European Union

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

The key legal source is article 81 of the EC Treaty (at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E081:EN:NOT*).

Article 81(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 EU. Article 81(2) EC renders such agreements void unless they satisfy the conditions for exemption under article 81(3): essentially where the objective economic benefits of an agreement outweigh its anti-competitive effects.

In order to assist companies and their advisers in ensuring that their agreements meet the conditions for an 'exemption' under article 81(3), the European Commission's Directorate General for Competition (the Commission) published two further documents of particular relevance to the assessment of vertical restraints:

- Commission Regulation (EC) No 2790/1999 (Vertical Block Exemption), providing that certain categories of vertical agreement will be treated as fulfilling the requirements for exemption (at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999R2790:EN:NOT*)
- non-binding Vertical 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 (at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000Y1013(01):EN:NOT*).

Where a party to an agreement occupies a dominant position on one of the markets to which the agreement relates, article 82 EC (which regulates the conduct of dominant companies) will also be relevant to the antitrust assessment of a given agreement. However, conduct falling within article 82 EC is considered in the *Getting the Deal Through – Dominance* publication and is therefore not covered here.

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

At article 2(1) of the Vertical Block Exemption, vertical agreements are defined as: "agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

Vertical restraints are, put simply, restrictions on the competitive behaviour of a party that occur in the context of such vertical agreements. The community courts have clarified that, in order for a restriction to be reviewed under article 81, there must be a concurrence of wills among the two parties to conclude the relevant restriction. (See, eg, *Bayer v Commission*. Note, however that article 82 EC regulates the unilateral conduct of companies occupying a dominant position on the market in question – see *Getting the Deal Through – Dominance*.)

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.

3 Are there particular rules or laws applicable to the assessment of vertical restraints in specific sectors of industry? If so, please briefly identify the sectors and the relevant sources.

Yes, under article 81(3), the Commission has issued a Block Exemption Regulation on the application of article 81(3) to categories of vertical agreements and concerted practices in the motor vehicle sector, available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R1400:EN:NOT*

The regulation creates a 'safe harbour' for certain motor vehicle distribution and repair agreements, exempting them from the prohibition laid down in article 81(1). Other industry-specific Block Exemption Regulations exist but none of these is targeted specifically at vertical restraints.

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

No. One of the key identifying features of EC competition policy has been its pursuit of a variety of different goals. Although in the recent past, the Commission has openly stated its intention to focus increasingly on consumer welfare and the pursuit of strictly economic goals in its application of article 81, the supranational nature of the EU dictates that the Commission and the community courts have also prioritised the furtherance of a single, integrated European market.

5 What entity or agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Do governments or ministers have a role?

The European Commission's Directorate General for Competition is the main administrative body responsible for applying article 81 at an EU level. However, post-1 May 2004, national courts and national competition authorities in each of the EU's

27 member states also have jurisdiction to apply article 81 in its entirety (ie including article 81(3)). At an EU level, the 'College of Commissioners' – ie the 27 Commissioners appointed by the EU's 27 member states – adopts infringement decisions under article 81. In practice, however, it is only at the very final stage of an infringement decision that the College of Commissioners is consulted. At all stages prior to that, decisions are driven by officials at the Directorate General for Competition.

6 What is the relevant test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction?

Article 81 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 fall to 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's Effect on Trade Notice at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(06):EN:NOT*).

For example, where vertical restraints are implemented in just a single member state they may also be capable of affecting trade between member states by, for example, 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 Commission's Effect on Trade Notice does 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, in general, be considered capable of having the requisite effect on trade.

7 To what extent does antitrust law apply to vertical restraints in agreements concluded by public or state-owned entities?

Article 81 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 and will therefore be subject to the provisions of article 81 in relation to those activities, but will be protected from the application of article 81 when fulfilling their public tasks.

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

In order for article 81 to apply, a vertical restraint must have an 'appreciable' effect on competition. The Commission has published a 'De Minimis' notice setting out the circumstances in which agreements (including vertical agreements) will not be viewed by the Commission as infringing article 81(1) (at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1222(03):EN:NOT*).

The De Minimis notice provides that, absent certain 'hardcore' restrictions such as price-fixing or clauses granting absolute territorial protection, and absent 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 81.

9 When assessing vertical restraints under antitrust law does the relevant agency take into account that some agreements may form part of a larger, interrelated, network of agreements or is each agreement assessed in isolation?

The Commission will normally take into account the cumulative impact of a supplier's agreements when assessing the impact of vertical restraints on competition in a given market. 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, then any vertical restraints that contribute significantly to that foreclosure may be found to infringe article 81. This kind of analysis has frequently been employed, for example, in the brewing industry.

10 Under what circumstances does antitrust law apply to agency agreements in which an undertaking agrees to perform certain services on a supplier's behalf in consideration of a commission payment?

In general, article 81 will not apply to any agreement between a 'principal' and its 'genuine agent' (ie one who bears no substantial financial risk in respect of the transactions in which it acts as agent) in so far as the agreement relates to contracts negotiated or concluded by the agent for its principal. However, 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 81 may apply if the arrangement leads to foreclosure of the principal's competitors from the market for the products in question. Article 81 may also apply where an agency agreement goes beyond 'genuine agency' and includes provisions according to which an agent accepts commercial and financial risks in selling the principal's contract products (of the kind normally accepted by a distributor).

It should also be noted that, where agency agreements are concluded, agents in the EU may benefit from significant protection under the EU's Commercial Agents Directive and the member state-level implementing measures adopted in relation thereto.

11 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, EC 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. 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.

12 Under what circumstances does antitrust law apply to agreements between a parent and a related company?

Article 81 does not apply to agreements between companies that form part of a single economic entity. In determining whether one company is part of the same economic entity as another, the community 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 the instructions issued to them by their parent company, they will be seen as part of the same economic entity as the parent company. Under the case law of the community courts, it is not clear what degree of control is necessary in order for a company to be considered related to another. In certain cases, the Commission has not allowed the defence of single economic entity. For example, in the case of *Gosme/Martell – DMP*, the Commission found that DMP, a 50/50-owned joint venture between Martell and Piper-Heidsieck, was a separate economic entity to Martell, so that article 81 applied to vertical restraints concluded between Martell and DMP.

13 Can the legality under antitrust law of a given vertical restraint change over time?

Yes. As the Commission refers extensively to market share thresholds in its decisions, Notices, Guidelines and the Vertical Block Exemption, a change in the market position of, for example, the supplier, can result in an agreement that was originally permissible under article 81 becoming prohibited. For example, article 9 of the Vertical Block Exemption states that an agreement may benefit from a safe harbour where the supplier has a market share below 30 per cent at the time of agreeing the restraint in question but will lose such benefit where the supplier's market share subsequently exceeds 30 per cent for a given period. Further, in a market characterised by a network of similar agreements containing vertical restraints, a given agreement may become illegal where other similar agreements covering a significant percentage of the market are entered into, since the cumulative effect of the similar agreements may be that certain parties are foreclosed from the market (question 9). In such a case, the Commission (or a member state national competition authority) may consider withdrawing the benefit of the Vertical Block Exemption's safe harbour. Such a withdrawal of the safe harbour is effected by decision addressed to the relevant parties and has only prospective effect.

14 Briefly explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Article 81 may apply to vertical restraints (as defined in question 2) provided they are NOT:

- concluded by public entities carrying out non-economic activities (question 7);
- 'genuine agency' arrangements (in most cases – question 10); or,
- concluded among related companies (question 12).

If none of the above criteria is met, then an agreement containing a vertical restraint may fall to be reviewed under article 81. There are a series of logical steps to be taken in determining whether and how article 81 may apply to a vertical restraint.

First, does the agreement lead to an appreciable effect on trade between member states of the EU? (question 6). If there is no effect on trade between member states, then article 81 will not apply (but member state level competition rules may apply – see national chapters).

Second, if there is an appreciable effect on trade between member states, does the vertical agreement contain a 'hardcore' restraint? If the agreement contains a hardcore restraint, it:

- will not benefit from the safe harbour created by the Commission's 'De Minimis' notice;
- will not benefit from the Vertical Block Exemption's safe harbour; and
- is highly unlikely to satisfy the conditions of article 81(3).

'Hardcore' vertical restraints are: 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.

Third, if the agreement contains no 'hardcore' vertical restraints, are the parties' positions on the relevant markets sufficiently minor such that the Commission's De Minimis notice may apply. If the criteria of the De Minimis notice are met (question 8), then the Commission will not consider that the agreement falls within article 81 (1) EC as it does not 'appreciably' restrict competition.

Fourth, does the agreement fall within the Vertical Block Exemption? (question 15). If the agreement falls within the scope of the Vertical Block Exemption, it will benefit from a 'safe harbour'. 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 81.

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 81(1) and, if so, whether the conditions for an exemption under article 81(3) are satisfied.

The Commission's Vertical Guidelines set out a number of factors that will be taken into account in assessing whether vertical agreements fall within article 81(1), namely: supplier market position; competitors' market positions; buyer market position; barriers to entry; market maturity; the level of trade affected by the agreement; and the product nature. Where an agreement falls within article 81(1), the Vertical Guidelines also set out the issues that will determine whether an agreement satisfies article 81(3), namely: whether the agreement will lead to efficiencies accruing to consumers, rather than to the parties themselves; whether the restrictions imposed are greater than necessary to achieve the efficiency 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.

15 Is there a block exemption or safe harbour which provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please briefly explain the manner in which this block exemption/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 the member state competition authorities or courts can determine

that the agreement infringes article 81, unless a prior decision (having only prospective effect) is taken to 'withdraw' the benefit of the Vertical Block Exemption from the agreement.

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 suppliers' in the contract product market.

The Vertical Block Exemption will not apply where the agreement comes under another of the Commission's Block Exemption Regulations (notably, the Technology Transfer Block Exemption, see question 11).

In general, the supplier's market share must not exceed 30 per cent on the relevant market(s) for the products in question in the most recent calendar year prior to commencement of the agreement. (In the case of supply to only one distributor for the entire EU, it is the buyer's market share that must not exceed 30 per cent.)

Where the relevant market shares go 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 any 'hardcore' restraints (see question 14), 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 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 clauses exceeding five years in duration, post-term non-compete obligations, and restrictions on members of a selective distribution system being obliged not to stock the products of an identified competitor of the supplier) these restraints themselves may be unenforceable. Where these lesser restraints are included, they will not prevent the rest of the agreement benefiting from the Vertical Block Exemption's safe harbour.

16 What are the consequences of an infringement of antitrust law for the validity, or enforceability by one of the parties, of a contract containing prohibited vertical restraints?

Under article 81(2) EC, restrictions of competition infringing article 81(1) and not qualifying for exemption under article 81(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 alone is void and unenforceable.

17 Briefly explain how restricting the buyer's ability to determine its resale price is assessed under antitrust law.

The Commission considers that the setting of minimum resale prices constitutes a 'hardcore' restriction of competition. As such, it will almost always fall within article 81(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under article 81(3).

Setting maximum resale prices or 'recommended' resale prices, from which the distributor is permitted to deviate without penalty, may be permissible, though the Commission views such arrangements with suspicion on concentrated markets, as such practices may facilitate collusion among suppliers.

18 Briefly explain how restricting the territory into which a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to customers in certain territories?

In general, export restrictions that prevent a buyer selling the contract products from one EU member state into another are among the most serious infringements of article 81, attracting Commission fines of €102m in 1998 for car manufacturer Volkswagen and €149m in 2002 for computer games manufacturer Nintendo.

As territorial restrictions can lead to market partitioning, the Commission has tended to see such restraints as 'hardcore' restraints that will almost always fall within article 81(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under article 81(3).

There is one exception to this. 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 lead to an increase in inter-brand competition. Provided the other conditions of the Vertical Block Exemption are met (including supplier's market share below 30 per cent), and provided the restrictions relate only to 'active' sales (ie they do not cover 'passive' or unsolicited sales) into territories granted on an exclusive basis to another buyer or to the supplier itself, such arrangements will fall within the safe harbour. Where restrictions on active sales into territories reserved exclusively to another buyer, or the supplier itself, are imposed by suppliers having market shares in excess of 30 per cent, such arrangements may still qualify for individual exemption under article 81(3).

19 Briefly explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to certain customers?

Customer restrictions give rise to issues similar to those arising in territorial restrictions (see question 18) and tend to be viewed by the Commission as 'hardcore' restrictions. As such, limitations on a buyer's sales to particular classes of customer will almost always fall within article 81(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under article 81(3). 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 Vertical Block Exemption's safe harbour, provided the various conditions are met (including supplier's market share below 30 per cent). However, according to the Commission's Vertical Guidelines, where such 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 81(3). 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 Vertical Block Exemption's safe harbour, as may restrictions on a wholesaler selling direct to end users. Finally, certain objectively justifiable customer restrictions will be permitted. For example, clauses preventing sales of medicines to children, will not fall within article 81(1).

20 Briefly explain how restricting the uses to which a buyer puts the contract products is assessed under antitrust law.

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 81(1). However, for such restrictions to be objectively justifiable, the supplier would be likely to have to impose the same restriction on all buyers and adhere to such restrictions itself.

21 Briefly explain how agreements establishing 'selective' distribution systems are assessed under antitrust law.

Following the judgment of the ECJ in *Metro v Commission*, selective distribution systems will fall outside article 81(1) where distributors are selected on objective criteria of a purely qualitative nature. In order to satisfy this doctrine: (i) the contract products must be of a kind necessitating selective distribution (eg technically complex products where after-sales service is of paramount importance and products where brand image is of particular importance); (ii) the criteria by which buyers are selected must be objective; and (iii) the restrictions imposed must not go beyond that which is necessary to protect the quality and image of the product in question.

Where selective distribution systems do not satisfy the above criteria, they will fall within article 81(1) but may benefit from a safe harbour 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 benefit from exemption under the Vertical Block Exemption provided: 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. Where such 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 should not affect the ability of the system overall to benefit from the safe harbour.

Certain restrictions are expressly permitted, including the restriction of active or passive sales to non-members of the network.

22 Briefly explain how restricting the buyer's ability to source the supplier's products from alternative sources is assessed under antitrust law.

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, its national subsidiary, this may prevent the ordinary arbitraging that would otherwise occur. On its own, however, 'exclusive purchasing' will only fall within article 81(1) where the parties have a significant market share and the restrictions are of long duration. Further, where the supplier has a market share 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 Commission's Guidelines, 'exclusive purchasing' is most likely to contribute to an infringement of article 81 where it is combined with other practices, such as selective distribution or exclusive distribution. Where combined with selective distribution (see question 21), an exclusive purchasing obligation would have the effect of preventing the members of the system from 'cross-supplying' to each other and would therefore constitute a 'hardcore' restriction, infringing article 81.

23 Briefly explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed under antitrust law.

An obligation on the buyer not to manufacture or stock products competing with the contract products ('non-compete') may fall within article 81(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 ease or difficulty of market entry for other potential suppliers.

The Commission recognises that such clauses can be pro-competitive because, for example, they give a guarantee of ensured sales to the supplier and a guarantee of continuous supply to the buyer. As such, providing 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 article 81(1) or, alternatively, may satisfy the conditions for exemption under article 81(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 will be permitted for a period of one year following termination of the contract, provided certain criteria are satisfied.

24 Briefly explain how requiring the buyer to purchase from the supplier a certain amount, or minimum percentage of its requirements, of the contract products is assessed under antitrust law.

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 22). 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; obligations to purchase minimum volumes amounting to substantially all of the buyer's requirements ('quantity forcing'); 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 becomes).

25 Briefly explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

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: (i) not to supply the products in question directly itself; and, (ii) not to sell the products in question to other buyers for resale in the assigned territory. Although the Commission's Vertical Guide-

lines do not deal separately with the restrictions imposed on the supplier in this kind of arrangement, 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 at questions 17 and 18 above.

However, there are two particular supplier restrictions that are identified in the Commission's Vertical Block Exemption. The first is a restriction on a supplier of components which prevents that supplier from selling the 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. This is identified as a 'hardcore' restriction and, as such, will almost always fall within article 81(1), will fall outside the safe harbours of the De Minimis notice and the Vertical Block Exemption and will hardly ever qualify for exemption under article 81(3).

The second supplier restriction is termed 'exclusive supply' and covers the situation in which a supplier agrees to supply only to one buyer in the entire EU. The main anti-competitive effect of such arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. Therefore, this is the only instance in which the buyer's market share is of primary importance. If the buyer has a market share of less than 30 per cent, the agreement will benefit from exemption under the Vertical Block Exemption, provided the other criteria for its application are met. Where the buyer has a market share in excess of 30 per cent, the Commission's Vertical Guidelines give an overview of the factors that will be relevant in determining whether the restriction falls within article 81(1) and, if so, whether it might qualify for exemption under article 81(3).

26 Briefly explain to what extent, if any, franchise agreements incorporating licences of intellectual property rights, relating to trademarks or signs and know-how for the use and distribution of products, are assessed differently from 'simple' distribution agreements under antitrust law.

Where the licensing of the franchiser's IPRs is related to the use, sale, or resale of the contract products, the Commission's Vertical Guidelines make it clear that franchise agreements will tend to be classed as vertical agreements and so will be subject to an assessment similar to that conducted in relation to other vertical agreements.

The following obligations imposed on the franchisee will not prevent the application of the Vertical Block Exemption (provided the various other conditions for its application are satisfied): an obligation not to compete with the franchiser's business; an obligation not to buy a stake in a competing franchiser; an obligation not to disclose the franchiser's know-how; an obligation to license to other franchisees any know-how developed in relation to the exploitation of the franchise; an obligation to assist in the protection of the franchiser's IPRs; an obligation only to use the know-how for the purposes of exploiting the franchise; and an obligation not to assign the IPRs without the franchiser's consent.

Where the franchiser's market share exceeds 30 per cent, and the franchise arrangements contain other vertical restraints such as exclusive distribution or non-compete obligations these obligations will be assessed in line with the analyses set out above (questions 18 and 23). However, the Commission's Vertical Guidelines explain that, "the more important the transfer of know-how, the more easily the vertical restraints fulfil the conditions for exemption [under article 81(3)]".

27 Briefly explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most favoured customer or warranting to the buyer that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law.

It is not clear whether such a restriction – in isolation – will constitute a restriction falling within article 81(1). In the event that such a restriction is deemed to fall within article 81(1), it would nonetheless fall within the safe harbour created by the Commission's Vertical Block Exemption, provided the other criteria for its application are met.

However, the Commission has suggested that in sectors where it considers market power to be concentrated among relatively few suppliers (including films and reinsurance), and where equivalent clauses operate in favour of the supplier (ie 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) such arrangements may increase the risk of price coordination.

28 Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify any particular categories of agreement?

The Commission abolished its formal prior-notification system as part of the 'Modernisation' reforms implemented by Regulation 1/2003 on 1 May 2004 (at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT*). Subject to the making of requests for guidance in novel cases (question 30) a notification of a vertical agreement is therefore neither necessary nor, in general, advisable.

29 If there is a formal notification procedure, how does it work, what type of ruling does the agency deliver at the end of the procedure, and what time period is normally required to obtain it? Is a reasoned decision published at the end of the procedure?

Apart from the procedure applying to requests for guidance relating to novel questions (question 30), there is no formal notification procedure.

30 If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

The Commission has published a notice on the circumstances in which it will give parties 'informal guidance' about the likely assessment of an agreement under article 81. (The Commission Notice on informal guidance relating to novel questions concerning articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) – at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(05):EN:NOT.*)

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 guidance letters in relation to vertical restraints.

31 Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

Yes. Private parties showing a 'legitimate interest' (those actually or potentially suffering damage as a result of the conduct in ques-

tion) 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 (in principle, four months). The community courts have long held that the Commission has a wide discretion in choosing which complaints to pursue.

32 How frequently is antitrust law applied to vertical restraints by the agency?

In the six years from 1 January 2001 to 1 January 2007, the Commission took around 10 vertical restraints infringement decisions under article 81. (This includes only cases in which the Commission: (i) focused its enforcement on article 81, as opposed to article 82; (ii) focused its enforcement on the vertical aspects of practices, rather than any horizontal aspects; and (iii) either took a formal infringement decision or identified infringements but reached formal settlement agreements with the parties involved.)

33 Is the agency empowered to impose penalties itself or does it need to have recourse to the court system or another administrative or government agency? What sanctions and remedies can the agency impose when enforcing the antitrust law prohibition of vertical restraints?

Under Regulation 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 the community courts.

34 Briefly, what investigative powers does the agency have when enforcing the antitrust law prohibition of vertical restraints?

Under Regulation 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.

35 Please give an indication of the level or nature of any sanctions or remedies imposed in particular cases. Can any recent trends in the imposition of sanctions or remedies be identified?

In the six years from 1 January 2001 to 1 January 2007, 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 – €45m; Topps – €1.6m; Yamaha – €2.6m; Nintendo – €149m; DaimlerChrysler – €72m; Volkswagen – €31m. In a number of cases, the Commission did not impose fines but instead required the companies to introduce behavioural and/or structural remedies, for example:

- in April 2006 the Commission required Repsol to open up certain long-term exclusive supply contracts between Repsol and hundreds of Spanish service stations;
- in May 2004 the Commission reached a settlement with Porsche to end the tying of after sales service provision to an obligation to sell new cars;
- in April 2003 the Commission approved supply agreements between Interbrew, the largest brewer in Belgium, and pubs, restaurants or hotels located in Belgium, on the condition that Interbrew amended the agreements to offer competitors access to the 'tied' outlets. The amended agreements gave the Belgian outlets significantly increased commercial freedom to carry beers not brewed by Interbrew.

With regard to recent trends, while the Commission still actively enforces its rules on vertical restraints, especially in the motor vehicle sector, it is fair to suggest that market liberalisation, the reduction of anti-competitive state aid and the fight against cartels have been higher enforcement priorities in recent years.

36 Can sanctions or remedies be imposed on companies having no branch or office in your jurisdiction?

Yes. However, how such sanctions would be enforced is not clear.

37 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints 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 Commission has launched several initiatives in order to improve the availability of damages actions for breaches of the EC competition rules, private enforcement is still in its infancy. Private damages actions cannot be brought before the Commission or before the community courts and must instead

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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 EU, with certain jurisdictions, such as the United Kingdom, being more claimant-friendly than others. The key case before the community courts is that of *Courage v Crehan*, a case referred from the UK courts, in which the ECJ states that private parties must be able to claim damages in relation to infringements of article 81. The ECJ 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 responsible for the infringement.

38 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 EU's system for the regulation of vertical restraints are:

- its largely formalistic approach (including, notably, the application of the Vertical Block Exemption which now stands as something of an anathema in a regulatory environment dominated by guidelines, other 'soft laws' and economic assessments); and,
- the importance it attaches to competition law as a tool for assisting in the development of the EU's single market, as reflected in its decisions in cases such as *Volkswagen* and *Nintendo*.