

# Vertical Agreements

*Contributing editor*  
**Patrick J Harrison**



2017

GETTING THE  
DEAL THROUGH 

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# Vertical Agreements 2017

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# Macedonia

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## 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.

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**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).

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**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.

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**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.

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**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.

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**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.

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**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.

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**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.



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**Analytical framework for assessment**


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**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.

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**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?**


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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.

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**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?**


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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.

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**Block exemption and safe harbour**


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**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.

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**Types of restraint**


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**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 aimed 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.



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