic amount of fine for implementation of anticompetitive concerted practices (including vertical restraints) may be equal to either:

- 10 per cent of the turnover of the undertaking from the sales of products on the relevant and adjacent markets for the period between the commencement of the violation and its termination or AMC's decision, or
- in case of concerted practices which may be individually exempted by the AMC or by the government – 5 per cent of the turnover of the undertaking from the sales of products on the relevant markets for the period between the commencement of the violation and its termination or the respective decision.

According to the above-mentioned Fining Guidelines, the AMC may apply coefficients (depending on the effect of violation on competition, social importance of the products, profitability of economic activity connected with violation) which may increase or decrease the fine. Also, in each case, the above basic amounts are subject to possible further adjustment for aggravating or mitigating circumstances.

Still, 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

53 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;

Asters

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

- request information or documents from the parties or other undertakings (or both), irrespective of their location;
- retain or seize documents, items or information media that may contain evidence; and
- engage police, customs and other enforcement authorities.

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

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

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

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

No.

United Kingdom

Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy
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 anticompetitive 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 anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

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

There are also certain sectoral regulators that have concurrent jurisdiction with the CMA in relation to their respective industries: 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; 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 United Kingdom. On 1 April

2015 the FCA gained full concurrent competition powers, and the new Payment Services Regulator acquired concurrent competition powers in relation to payment systems from that same date. 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, Energy and Industrial Strategy does retain a residual power to intervene where there are exceptional and compelling reasons of public policy. (Equivalent powers are exercised by the Secretary of State for Culture, Media and Sport 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.

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

In its 2016 decision in *Bathroom Fittings*, which concerned prohibitions on discounting online prices beyond a proportion of the in-store recommended price, the CMA found that the relevant agreements appreciably restricted competition both in the United Kingdom (the Chapter I Prohibition) and between the United Kingdom and other EU member states (article 101 TFEU), because the products covered by the prohibition (eg, baths, whirlpools, shower enclosures and trays, cabinets, taps) were easily traded with no significant cross-border barriers.

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 or she advertised or sold), was lifted.

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

General exceptions

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

The Chapter I prohibition will only apply to a vertical restraint that has an 'appreciable' effect on competition within the United Kingdom. Paragraph 2.18 of the CMA's Guidance Note on Agreements and Concerted Practices states that, in determining the appreciability of a restraint, the CMA will 'have regard to' the European Commission's De Minimis Notice (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 Exclusion) Orders (including those enacted in 2006, 2008 and 2012) exempting from the Chapter I prohibition certain agreements in the defence sector and certain agreements regarding the distribution of fuel in the event of a fuel supply disruption.

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 32). 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', the explicit or tacit acquiescence of one party in the other's unilateral policy may amount to an 'agreement' between undertakings for the purpose of article 101 (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, 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 anticompetitive 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 Exclusion) 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, in the response to question 32).

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 CMA and the UK courts will have regard when considering vertical restraints), as confirmed by the Court of Justice of the European Union in *Expedia*;
- will not benefit from the safe harbour under the Vertical Block Exemption (which is legally binding on the CMA 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. For example, in 2015 the UK Office of Rail Regulation, which has concurrent jurisdiction with the CMA, accepted undertakings from Freightliner, following a two-year investigation of its commercial practices. The undertakings prohibited certain restrictions which had been agreed with Freightliner's customers and which limited potential resellers from entering the market, thus reinforcing Freightliner's large market share in six ports and inland terminals.

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 CMA's predecessor, 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.

The fixing of resale prices often led to enforcement action by the CMA's predecessor, the OFT. For example, in November 2002, the OFT fined Hasbro £9 million (reduced to £4.95 million for leniency) for the imposition of minimum resale prices.

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. In its 2016 decision in *Bathroom Fittings*, for example, the CMA found that a price recommended by the supplier constituted a minimum resale price, notwithstanding that the supplier's guidelines expressly described the price as a 'recommendation', because the CMA found that the supplier had threatened distributors that deviated from the recommended price with a reduction of supplies or revocation of the copyright licence necessary for advertising the affected products, and had regularly monitored distributors' websites in order to verify compliance.

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, in January 2014 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 regarding sports bras 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 CMA's predecessor, 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 CMA's predecessor, the OFT, involved additional elements.

In 2003, the OFT identified an element of horizontal collusion among buyers in the *Replica Football Kits* case. Also in 2003, the OFT adopted a decision concerning Lladró Comercial SA's agreements (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 CMA's predecessor, the, OFT acknowledged that, in the specific factual context of that case, there were efficiencies in enabling hotels to have control over the headline rate for their hotel rooms, and so to restrict discounting by online travel agents.

However, the OFT gave 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 CMA's predecessor, the OFT, fined 10 retailers and two tobacco manufacturers a total of £225 million for fixing retail prices across competing brands and competing retail outlets. The arrangements in question were alleged to involve setting the retail price for one supplier's brand of cigarettes by reference to the price for another supplier's competing brand of cigarettes. The 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 CMA's predecessor, the OFT, explained in that case:

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

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

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

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

Recent cases indicate that a retail MFN clause such as that described could potentially constitute a restriction of competition falling within the Chapter I prohibition or article 101 prohibition.

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

The recent findings in the private motor insurance market investigation also included concerns relating to MFNs included in agreements between insurers and price comparison websites. In November 2016 the CMA opened an investigation into alleged exclusionary and restrictive pricing practices, including MFNs in respect of online sales, in the supply of auction services in the UK. Following the CMA's initial investigation, a decision on whether to proceed is expected in May 2017.

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

In its March 2014 decision in relation to Mobility Scooters II, the CMA's predecessor, the OFT, found that an arrangement by which a supplier prevented a buyer from advertising its products online for sale below a certain minimum price (a minimum advertised price policy, or MAPP) 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 and that no equivalent prohibition applied to advertising in bricks-and-mortar stores and/or in local print and broadcast media. In May 2016 the CMA similarly imposed fines in relation to *Commercial Refrigeration Products*, where a supplier's MAPP applied to both sales online and sales from brick-and-mortar shops (see also question 32). The CMA's decision in *Commercial Refrigeration Products* sets out the CMA's view that MAPPs can be equivalent to, and sanctioned as, resale price maintenance (RPM – see question 19). In June 2016, the CMA also published an open letter, explaining that it considered that MAPPs could amount to RPM.

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

As with most favoured customer clauses (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 CMA's predecessor, 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 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

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

Through 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.

For recent examples of enforcement by the CMA in respect of territorial restrictions on internet sales, see question 32.

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

Customer restrictions give rise to issues similar to those arising in territorial restrictions (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 directly 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.

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

Objectively justifiable restrictions on the uses to which a buyer or subsequent buyer puts the contract goods are permissible and will not fall within the Chapter I prohibition (eg, restrictions on the sale of medicines to children). However, for 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.

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

Broadly speaking, the UK rules follow the principles set out in the Commission's EU Vertical Guidelines (see European Union chapter). A number of recent investigations have given an indication as to how the EU-level principles will be applied in the UK.

In August 2013 the CMA's predecessor, the OFT, issued an infringement decision in its *Mobility Scooters I* case against Roma Medical Aids Limited (Roma) and certain of its retailers. The OFT found that Roma entered into arrangements with seven UK-wide online retailers that prevented them from selling Roma-branded mobility scooters online, and from advertising their prices for Roma-branded mobility scooters online. The OFT considered that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed in this case as Roma and each of the seven retailers involved benefited from immunity under the 'small agreement' exemption (see question 8). The OFT expressed similar reasoning and reached the same result in *Mobility Scooters II*. More recently, following the initiation of an investigation into the sports equipment sector in November 2015, the CMA sent a statement of objections to Ping Europe in June 2016, alleging that Ping Europe had operated an online sales ban in respect of its golf clubs.

The OFT also expressed concern in its earlier *Yamaha* case that a scheme awarding discounts to Yamaha dealers based upon the ratio of face-to-face sales as opposed to distance and internet sales was designed to target internet-only retailers and discounters, and acted as a disincentive for dealers to engage in distance and internet sales. The OFT

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

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

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

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

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

In January 2015 the CMA undertook an economic research project to understand how makers of branded clothes and luxury goods restrict sales on internet retail platforms.

34 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 aftersales 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).

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

According to the CJEU's judgment in *Metro v Commission*, and 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 aftersales 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 CMA's predecessor, the OFT, recognised in the *Newspaper and Magazine Distribution* case (Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the 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).

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

The EU Vertical Guidelines state that: '[w]ithin a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet'. However, this section should be read in light of an earlier section of the EU Vertical Guidelines, which states that: 'the supplier may require quality standards for the use of the internet site to resell his goods'. (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 32). 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. The CMA has maintained this emphasis in its recent *Bathroom Fittings* and *Commercial Refrigeration Products* decisions.

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

In a 2003 decision concerning the selective distribution agreements of Lladró Comercial SA, the CMA's predecessor, the OFT, noted, 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).

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

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

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

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

The following are identified in the EU Vertical Guidelines (to which the CMA and 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.

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

Such an arrangement may raise concerns regarding market partitioning. Where the supplier insists that a given buyer must buy all of its requirements of the supplier's products from, for example, the supplier's local subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, this restriction, known as 'exclusive purchasing', will only infringe the Chapter I prohibition where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier and the buyer each 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 30), 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.

41 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'.

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

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

Providing that non-compete clauses do not have a duration exceeding five years, they may benefit from the safe harbour under the 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 CMA's predecessor, the OFT, 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.

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

The CMA considers 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 42). They are, therefore, subject to a similar antitrust assessment. In particular, the UK Vertical Guidelines identify as equivalent to a non-compete obligation, a requirement to purchase minimum volumes amounting to substantially all of the buyer's requirements ('quantity forcing').

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

In an exclusive distribution network, as a corollary of limiting the buyer's ability actively to sell the contract products into other exclusively allocated territories, the supplier often agrees: not to supply the products in question directly itself; and not to sell the products in question to other buyers for resale in the assigned territory. The EU Vertical Guidelines, to which the CMA has regard, do not deal separately with

Update and trends

Following its closure of the *Online Hotel Bookings* case in September 2015, the CMA has maintained its focus on most favoured nation clauses. In July 2016, the CMA distributed questionnaires to hotels across the UK as part of an ongoing monitoring project, launched in partnership with the European Commission and the national competition authorities of nine other EU Member States, in order to assess the effect of commitments by online travel agents to remove 'rate parity' clauses from their agreements with hotels. In addition to enforcement efforts to promote competition among suppliers, the CMA is also seeking to increase engagement among customers, and the final reports in market investigations into retail banking and the energy market (completed in August and December 2016, respectively) included a number of recommendations designed to facilitate customer switching. In the digital space, the CMA has used its consumer protection powers: (i) to address issues around fake online reviews and undisclosed online advertising in social media; (ii) to promote the efficacy of online price comparison tools by requiring websites to display the full cost of goods or services; (iii) to facilitate customer switching between cloud storage suppliers; and (iv) to investigate online secondary ticketing markets.

Anticipated developments

The CMA is expected to maintain its emphasis on infringements in the digital sector, particularly in relation to restrictions on online sales and advertising. In its draft Annual Plan 2017/2018, the CMA stated its intention to be guided by enforcement priorities identified in its Strategic Assessment (November 2014), which include online and digital markets.

Having published an economic study on vertical restraints in March 2016, the CMA plans to continue its programme of economic research aimed at improving implementation of competition policy with two research further projects in 2017/2018. The CMA will also continue two ongoing market studies into the supply of digital comparison tool services and the supply of care home services for the elderly, and has stated that it intends to launch two to four new markets studies in 2017. The Financial Conduct Authority, one of the UK's concurrent regulators, also published interim findings in a market investigation into the supply of asset management services in November 2016, with a final report expected in the second quarter of 2017.

The CMA will likely maintain use of a range of its powers in order to promote public understanding and compliance, including by way of open and advisory letters and commitments. In December 2016 the CMA made first use of its competition director disqualification powers, and indicated that it would continue to examine the conduct of directors of companies that have breached competition law. Earlier, in March 2016 the CMA also obtained a criminal conviction for breach of competition law.

The CMA has also indicated that the UK's exit from the European Union, the process for which is expected to commence in March 2017, could also have a significant bearing on its work.

the restrictions imposed on the supplier in this kind of arrangement. However, they do acknowledge that the restrictions on the supplier and the buyer 'usually' go hand-in-hand. Such systems should therefore be assessed in accordance with the framework set out in questions 23 and 24.

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

As noted in question 44, the EU Vertical Guidelines, to which the 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.

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

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

Notifying agreements

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

In line with the modernisation reforms effected by the European Union in May 2004, the United Kingdom abolished the notification system that previously existed under the CA. Subject to the making of requests for guidance in novel cases (see question 48), a notification of a vertical restraint is therefore not possible. Note, however, that it is possible to apply to the CMA for immunity from fines in relation to resale price maintenance practices (see questions 19 and 52).

Authority guidance

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

In general, the 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 CMA's predecessor, 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

49 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

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

In the years from 2005 to 2014, the CMA/OFT published details of decisions (or other, lesser, enforcement actions) of an average of around two vertical restraint cases per year. In 2015 the CMA issued one decision concerning vertical restraints (Residential Estate Agent Services) and, following the agreement of undertakings in other jurisdictions addressing practices that were also of concern to the CMA, closed the investigation in *Hotel Online Bookings*. The CMA also published open letters in respect of three markets. In addition, the UK Office of Rail Regulation, which has concurrent jurisdiction with the CMA, accepted

undertakings in one case to end resale price maintenance (see question 16). This focus on resale price maintenance continued in 2016, with publication in March of a report on vertical restrains, two CMA decisions in May concerning price restrictions designed to limit online discounts, and commencement in July of a project to monitor the use of MFN clauses in the online hotel bookings sector.

The CMA considers on a case-by-case basis whether an agreement falls within its administrative priorities so as to merit investigation.

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

Under section 2(4) of the CA, any agreement that falls within the Chapter I prohibition and does not satisfy the conditions for exemption under section 9(1) of the CA (or does not benefit from a parallel exemption by virtue of section 10) will be void and unenforceable. However, where it is possible to sever the offending provisions of the contract from the rest of its terms, the latter will remain valid and enforceable. As a matter of English contract law, severance of offending provisions is possible unless, after the necessary excisions have been made, the contract 'would be so changed in its character as not to be the sort of contract that the parties entered into at all' (*Chemidus Wavin Ltd v Société pour la Transformation*). Such assessment will depend on the exact terms and nature of the agreement in question.

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

The 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. Under sections 9A to 9E of the Company Directors Disqualification Act 1986, the CMA also has the power to apply to the court for a disqualification order to be made against the director of a company that has breached competition law, or to accept a disqualification undertaking from such a director, for a maximum of 15 years. The CMA first exercised this power in December 2016, following its decision concerning a cartel among the online vendors of posters and frames.

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

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

The CMA's investigation powers are set out in sections 25 to 30 of the CA. 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.

SIDLEY

Stephen Kinsella OBE **skinsella@sidley.com**
Patrick J Harrison **pharrison@sidley.com**
Rosanna Connolly **rconnolly@sidley.com**
Kyle Le Croy **klecroy@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

In previous cases, the OFT has obtained information from entities domiciled outside the United Kingdom (eg, *Lladró Comercial SA*).

Private enforcement

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

Private actions for damages for breaches of the Chapter I prohibition or article 101 may be brought in the UK High Court 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.

Following the Consumer Rights Act 2015, which entered into force on 1 October 2015, the number of private damages cases in the United Kingdom is expected to rise, owing to its creation of an opt-out collective redress scheme as well as the expansion of the UK Competition Appeal Tribunal's jurisdiction to hear a wider range of private actions. The first such opt-out collective action was brought in May 2016 in respect of the CMA's decision in *Mobility Scooters II,* a decision which concerned a vertical agreement prohibiting online advertising of prices below the manufacturer's recommended retail price.

Outside the opt-out collective redress scheme, the Consumer Rights Act also created a 'fast track' procedure for more straightforward cases brought by individuals and small and medium-sized entities before the UK Competition Appeal Tribunal. The second such case before the CAT, brought in February 2016 by a supplier of certain lands to Tesco, concerned a restrictive agreement against the supplier in respect of its use of retained lands, including a prohibition on sales to the buyer's competitors (on seller restrictions, see question 44).

Other issues

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

No.

United States

Joel Mitnick, Peter Huston and Karen Kazmerzak
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 (2012)). 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 (2012)). 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 (2012)).

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) (2012)). 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 suggested that it may seek to expand its powers under section 5 in the future and it did. In January 2017 the FTC filed a complaint against Qualcomm alleging that the company's course of conduct constitutes an unfair method of competition regardless of whether it seperately constitutes monopolisation or an unreasonable restraint of trade.

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 under the terms of the agreement;
- 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 anticompetitive 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 anticompetitive 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 55).

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 (*Hartford Fire Ins Co v California*, 509 US 764, 796 (1993); *United States v Aluminum Company of America*, 148 F2d 416, 443-44 (2d Cir 1945)). The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) delineates what extraterritorial conduct is governed by the antitrust laws of the United States and what lies beyond their reach. The FTAIA added section 6a to the Sherman Act, which provides that the other sections of the Sherman Act shall not apply to foreign commerce (other than import trade or commerce), except where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce (15 USC, section 6a (2012)). See *Minn-Chem Inc, et al v Agrium Inc, et al*, 683 F3d 845, 856-58 (7th Cir 2012); see also *United States v Hsiung*, 778 F3d 738 (9th Cir 2015); *Motorola Mobility LLC v AU Optronics Corp*, 775 F3d 816 (7th Cir. 2014); *Lotes Co, Ltd v Hon Hai Precision Indus Co*, 753 F3d 395, 410 (2d Cir 2014). The FTAIA also added section 5(a)(3) to the FTC Act, 15 USC, section 45(a)(3), which closely parallels section 6a.

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 anticompetitive conduct in question. When a state legislature acts by adopting legislation and where a state's highest court enacts rules, its actions are exempt from the antitrust laws. Private parties and subordinate government entities also might be immune from the antitrust laws. 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 programme established by the California legislature that regulated the marketing of raisins. The *Parker* doctrine has a two-pronged test for the application of antitrust immunity for private parties and subordinate government entities (see *California Retail Liquor Dealers Ass'n v Midcal Aluminum Inc*, 445 US 97, 105 (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. 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 healthcare, 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 (ie, an agreement) between two or more separate economic actors. 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 not separate economic actors and 'are incapable of conspiring with each other for purposes of section 1 of the Sherman Act'. The Supreme Court has said that the key is not whether the defendant is legally a single entity or whether the parties '"seem" like one firm or multiple firms in a metaphysical sense,' but rather 'whether there is a "contract, combination . . . or conspiracy" among 'separate economic actors pursuing separate economic interests such that the agreement "deprives the marketplace of economic centers of decisionmaking."' *American Needle v NFL*, 560 US 183, 195 (2010) (citations omitted).

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; and
- a wholly owned subsidiary and a partially owned subsidiary of the same parent corporation.

Today, courts generally hold the *Copperweld* exception to be inapplicable to partial holdings at or below 50 per cent.

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).

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 recently issued revised joint Antitrust Guidelines for the Licensing of Intellectual Property (https://www.justice.gov/atr/IPguidelines/download), which account for US intellectual property and antitrust legal developments since the guidance was last issued in 1995. The guidelines embody three general principles that guide the agencies' antitrust analysis in the context of intellectual property. First, the FTC and DOJ apply the same general antitrust principles to intellectual property as applies 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); see also *Mediacom Commc'ns Corp v Sinclair Broad Grp*, 460 F Supp 2d 1012, 1027-28 (SD Ia 2006) (applying *Independent Ink* to copyright). 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 anticompetitive 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 anticompetitive 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 anticompetitive 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 anticompetitive effects, the rule-of-reason analysis may sometimes be shortened via a 'quick look' analysis. In the *E-books* case, however, on facts specific to the case, the Second Circuit rejected Apple's argument that, under the rule of reason, the court should factor in the pro-competitive benefits of the conduct at issue (promotion of entry and innovation). The court instead applied per se treatment to determine that Apple's actions, which the court found amounted to facilitation of a horizontal cartel, were unlawful.

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 *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 anticompetitive 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 anticompetitive 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 *Telerate Sys v Caro*, 689 F Supp 221, 234 (SDNY 1988) (applying a de minimis requirement that a not-insubstantial absolute dollar amount of commerce must be affected).

In *Oracle America Inc v Terix Computer Company* (2014 WL 5847532, at 2 (ND Cal 7 November 2014)), the district court specifically held that tying claims are subject to a rule-of-reason analysis. Also, in *Schuykill Health System v Cardinal Health 200 LLC* (2014 WL 3746817, at 5, n8 (ED 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 [prevents 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 a court does not find a tying arrangement to satisfy the elements of a per se violation, the defendant's tying arrangement may nonetheless still be unlawful under a full fledged rule-of-reason analysis. See, for example, *Collins Inkjet Corp v Eastman Kodak Co*, 781 F3d 264 (6th Cir 2015).

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, is often 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 anticompetitive 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 in which one hardware retailer accused another of locking up the supply of power tools, a court held that the combined market power of two suppliers who each had exclusive supply contracts with the defendant retailer 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 defendant retailer, 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?

Although 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.

The buyer's market share was also relevant to the analysis in another recent case. In *In re Musical Instruments & Equip Antitrust Litig*, 798 F3d 1186 (9th Cir 2015), a retail buyer with large market share pressured its suppliers to adopt minimum advertised price (MAP) policies. Plaintiffs who purchased from the retailer alleged a hub-and-spoke conspiracy among the suppliers. The court of appeals affirmed the district court's dismissal of the case and noted that it was in the independent interest of the suppliers to heed the demands of an important customer which exercised considerable market power over the suppliers.

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 (See discussion of *Leegin* in question 15).

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. To the contrary, the Supreme Court in *Leegin* noted that:

> *resale price maintenance . . . can increase interbrand competition by facilitating market entry for new firms and brands. [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.*

551 US at 891 (quoting *Continental TV, Inc v GTE Sylvania*, Inc 433 US 36 (1977)).

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 anticompetitive 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 a complaint 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 liability for Apple's role in facilitating a conspiracy among the publishers (*United States v Apple Inc*, 952 F Supp 2d 638, 699 (SDNY 2013), affirmed, *United States v Apple Inc*, 791 F3d 290 (2d Cir 2015)).

While vertical restraints are subject to review under the rule of reason, the court determined that 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 procompetitive benefits of resale price maintenance, including, among other things, increasing interbrand 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.

It is likely that pricing relativity agreements would not be held to warrant per se treatment under this standard, and instead 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)).

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 healthcare 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. A related class action was settled and the district court approved the settlement in March 2015 (*Shane Group Inc v Blue Cross Blue Shield of Michigan*, 2015 WL 1498888 (ED Mich 31 March 2015)). 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 and a supplier's use of an agency arrangement with internet platforms may avoid antitrust issues. 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 to subsequently 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) ¶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 interbrand 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 30, 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 interbrand competition is strong, courts typically find territorial restraints lawful under the rule of reason.

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

Territorial restrictions pertaining to online sales are subject to the same rule-of-reason analysis detailed in question 28, regarding territorial restrictions generally.

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

Customer restrictions of this nature are subject to the same rule-of-reason analysis detailed in question 28, regarding territorial restrictions.

31 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.

32 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.

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

Research has not uncovered any decisions or guidelines distinguishing between different types of internet sales channels.

34 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.

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

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.

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

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.

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

Research has not uncovered any recent decisions in this area.

38 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.

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

Research has not uncovered any recent agency decisions or guidance concerning distribution arrangements that combine selective distribution with territorial restrictions.

40 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.

41 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.

42 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 5 of the FTC Act, and section 3 of the Clayton Act, but section 3 challenges would not apply to conduct involving services or intangibles. This is because section 3 of the Clayton Act is limited to arrangements involving 'goods, wares, merchandise, machinery, supplies, or other commodities'. 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.

The courts and agencies have considered a number of factors in determining the legality of exclusive dealing arrangements under the rule of reason, although the most significant factor considered is the percentage of commerce foreclosed within a properly defined market, and the ultimate anticompetitive 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' U, Inc v FTC*, 221 F3d 928 (7th Cir, 2000) to hold that, under the rule of reason, plaintiffs adequately alleged anticompetitive harm as result of a distributor's exclusive agreements with three manufacturers). See also *Asphalt Paving* in question 7. See also *McWane Inc v FTC*, 783 F3d 814 (11th Cir 2015) (finding unlawful exclusive dealing in violation of section 5 of the FTC Act). See also *American Needle Inc v New Orleans Lousiana Saints* (2014 WL 1364022, at 1 (ND 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. Some other key factors the courts and agencies consider is the duration of the agreement and ease with which the buyer may terminate (see, eg, *W Parcel Express v UPS*, 190 F3d 974, 976 (9th Cir 1999) (upholding exclusive agreement that allowed buyer to terminate 'for any reason with very little notice') and whether the buyer favours the exclusivity (see, eg, *Menasha Corp v News Am Mktg In-Store*, 238 F3d 661, 663 (7th Cir 2004) (finding relevant to legality fact that buyers favoured exclusivity).

Recently, the DOJ challenged a form of exclusive dealing arrangement under section 1 of the Sherman Act, *United States v American Express Co et al*, 2015 WL 1966362 (EDNY 30 April 2015). The DOJ filed a complaint against American Express, MasterCard and Visa alleging that the defendants 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. The District Court issued a decision against American Express in February 2015 and issued an injunction in April 2015. The Court of Appeals for the Second Circuit reversed, noting that the DOJ did not properly define the market because it focused entirely on merchants in evaluating harm while ignoring the interests of cardholders, 838 F3d 179 (2d Cir 2016).

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

Requirements contracts are analysed under the same standards as exclusive dealing arrangements (see question 42).

44 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 42) 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.

45 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 44.

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

No, there are no guidelines or agency decisions addressing restrictions on suppliers that have not been discussed above.

Notifying agreements

47 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

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

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

49 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

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

The FTC and DOJ file few vertical restraint cases in any given year. Two recent examples, however, include DOJ's enforcement action against American Express pertaining to exclusive dealing arrangements (see question 42), and the DOJ's successful case against Apple Inc and five e-book publishers (see questions 21 and 24), alleging a horizontal conspiracy among the publishers, 'facilitated' by Apple, a distributor of the publishers' e-books (*United States v Apple Inc*, 791 F3d 290 (2d Cir 2015)).

The DOJ's case against American Express resulted in an injunction barring American Express from engaging in the complained-of behaviour, *United States v American Express Co et al*, 2015 WL 1966362 (EDNY 30 April 2015), as well as an out-of-court settlement with the other two defendants, MasterCard and Visa. The Court of Appeals for the Second Circuit, however, reversed. It held that the DOJ did not properly define the market because it focused entirely on merchants in evaluating harm while ignoring the interests of cardholders. 838 F3d 179 (2d Cir 2016). The nature of the conduct alleged in the DOJ's case against Apple and the publishers 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. The district court ruled against Apple at trial and the decision was affirmed by the Second Circuit. Apple has petitioned to the United States Supreme Court for certiorari.

There have been a number of other notable government challenges to vertical restraints. Most recently, the FTC filed a complaint against Qualcomm alleging the company unreasonably restrained trade by placing contractual conditions on its customers, smartphone manufacturers, that had the effect of excluding competitors and impeding innovation in baseband processors. Among other allegations, the FTC asserted that the company used its monopoly power in baseband processors to force smartphone manufacturers into paying elevated royalties on Qualcomm's FRAND-encumbered patents if the customer used a competitor's baseband processors in its devices and extracted exclusivity from Apple in exchange for reduced patent royalties. (See complaint *Federal Trade Commision v Qualcomm Inc*, N 5:17-cv-00220

(ND Cal 17 January 2017), available at https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.) Other government challenges to vertical restraints include DOJ's case against Blue Cross Blue Shield of Michigan pertaining to MFN provisions (and the related class case, see question 24), which resulted in an out-of-court settlement that was approved by the district court in March 2015 (*Shane Group Inc v Blue Cross Blue Shield of Michigan*, 2015 WL 1498888 (ED Mich 31 March 2015), the DOJ's 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)), and the FTC's resolution by settlement of 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 51 and 54).

51 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, a contract containing a prohibited vertical restraint will be held enforceable 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' (See *Kelly v Korsuga*, 358 US 516, 518–520 (1959); see also *Kaiser Steel Corp v Mullins*, 455 US 72 (1982)).

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

The 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)).

Private parties may also enforce the antitrust laws (see question 54) and must bring cases in federal court.

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

53 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

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

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

55 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 anticompetitive 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)). California courts use Federal authority as an aid in interpreting California's antitrust statute, known as the Cartwright Act. The Cartwright Act, however, was patterned on sister state statutes at the turn of the 20th century, not the Sherman Act, and it is broader and deeper in some respects (*In re Cipro Cases I & II*, 61 Cal 4th 116, 142, 160-61 (2015)).

Within the past decade 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 $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,* Inc, (no. 10011659 Cal Sup Ct 11 January 2011) (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* (no. 08-cv-02977, 2008-2 Trade Cases CCH) §76, 454 (SDNY 21 March 2008)) (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

Joel Mitnick **jmitnick@sidley.com**
Peter Huston **phuston@sidley.com**
Karen Kazmerzak **kkazmerzak@sidley.com**

787 Seventh Avenue
New York
NY 10019
United States

Tel: +1 212 839 5300
Fax: +1 212 839 5599
www.sidley.com