PRACTICE NOTE

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EU vertical agreements

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This note considers the application of EU competition law to vertical agreements. Vertical agreements are the most frequently encountered commercial agreement. They are entered into between two or more firms operating at different levels of the market, for example, between a manufacturer and a distributor. The note provides an essential guide to the Commission's vertical restraints policy, in particular, the Vertical Block Exemption Regulation (*(EU) 2022/720*) (VBER)) and its accompanying guidelines (Vertical Restraints Guidelines).

Scope of this note

This note considers the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to the most frequently encountered types of commercial agreements: vertical agreements. Vertical agreements are entered into between businesses operating at different levels of the market, such as a manufacturer and a supplier, a distributor and a reseller, a franchisor and a franchisee or a principal and an agent. This is in contrast to horizontal agreements, which are entered into between actual or potential competitors acting at the same level on the market.

Vertical agreements normally involve one or both of the parties accepting certain restraints on their freedom of action, such as exclusive dealing requirements and territorial limitations.

This note covers:

- The development of the European Commission's vertical restraints policy.
- The general application of Article 101 of the TFEU.
- The Commission's methodology for examining vertical restraints.
- The application of the Vertical Block Exemption Regulation ((EU) 2022/720) (VBER).
- The Vertical Restraints Guidelines.
- An analysis of the application of the block exemption and guidelines to specific types of vertical restraints, including exclusive and selective distribution, franchising, agency exclusive supply and resale price restrictions.
- An overview of the Geo-blocking Regulation ((EU) 2018/302) that came into effect on 3 December 2018.
- The application of Article 102 of the TFEU to vertical agreements.

This note has been updated to reflect the adoption of Regulation 2022/720 and its accompanying updated guidelines, which apply since 1 June 2022. The previous version of this note was based on Regulation 330/2010 and the accompanying guidelines on vertical restraints from 2010.

Development of Commission's vertical restraints policy

The European Commission's approach to vertical restraints (that is, restrictions of competition in vertical agreements) was historically based on a broad and relatively strict interpretation of Article 101(1) of the TFEU, which prohibits arrangements that prevent, distort or restrict competition in the EU. The Commission often failed to recognise the potential pro-competitive effects of vertical restraints on inter-brand competition. The Commission's approach should be viewed in the economic context in which EU competition law developed during the 1960s and 1970s, when national markets were very much partitioned. While the primary objective of the Commission in this field has been to protect competition, the objective of market integration and the dismantling of private barriers to trade between EU member states has also played a significant role in shaping the EU competition rules which apply to vertical restraints.

In the early 1990s, the then existing "block exemptions" for exclusive distribution, exclusive purchasing and franchising agreements provided the cornerstone of the Commission's policy on vertical restraints. Block exemptions automatically exempt agreements

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that fall within their terms from the prohibition in Article 101(1). However, these early block exemptions had several shortcomings. They were formalistic, and allowed distribution agreements that were capable of having harmful effects to receive automatic exemption by virtue of the manner in which they were drafted. Conversely, many agreements that had pro-competitive effects needed to be redrafted to fit within the terms of a block exemption, a process that gave rise to unnecessary expense. As a result of these shortcomings, the Commission's policy towards vertical restraints was criticised for many years by industry and legal practitioners. At the end of the 1990s, the Commission reacted to these criticisms by initiating a comprehensive review of its policy in relation to vertical restraints.

The final results of this review were the adoption of:

- A single block exemption applying to all vertical arrangements (vertical agreements block exemption (2790/1999)) (adopted on 22 December 1999).
- The Vertical Restraints Guidelines, which set out the Commission's policy in relation to vertical agreements (adopted on 24 May 2000) (*OJ 2000 C291/1*).

The vertical agreements block exemption entered into force on 1 June 2000 and replaced the exclusive distribution, exclusive purchasing and franchising block exemptions as well as covering, for the first time, other types of vertical agreements such as selective distribution and agency arrangements. The 1999 block exemption, together with the accompanying guidelines, placed greater emphasis on economic analysis in developing the Commission's vertical restraints policy. In particular, it introduced a presumption that vertical restraints are legal in the absence of market power on the part of the party benefitting from the restraint.

Regulation 2790/1999 expired on 31 May 2010. It was replaced by *Regulation 330/2010*. A revised version of the Vertical Restraints Guidelines was also adopted (*OJ 2010 C130/1*). Regulation 330/2010 expired on 31 May 2022.

Regulation 330/2010 introduced several amendments, reflecting the increase seen over the previous ten years in the market power of large distributors and retailers and also in sales on the internet. The main change was that the "safe harbour" threshold of 30% (see Safe harbour) now applies to both the market share of the supplier and the market share of the buyer, and not just that of the party benefiting from the restraint.

On 8 November 2018, the Commission published an evaluation and fitness check roadmap for the vertical agreements block exemption Regulation 330/2010, inviting comments by 6 December 2018 (see Legal update, Commission roadmap on review of vertical agreements block exemption). This was followed on 4 February 2019 by a consultation seeking information on the relevance of the block exemption and vertical restraints guidelines and views on whether their objectives have been met, whether the current hardcore and excluded restrictions are still appropriate and whether amendments are needed in the light of market trends over the last five years (such as the increased importance of online sales and the emergence of new market players) (see Legal update, Commission issues consultation to inform evaluation of vertical agreements block exemption).

On 8 September 2020, the Commission published its evaluation of the block exemption regulation and accompanying Guidelines, finding that the market has changed significantly since their adoption in 2010, in particular due to the growth of online sales and of new market players such as online platforms (see Legal update, Commission evaluation of vertical agreements block exemption Regulation 330/2010). These developments have led to several changes in distribution models, such as increased direct sales by suppliers and a greater use of selective distribution systems. Similarly, new types of vertical restrictions, such as restrictions regarding sales through online marketplaces and restrictions on online advertising, as well as retail parity clauses, have become more widespread.

As a result, the evaluation identified several issues with regard to the functioning of the vertical agreements rules, including:

- A lack clarity in the rules defining agency agreements.
- Difficulties in applying rules that are no longer adapted to the current business environment.
- Gaps in the rules, for example, a lack of guidance on how to assess retail parity clauses or restrictions on the use of price comparison websites.
- Scope for diverging interpretations of the rules by national competition authorities and national courts.

On 23 October 2020, the Commission published for consultation its inception impact assessment for the examination of policy options for a potential revision of Regulation 330/2010, and its accompanying Guidelines, exploring a possible revision of the rules in the areas of dual distribution, active sales restrictions, indirect measures restricting online sales and parity (most-favoured nation) obligations (see Legal update, Commission seeks feedback on inception impact assessment of revision of vertical agreements block exemption Regulation 330/2010).

On 18 December 2020, the Commission launched a consultation to seek views on the options set out in the inception impact assessment. It also asked for views on issues relating to resale price maintenance and non-compete obligations, as well as on sustainability agreements, and the impact of the COVID-19 crisis on supply and distribution arrangements (see Legal update, Commission consults on revision of vertical agreements block exemption Regulation 330/2010 and verticals guidelines).

On 9 July 2021, the Commission published for consultation a draft of a revised vertical agreements block exemption regulation and draft revised Guidelines on vertical restraints (see Legal update, Commission consults on revised draft vertical agreements block exemption regulation and vertical guidelines). The revised block exemption proposed the following main changes:

- New definitions of "supplier" (including the provision of online intermediation services) and "active and passive restrictions" (clarifying that a restriction that, directly or indirectly, has as its object to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels is a hardcore restriction of active or passive sales).
- Market share thresholds and other conditions are included to limit the circumstances in which the block exemption applies to dual distribution (where a supplier sells goods or services in direct competition with its wholesalers or retailers, for example, by operating its own shops or online stores).
- (In this context, on 4 February 2022, the Commission published a consultation on proposed guidance about information exchange in dual distribution; see Legal update, Commission invites comments on proposed guidance about information exchange in dual distribution relationships.)
- The hardcore restrictions relating to territorial restrictions and customer allocation have been redrafted and are set out separately for exclusive distribution, selective distribution and free distribution. Some of the exceptions relating to restrictions on active sales have been amended (in particular, to allow shared exclusivity).
- Across-platform retail parity obligations imposed by providers of online intermediation services are excluded from the scope of the block exemption.

On 10 May 2022, the Commission adopted its revised block exemption rules. *Regulation 2022/720* and revised Vertical Restraints Guidelines apply as of 1 June 2022 (replacing Regulation 330/2010, which expired on 31 May 2022) (see Legal update, Commission adopts new vertical agreements block exemption regulation and Guidelines on vertical restraints). Regulation 2022/720 will expire on 31 May 2034.

The revised block exemption includes the following main changes:

- There are new definitions of "supplier" (including the provision of online intermediation services) and "active" and "passive" sales.
- Extension of the dual distribution exemption to wholesalers and importers.
- The hardcore restrictions relating to territorial restrictions and customer allocation have been redrafted and are set out separately for exclusive distribution, selective distribution and free distribution. Some of the exceptions relating to restrictions on active sales have been amended (in particular, to allow shared exclusivity).
- Across-platform retail parity obligations imposed by providers of online intermediation services are excluded from the scope of the block exemption. Regulation 2022/720 still block exempts all other types of parity obligation, including retail parity obligations relating to direct sales channels (narrow parity).

The Vertical Restraints Guidelines have been substantially restructured, updated, expanded and redrafted in places to explain the provisions of the revised VBER and to provide further guidance on, in particular, issues relating to information exchange in dual distribution and e-commerce and online platforms (for example, restrictions on use of online marketplaces and price comparison websites).

For further detail, see Main changes introduced by Regulation 2022/720.

There is a transitional period in which Article 101(1) of the TFEU will not apply during the period from 1 June 2022 to 31 May 2023 in respect of agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption provided for in the new block exemption but which, on 31 May 2022, satisfy the conditions for exemption provided for in Regulation 330/2010.

The text below has been updated to reflect the changes made by Regulation 2022/720.

Modernisation of rules implementing Article 101

1 May 2004 saw the entry into force of *Regulation 1/2003* on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU) (*OJ 2003 L1/1*). This is sometimes referred to as the "Modernisation Regulation", as it substantially changed the procedures governing the enforcement of EU competition law (which were previously embodied in *Regulation 17/62* (*OJ 1962 L13/204*)).

The core feature of Regulation 1/2003 is the shifting from the individual exemption system under which agreements had to be notified to the Commission towards a directly applicable "legal exception" system. By making the provisions of Article 101(3) directly applicable, the Regulation allows the joint enforcement of Article 101(3) by the Commission, the national competition authorities and the national courts.

In essence, the directly applicable legal exception system means that companies need to ensure themselves that their agreements do not restrict competition under Article 101(1), and, in case they do, that, they will fall under the Article 101(3) legal exception. Applications for negative clearance and individual exemption made under Regulation 17/62 have not been available since 1 May 2004 (see Legal exception under Article 101(3)).

In the area of vertical restraints, the task for companies in assessing their business transactions is facilitated by the vertical agreements block exemption and the vertical restraints guidelines (see Vertical agreements block exemption*;* Vertical restraints guidelines *and* Analysis of specific vertical restraints). Prior decisions of the Commission and the European courts under Article 101 assist with this analysis (see Legal exception under Article 101(3)). For a more detailed description of the modernisation of the rules implementing Article 101, see Practice note, Competition regime: Article 101.

To ensure consistent application of competition law, Article 3(1) of Regulation 1/2003 requires EU member states to ensure that agreements that are permitted under Article 101 (including agreements covered by the vertical agreements block exemption) are not prohibited under national competition laws that deal with anti-competitive agreements. This means that a distribution arrangement that complies with the vertical agreements block exemption will usually also be compliant with national competition law in any given EU member state. This is not always the case, however, as member states are permitted to impose stricter prohibitions on unilateral conduct than is the case under the EU prohibition on abuse of dominance, contained in Article 102 of the TFEU (see Geo-blocking Regulation), and may even apply those national prohibitions to companies that do not have a dominant position.

Article 101 regime

The following discussion focuses on the application of Article 101 of the TFEU to vertical agreements specifically and deals with the general aspects of Article 101 in outline only. For more detail, see Practice note, Competition regime: Article 101.

Scope of prohibition

Article 101(1) of the TFEU prohibits as anti-competitive all agreements, decisions and practices between undertakings which may affect trade between EU member states and which have as their object or effect the restriction or distortion of competition within the internal market (see Practice note, Competition regime: Article 101: Prohibition in Article 101(1)). To be caught by Article 101(1), an agreement must have an appreciable effect on competition and on trade between member states (see Appreciable effect).

Agreement or concerted practice

Conduct in the context of a vertical business relationship will not infringe Article 101 if it does not amount to an agreement. For most vertical arrangements, there will be contractual arrangements that set out the parties' respective obligations and this requirement will clearly be satisfied. However, the definition of "agreement" for the purposes of Article 101 is much wider than just written agreements: it catches anything that expresses the parties' joint intention to conduct themselves on the market in a specific way, including an oral understanding, or a tacit "concurrence of wills" between the parties.

If there is no explicit agreement expressing the parties' concurrence of wills, the Commission must prove that the unilateral policy of one party receives the acquiescence of the other party. In particular:

- If the clauses of an agreement drawn up in advance provide for or authorise a party to adopt a specific unilateral policy which will be binding on the other party, the other party will be deemed to have acquiesced to that policy (*Commission v Volkswagen AG (Case C-74/04) EU:C:2006:460*).
- If one party requires explicitly or implicitly the co-operation of the other party for the implementation of its unilateral policy, that other party will be deemed to have tacitly acquiesced to that policy if it implements the policy in practice. The Commission's vertical guidelines give the example of a supplier that announces a unilateral reduction of supplies to prevent parallel trade, in response to which distributors reduce immediately their orders and stop engaging in parallel trade, citing the case of *Bayer AG v Commission (Case T-41/96) EU:T:2000:242*.

  However, this example may be misleading, as in *Bayer*, the European Court of Justice (ECJ) ruled that there was no agreement, partly on the grounds that distributors had continued to engage in parallel trade and tried to find new ways to engage in parallel trade, but also because the unilateral policy in question could be put into effect without the co-operation of the distributors, that is, the supplier could reduce its supplies to distributors regardless of whether they reduced their orders for such supplies. It is arguably this latter factor which will usually be determinative, not the distributors' compliance or otherwise with the desired policy.

- Tacit acquiescence may also be deduced if a party applies a degree of coercion on the other party or parties to implement a given unilateral policy, for example, through a system of monitoring and penalties, and there is evidence that several distributors are implementing that policy in practice.

Agreements with the object of restricting competition

An agreement that is deemed to have the object of restricting competition will be in breach of Article 101(1) regardless of whether it actually had the effect of doing so. The categories of vertical agreements that are typically treated by the Commission as having the object of restricting competition are those that are deemed to be "hardcore" agreements for the purposes of the vertical agreements block exemption (see Hardcore restrictions), for example:

- Imposition of fixed or minimum resale prices.
- Restrictions of passive sales (including sales over the internet) in exclusive distribution agreements.
- Restrictions of cross-supplies between members of a selective distribution arrangement.
- Restrictions of sales to end-users by buyers operating at the retail level of trade.

The Vertical Restraints Guidelines indicate that, in the Commission's view, the listed hardcore restrictions will in general be viewed as restrictions of competition "by object" (*paragraph 179*). However, contrary to hardcore restrictions under Regulation 2022/720, for which it is presumed they generally result in a net harm to competition as a result of which vertical agreements that contain hardcore restrictions cannot benefit from the block exemption, a finding of a restriction by object requires an individual assessment of the vertical agreement concerned.

Indeed, the ECJ has made it clear that restrictions that are treated as hardcore for the purposes of the vertical block exemption do not necessarily equate with restrictions of competition by object, as to determine whether an agreement restricts competition by object it is in every case necessary to examine the content of the provisions of the agreement in question, the objectives it seeks to attain and the economic and legal context of which it forms a part (*Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence (Case C-439/09) EU:C:2011:649*; see Pierre Fabre Dermo-Cosmétique (Selective distribution)).

In September 2006, the General Court partially upheld a 2001 Commission decision that had found that GlaxoSmithKline's (GSK) Spanish subsidiary infringed Article 101(1) by operating a dual pricing system with Spanish wholesalers, under which the prices charged to the wholesalers for medicines sold to pharmacies and hospitals in Spain were lower than those charged for products to be exported to other member states (*Case COMP/36.957/ F3 Glaxo Wellcome, Commission press release IP/01/661*). The General Court ruled that the Commission had erred in finding that the object of the pricing system was to restrict competition as, due to the existence of national regulations governing the price of medicines, it could not be taken for granted that parallel trade tends to reduce prices and increase consumer welfare, as it would in other sectors (*GlaxoSmithKline Services Unlimited v Commission (Case T-168/01) EU:T:2006:265*). The Commission appealed the General Court's ruling on this aspect to the ECJ ((Case C-513/06) EU:C:2008:738).

The General Court, however, upheld the Commission's finding that the dual pricing system did in fact have an anti-competitive effect, remarking that although national regulations mean that competition in the pharmaceutical sector is restricted, this should not result in tolerance for conduct which restricts the remaining competition. The General Court also ruled that the Commission had failed to conduct an adequate examination of GSK's application for exemption of its sales conditions under Article 101(3) and ordered that the Commission reconsider the application.

In October 2009, the ECJ dismissed the Commission's appeal against the General Court's decision. The ECJ found that any agreement whose purpose is to restrict parallel trade across the EU is a restriction by object. In so doing, it confirmed that it is not necessary to demonstrate consumer detriment for an agreement that limits parallel trade to be restrictive of competition by object. Although it considered that the General Court erred in its assessment of the agreement as an effects-based restriction, rather than an object-based restriction, the ECJ considered that the operative part of the General Court's judgment in which it confirmed the Commission's finding that the pricing system infringed Article 101(1) need not be set aside.

The ECJ did agree with the General Court that restrictions by object can be exempted under Article 101(3), and confirmed the General Court's findings in relation to its assessment of the Article 101(3) criteria. The ECJ held that it is sufficient to show that there is a mere probability that these criteria are satisfied. The Commission had been wrong not to take into account the nature and specific features of the pharmaceutical sector and it was not necessary to prove, as had been claimed by the Commission, that all the advantages of the restriction be fully passed on to the consumers in the form of additional R&D for Article 101(3) to apply.

Hub and spoke agreements

Suppliers should be aware of the need to avoid facilitating anti-competitive information exchanges between their customers ("hub and spoke" or "A-B-C" arrangements). If a supplier is found to have knowingly acted as a conduit for collusion between its customers, it may be treated as a participant in that cartel conduct, triggering potential liability for high fines and damages claims from third parties that suffered harm as a result of the collusion. This will be the case notwithstanding that the supplier is not active on the markets affected by the cartel.

While the Commission has fined third parties for facilitating anti-competitive information exchanges between competitors, these cases have tended to involve either trade associations or consultancy firms (see, for example, *AC-Treuhand AG v Commission (Case T-99/04) EU:T:2008:256*). AC Treuhand appealed the General Court's judgment in this case to the ECJ. On 21 May 2015, Advocate General Nils Wahl handed down his opinion that the appeal should be upheld on the grounds that the General Court had erred in agreeing with the Commission's finding that AC Treuhand had directly participated in the heat stabilisers cartels in breach of Article 101 by virtue of its administrative role in the organisation and conduct of cartel meetings. The Advocate General considered that AC Treuhand acted in its capacity as a consultancy firm and was clearly not active, nor potentially active, on the relevant markets as regards the applicable cartel decisions. It, therefore, should not have been found to have directly participated in the heat stabilisers cartels (*Case C-194/14*; see Legal update, Advocate General opinion on AC Treuhand's appeal of General Court judgment on heat stabilisers cartel decisions).

The ECJ, however, disagreed with the Advocate General and rejected AC Treuhand's appeal, on 22 October 2015. The ECJ found that AC Treuhand was essential for the operation of the cartel, and nothing in Article 101 of the TFEU prevented the Commission from applying it to parties that operated on markets different to those impacted by the infringement. It considered that there is nothing in the wording of Article 101 indicating that its prohibition is only directed at parties active in the affected markets, and that it is well-established that even passive participation may be caught by Article 101. The ECJ also considered that it would undermine the objective of competition law to interpret Article 101 otherwise. Its judgment, therefore, affirms the decision of the Commission and judgment of the General Court, and clarifies that competition infringement can occur irrespective of whether the parties to a restrictive agreement, or concerted practice, impact the market directly or merely facilitate the infringing conduct (see Legal update, ECJ judgment rejects AC Treuhand appeal).

The Commission has also fined a broker, ICAP, for facilitating cartels in relation to Yen interest rate derivatives (see Legal update, Commission fines ICAP for facilitating Yen interest rate derivatives cartels), who appealed the decision to the General Court (*Case T-180/15*; see *ICAP (YIRD cartel)*). On 10 November 2017, the General Court partially upheld the appeal. It found that the Commission had not erred in establishing that ICAP had infringed Article 101(1) due to its "facilitation" of four of the cartel infringements, but that, in relation to a bilateral cartel between UBS and RBS in 2008, the Commission had not established to the requisite legal standard that ICAP was aware of RBS's role in that cartel. The General Court also ruled that the Commission had erred in establishing the duration of ICAP's participation in four of the cartels in which ICAP was found to have participated.

In the UK, the Office of Fair Trading (OFT) (predecessor of the Competition and Markets Authority (CMA)) issued decisions in respect of several hub and spoke cases in which retailers exchanged information via a supplier, many of which have been the subject of judgments of the UK courts (see Practice note, UK Vertical agreements: Vertical agreements involving horizontal co-ordination).

Accordingly, where a supplier's employee becomes aware of the future pricing intentions of a customer (for example, timing or amount of a future intended price rise), they should be careful to ensure that such information is not then passed on to other customers and, preferably, is not disclosed to other employees of the supplier, in particular those acting as account managers for other customers.

Appreciable effect

An agreement that does not have the object of restricting competition will not be caught by Article 101(1) unless it has an **appreciable** effect both on competition and trade between member states. The principle was first stated in *Völk v Vervaecke (Case 5/69) EU:C:1969:35*, where the ECJ said that "an agreement falls outside the prohibition of Article 101 where it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question". Guidance as to whether an agreement has an appreciable effect on competition is now set out by the Commission in its Notice on agreements of minor importance (see Notice on agreements of minor importance). Separate guidelines explain the circumstances in which the Commission considers that an agreement will not have an effect on trade between EU member states (see Guidelines on the effect on trade concept).

Notice on agreements of minor importance

According to this Commission Notice (*OJ 2014 C291/1*) (also known as the de minimis notice), certain agreements of "minor importance" are deemed not to contravene Article 101(1) (see Practice note, Competition regime: Article 101: Notice on agreements of minor importance).

A distribution agreement will be deemed to be of "minor importance" if the market share held by each of the firms that are parties to it does not exceed 15% of any relevant market affected by the agreement, in the case of vertical agreements between parties who are not actual or potential competitors in any market affected by the agreement (by contrast, the threshold for horizontal agreements between actual or potential competitors in the markets affected by the agreement is a combined threshold of 10%). When competition in the relevant market is limited by the cumulative effect of parallel networks of similar agreements established by several manufacturers or traders, these market share thresholds are reduced to 5% both for vertical and horizontal agreements. A cumulative foreclosure effect is, however, considered unlikely if less than 30% of the relevant market is covered by parallel networks of agreements having similar effects (see Cumulative effect). The market share thresholds are irrespective of the turnover of the parties, so large companies with limited market share may be able to take advantage of the notice. Although the de minimis notice is not legally binding, it is widely followed in practice.

The turnover of the parties still has some relevance, however, for agreements between independent small and medium-sized enterprises (SMEs). Agreements between SMEs are not generally caught by the prohibition in Article 101(1) even if the 15% market share threshold is exceeded. Under the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (*OJ 2003 L124/36*), the category of SMEs includes firms whose annual turnover is below EUR50 million or whose total balance sheet is below EUR43 million, and who employ not more than 250 people. For the purpose of calculating these thresholds, an undertaking includes all companies within the same group as the parties to the agreement. This definition of SMEs updated a 1996 Recommendation and has applied since 1 January 2005.

Certain types of agreement are excluded from the benefit of the notice, even if the market share thresholds are not exceeded, including agreements intended to set resale prices or which contain certain types of territorial protection clause (so-called hardcore restrictions).

Even vertical agreements that exceed the 15% threshold may not necessarily restrict competition (*Langnese-Iglo v Commission (Case T-7/93) EU:T:1995:98, at paragraph 98; Notice on agreements of minor importance, point 2*), but this can only be assessed on a case-by-case basis. Such an assessment is relevant in particular for vertical agreements not covered by the vertical agreements block exemption (see Vertical agreements block exemption).

In December 2012, the ECJ handed down a ruling on a reference from the French Supreme Court on whether national competition authorities can take enforcement action against companies found to be in breach of Article 101 of the TFEU, but who are below the market share thresholds in the de minimis notice (*Expedia v Autorité de la concurrence and others (Case C-226/11) EU:C:2012:795*; see Legal update, ECJ ruling on ability of national authority to take action against agreement below de minimis threshold).

The ECJ concluded that national competition authority can apply Article 101(1) to an agreement between undertakings that may affect trade between member states, but that does not reach the thresholds specified by the Commission in its de minimis notice, provided that the agreement constitutes an appreciable restriction of competition within the meaning of Article 101.

The ECJ also held that an agreement that may affect trade between member states and that has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition.

The Commission considered that it was necessary to modify the de minimis notice in the light of the clarification given in the *Expedia* judgment that the concept of a non-appreciable impact on competition (de minimis) does not apply when the agreement in question has an anti-competitive object. Modification of the de minimis notice was necessary to ensure that no agreements containing "by object" restrictions can benefit from the safe harbour that it provides.

The de minimis notice was, therefore, revised in 2014 to make it clear that agreements that have as their object the prevention, restriction or distortion of competition do not benefit from the safe harbour provided by the de minimis market share thresholds (which have not been changed). Therefore, the de minimis notice only applies to agreements that may affect trade between member states and which have an anti-competitive effect. For these purposes, the notice states that restrictions that are listed as hardcore restrictions in any of the block exemption regulations are generally considered to constitute restrictions by object.

The revision to the de minimis notice was accompanied by new Commission guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the de minimis notice. This identifies the restrictions in agreements between competitors and non-competitors which are generally regarded as restrictions by object. By reference to the various block exemptions, it also identifies restrictions which will not prevent an agreement from benefiting from the safe harbour of the de minimis notice (see Legal update, Commission adopts revised competition de minimis notice and guidance on restrictions "by object").

Guidelines on the effect on trade concept

The effect on trade criterion determines when Article 101 (or Article 102), rather than national competition law, applies, confining the scope of application of the former to agreements and practices that are capable of having a minimum level of cross-border effects within the EU. However, even if EU competition laws do not apply, most national competition laws in the EU mirror those applicable at the EU level. This means that an agreement that would be prohibited under EU law but for its lack of effect on trade between EU member states will usually infringe national competition laws in any event.

These Guidelines (*Commission's Guidelines on the effect on trade concept, OJ 2004 C101/81*) set out the principles indicating whether one jurisdictional criterion for Article 101 (or Article 102), that is, that the agreement is likely to appreciably affect trade between member states, is likely to be fulfilled.

In Article 101 cases, provided that the agreement as a whole is capable of affecting trade between member states, it is not necessary for each individual part of the agreement to be capable of doing so.

Application of the effect on trade criterion requires that three aspects be addressed:

- **Trade between member states.** The concept of "trade between member states" covers not only traditional exchanges of goods and services, but all cross-border economic activity, including establishment. It also includes cases where agreements or practices affect the competitive structure of the market.
- **The notion "may affect".** It must be possible to foresee with a sufficient degree of probability on the basis of objective factors of law or facts that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states. In cases where the agreement or practice is liable to affect the competitive structure inside the EU, EU law jurisdiction is established.
- **The concept of "appreciability".** The effect on trade criterion incorporates a quantitative element, limiting EU law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Appreciability can be measured both in absolute terms (turnover) or relative terms (market share).

The Commission holds the view that, in principle, agreements are not capable of appreciably affecting trade between member states (the NAAT rule) where the parties' market share within the EU does not exceed 5% and, in the case of vertical agreements, the aggregate annual EU turnover of the supplier (aggregate annual EU turnover of the undertakings concerned in the case horizontal agreements) in the products covered by the agreement does not exceed EUR40 million. In the case of licence agreements, the relevant turnover shall be the aggregate turnover of the licensees and licensor in products incorporating the licensed technology.

Where the agreement can by its very nature affect trade between member states, for example, because it concerns territorial exclusivity or covers several member states, there is a rebuttable presumption that such effects are appreciable where the relevant turnover of the parties exceeds EUR40 million, or the 5% market share threshold is exceeded (provided the agreement does not only cover part of one member state).

An agreement covering a single member state may have an appreciable effect on trade between member states provided certain conditions are met. In the case of vertical agreements, trade between member states may be appreciably affected if they give rise to foreclosure effects, which may, for example, occur when suppliers impose exclusive purchase obligations on buyers.

An agreement covering only part of a single member state will have an appreciable effect where it forecloses access to a regional (as opposed to local) market, provided the volume of sales affected is significant in relation to the overall sales of the products in the member state in question or where it hinders competitors from other member states from gaining access to a part of a member state which constitutes a substantial part of the internal market.

As regards agreements involving undertakings in third countries, it is necessary to distinguish between agreements which have as their object a restriction of competition in the EU, as, for example, agreements whereby competitors in the EU and in third countries share markets, and those which do not. Whereas the former are normally by their very nature capable of affecting trade between member states, in the latter case, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity within the EU and therefore patterns of trade between member states are capable of being affected. With respect to vertical agreements preventing re-imports into the EU, the principles of *Javico v Yves St Laurent (Case C-306/96) EU:C:1998:173* apply (see *Javico v Yves St Laurent (Export ban)*).

While EU competition law does not apply to an agreement that does not affect trade between member states, the agreement is nevertheless likely to remain subject to equivalent prohibitions on anti-competitive agreements that apply under national competition laws in one or more member states. For the most part, these national prohibitions are identical in substance to the Article 101 prohibition, save for the requirement for an effect on trade between member states. Consequently, if a restriction would be prohibited under Article 101 but for the absence of any effect on trade between member states, it will usually be prohibited under the national competition laws of one or more member states.

Consequences of infringement

Any restrictions found to be in contravention of Article 101(1) are automatically void and unenforceable (*Article 101(2)*), and the parties to them may also be subject to substantial fines (*Article 23, Regulation 1/2003*). In addition, a third party may claim damages in its local national court against the operators of the offending restrictions, if they can show that they have suffered loss as a result (see Practice note, Competition regime: Consequences of infringement). In certain circumstances, a party to an infringing contract may be able to sue its co-contractor for damages. In *Courage v Crehan (Case C-453/99) EU:C:2001:465*, the ECJ held that the rule that a party may not benefit from its own illegality may not apply in the situation where the parties are of such unequal bargaining power that the illegal terms were effectively imposed on the weaker party, who is, therefore, innocent.

Examples

The Commission fined Volkswagen EUR102 million for infringing Article 101(1) by entering into agreements with its Italian dealers to prohibit or restrict sales to consumers from another member state, and to other authorised dealers in the distribution network established in other member states (*VW-Audi OJ 1998 L124/60*). The fine was, however, reduced on appeal to the General Court to EUR90 million (*Volkswagen AG v Commission (Case T-62/98) EU:T:2000:180*).

In 2000, the Commission imposed on Opel Nederland BV a fine of EUR43 million for infringing Article 101(1) by entering into agreements with Opel dealers in the Netherlands aimed at restricting or prohibiting export sales of Opel vehicles to end-users resident in other member states and to Opel dealers established in other member states (*Opel OJ 2001 L59/1*). According to the Commission's decision, Opel's general strategy comprised, among other things:

- A restrictive supply policy, limiting supplies on the basis of existing sales targets with respect to sales to final consumers and with respect to sales to other Opel dealers.
- A restrictive bonus policy excluding export sales to final consumers from retail bonus campaigns.
- An indiscriminate direct export ban applied with respect to sales to final consumers and with respect to sales to other Opel dealers.

The Commission's decision was essentially confirmed by the General Court. However, the General Court considered that the Commission had not succeeded in establishing the existence of a restrictive supply measure, limiting supplies by reference to existing sales objectives, and, therefore, reduced the fine to EUR35.475 million (*General Motors Nederland BV and Opel Nederland BV v Commission (Case T-368/00) EU:T:2003:275*). The General Court's judgment was subsequently confirmed on further appeal by General Motors (*General Motors Nederland BV (formerly General Motors BV and Opel Nederland BV) v Commission (Case C-551/03) EU:C:2006:229*).

In 2002, the Commission fined the Japanese computer games manufacturer Nintendo and its seven European distributors EUR167.8 million for participating in a vertical arrangement with the aim of partitioning the European single market (*Nintendo OJ 2003 L255/33*). According to the arrangements between Nintendo and its distributors, each distributor was obliged to prevent parallel trade from its territory. Traders that allowed parallel exports to occur were being punished by being given smaller shipments or by being boycotted altogether. On 30 April 2009, the General Court handed down its judgments in appeals by Nintendo and two of its distributors, CD-Contact Data GmbH and Itochu Corp, reducing the fines imposed on Nintendo and CD-Contact Data (*Nintendo Co Ltd and Nintendo of Europe GmbH v Commission (Case T-13/03), CD-Contact Data v Commission (Case T-18/03) EU:T:2009:132 and Itochu Corp v Commission (Case T-12/03) EU:T:2009:130*). The General Court reduced the fine imposed on Nintendo to EUR119.2425 million, to take into account the fact that it should have benefited from the same level of reduction of fine as that granted to John Menzies, namely 40%, as both undertakings co-operated with the Commission at the same stage in the administrative procedure and both provided information of comparable value. The General Court also found that the Commission erred in not finding that CD-Contact Data played a passive role in the infringement. The Commission should, therefore, have reduced the fine imposed on CD-Contact Data by 50% in application of the principle of equal treatment. An appeal by CD-Contact Data against the General Court's judgment was dismissed by the ECJ in February 2011 (*Activision Blizzard Germany GmbH (formerly CD-Contact Data GmbH) v European Commission Case (C-260/09) EU:C:2011:62*). In particular, the ECJ concluded that the General Court had not erred in establishing, on the basis of the overall evidence and context, that there had been a concurrence of wills between Nintendo and CD-Contact Data with a view to limiting parallel trade.

In contrast, in July 2003, the Commission fined musical instruments manufacturer Yamaha EUR2.56 million for including provisions in its selective distribution arrangements that restricted trade in the EEA and maintained resale prices (*Yamaha, Commission decision of 16 July 2003, Commission press release IP/03/1028*). The Commission found that Yamaha had breached Article 101(1) by imposing a range of restrictions on its official dealers in Germany, Italy, France, Austria, the Netherlands, Denmark and Iceland. Official dealers were required to sell only to final customers, purchase exclusively from Yamaha subsidiaries, contact Yamaha before exporting via the internet, and sell at specified resale prices. Although the Commission concluded that these restrictions constituted a serious infringement of EU competition law, it found that there were several mitigating factors. The restrictions were only imposed on a limited number of dealers in respect of certain products rather than in all of Yamaha's agreements. Therefore, this did not appear to be a deliberate, co-ordinated strategy to restrict trade. Further, the restrictions were not implemented in full. The Commission also gave consideration to the fact that Yamaha terminated most of the restrictions and took steps to redesign its European distribution system as soon as the Commission intervened. Accordingly, the fine of EUR2.56 million is substantially lower than that imposed by the Commission on other companies such as Volkswagen and Nintendo for use of their distribution systems to partition the EEA market or to maintain resale prices.

Similarly, in May 2004, the Commission fined Topps for entering into a series of agreements with several of its distributors in the United Kingdom, Italy, Finland, Germany, France and Spain aimed at preventing parallel imports of stickers and collectible products bearing the image of Pokémon (*Commission press release IP/04/682*). Even although the Commission found that the practices constituted a hardcore violation of Article 101(1), in view of the short duration of the infringement and of its termination immediately after receiving a warning, the Commission set the overall fine at only EUR1.59 million.

In view of the potentially serious consequences if an agreement is found to be prohibited under Article 101(1), it is essential to consider at an initial stage whether the agreement is likely to contravene the prohibition and, if it does, whether it is likely to benefit from an exemption under Article 101(3) (see Legal exception under Article 101(3), Modernisation of rules implementing Article 101 and Practice note, Competition regime: Article 101: Exemption under Article 101(3)).

Legal exception under Article 101(3)

Until 1 May 2004, the Commission had sole power (subject to scrutiny by the European Courts) under Article 101(3) of the TFEU to declare Article 101(1) inapplicable in the case of any agreement or category of agreement where the overall economic benefits of the agreement outweigh the negative impact on competition on receipt of a notification requesting for individual exemption. With the entry into force of *Regulation 1/2003*, the advance notification procedure was abolished. Companies now must form their own view on whether an agreement complies into the conditions for the legal exception regime under Article 101(3) and would survive an attack by a regulator or third party.

Factors for assessment under Article 101(3)

To benefit from the legal exception regime under Article 101(3), a vertical agreement must satisfy the following criteria:

- It must contribute to improving production or distribution or to promoting technical or economic progress.
- It must allow consumers a fair share of these benefits (this can often be assumed if there is sufficient residual competition on the market).
- It may not impose on the firms concerned vertical restraints which are not indispensable to the attainment of these benefits.
- It may not afford such firms the possibility of eliminating competition in respect of a substantial part of the products in question. According to the Vertical Restraints Guidelines, where an undertaking is dominant or becoming dominant as a consequence of the vertical agreements, a vertical restraint that has appreciable anti-competitive effects cannot in principle be exempted. (Some restraints may, however, fall outside Article 101(1), for example, those protecting essential know-how or investments.)

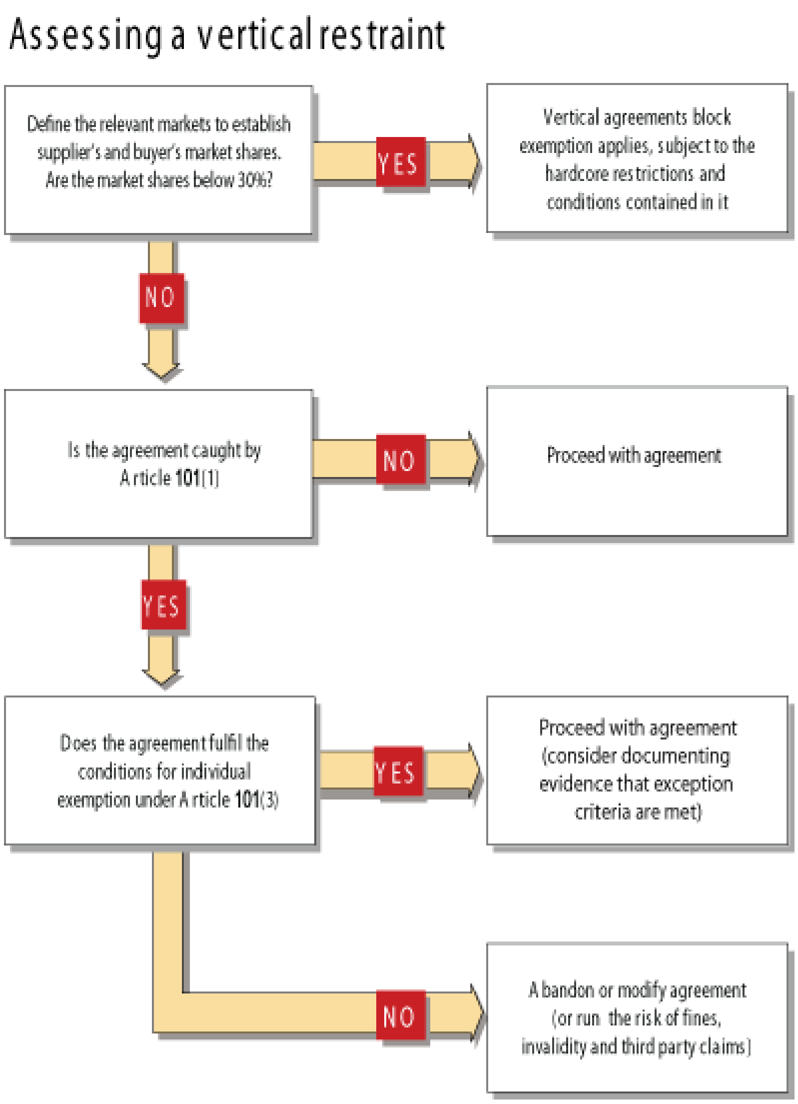
The conditions for the legal exception regime are considered in detail in Practice note, Competition regime: Article 101: Exemption under Article 101(3). The vertical restraints block exemption is considered at Vertical agreements block exemption.

Methodology for assessing vertical restraints

Under the VBER and accompanying Vertical Restraints Guidelines, vertical restraints are presumed to be legal in the absence of market power. The vertical agreements block exemption uses a market share threshold of 30% of the relevant market as a test for the existence of market power. Below this threshold (the so-called safe harbour) no market power is presumed and agreements may benefit from the block exemption. There is no presumption of illegality above the 30% threshold, but the block exemption will not apply and companies must make their own assessment to determine whether an agreement is restrictive of competition. The Vertical Restraints Guidelines are intended to assist with this analysis (see Analysis of specific vertical restraints).

The Guidelines establish the following steps for the assessment of a vertical restraint:

- The companies involved need to **define the relevant market** to establish the market shares of the supplier and the buyer (see Ascertaining market share).
- For the buyer, the relevant share is that of the market for purchasing goods or services in question, which will often be of much broader geographic scope than the downstream market on which it resells the relevant goods or services. For the supplier, the relevant share is that of the market on which it sells the goods or services in question (*paragraph 171, Vertical Restraints Guidelines*).
- If the relevant market shares of the supplier and the buyer are each below the 30% threshold, the vertical agreement is covered by the block exemption, provided that the agreement does not contain hardcore restrictions (*Article 4, VBER*) or any excluded restrictions (*Article 5, VBER*) that cannot be severed from the rest of the agreement.
- If the relevant market share of the supplier or the buyer is above the 30% threshold or the agreement contains one or more hardcore restrictions or non-severable excluded restrictions, it is necessary to assess whether the vertical agreement falls within Article 101(1).
- If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for legal exception under Article 101(3).



Vertical agreements block exemption

The scope and application of the block exemption are considered below. For a flowchart guide and overview of the application of the block exemption, see Practice note, Flowchart guides: Vertical agreements in general and the vertical agreements block exemption.

Scope

"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 which relate to the conditions under which the parties may purchase, sell or resell certain goods or services (*Article 1(1)(a), VBER*).

"Vertical restraints" are restrictions of competition contained in vertical agreements (*Article 1(1)(b)*).

There are three elements to this definition:

- The agreement must be between two or more undertakings.
- Each undertaking must operate, for the purposes of the agreement, at a different level of the production or distribution chain.
- The agreement must relate to the conditions of purchase, sale or resale of services or goods. This means that vertical agreements relating to goods and services, final and intermediate, are all covered. The only exception is the motor vehicles sector, as long as this sector remains covered by a specific block exemption. Under the block exemption, the product or service provided by the supplier may either be resold by the buyer or used as an input to produce the buyer's own product or service (as in the case of goods supplied under an industrial supply contract). The block exemption applies to goods sold and purchased for renting to third parties, but not to rental and lease agreements.

The VBER will apply to the following categories of vertical agreements only if the particular conditions applicable to each respective category are satisfied:

Associations of retailers

Vertical agreements between an association of undertakings and its members, or between the association and its suppliers, are only covered by the block exemption if both of the following apply:

- All the members of the association are retailers of goods (not services).
- No individual member of the association (together with its connected undertakings) has an annual turnover exceeding EUR50 million (the rules for calculating turnover are set out in Calculating turnover) (*Article 2(2)*).

Where the block exemption does apply to such vertical agreements, this is stated to be without prejudice to the application of Article 101(1) to **horizontal** agreements between the members of the association, or to decisions adopted by the association (*Article 2(2)*; see Practice note, Transactions and practices: EU Co-operation between competitors).

Intellectual property rights

The block exemption applies to provisions in vertical agreements that relate to the assignment to the buyer or use by the buyer of intellectual property rights (IPRs), provided that:

- The IPR provisions are part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services.
- The IPRs are assigned to, or licensed for use by, the buyer.
- The IPRs do not constitute the primary object of the agreement.
- The IPR provisions are directly related to and necessary for the use, sale or resale of the goods or services supplied by the buyer or its customers (see Vertical agreements and intellectual property rights).
- The IPR provisions do not contain restrictions of competition that have the same object or effect as vertical restraints not exempted under the block exemption (*Article 2(3)*).

The third condition requires that to be covered by the block exemption, the primary object of the agreement must not be the assignment or licensing of IPRs, but the purchase or distribution of goods or services and the IPR provisions must serve the implementation of the vertical agreement. Agreements relating to the use of the licensor's IPRs will be covered by the block exemption as long as they are "directly" related to the what the licensee produces with the licensed technology rights (see *paragraphs 71-79, Vertical Restraints Guidelines*).

Agreements having as the primary object the assignment or licensing of IPRs may benefit from the Technology Transfer Block Exemption Regulation (316/2014).

Agreements between competitors

Vertical agreements between competing or potentially competing firms are not covered by the block exemption (*Article 2(4); paragraphs 88-103, Vertical Restraints Guidelines*), except in certain, limited circumstances.

Under Regulation 2022/720, a competing undertaking is defined as an actual or potential competitor (*Article 1(1)(c)*). Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small and permanent increase in relative prices it is likely that this first company, within a short period of time normally not longer than one year, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. The guidelines emphasise that the assessment must be realistic and not based on a mere theoretical possibility of market entry. However, there is no need to demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there.

As an exception to the general rule that vertical agreements between competitors are not block exempted, vertical agreements between actual or potential competitors are covered by the block exemption where the firms enter into a **non-reciprocal** vertical agreement (that is, where the buyer of the contract goods or services does not also supply competing goods or services to the supplier) and either:

- The supplier is active at an upstream level as a manufacturer, importer or wholesaler and at a downstream level as an importer, wholesaler or retailer of goods, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods (a wholesaler or retailer who provides specifications to a manufacturer to produce particular goods under that wholesaler or retailer's brand name is not to be considered a manufacturer of such own brand goods).
- The supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and does not provide competing services at the level of trade where it purchases the contract services.

These two exceptions in Article 2(4) of the VBER both concern scenarios of dual distribution. Dual distribution covers situations in which a supplier not only sells its goods or services through independent distributors, but also directly to end-customers in direct competition with its independent distributors. This has become more common, in particular due to the growth of online sales.

The rationale for these exceptions is that, in a dual distribution scenario, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and the buyer at the downstream level is considered to be less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream levels.

Article 2(5) and (6) makes clear that the exceptions in Article 2(4) do not apply to:

- The exchange of information between the supplier and the buyer that is either:
  - not directly related to the implementation of the vertical agreement; or
  - not necessary to improve the production or distribution of the contract goods or services.

  Whether these criteria are met in a dual distribution scenario may depend on the particular model of distribution. The Vertical Restraints Guidelines provide a list of examples of information that may, depending on the particular circumstances, be directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services (*paragraph 99*) and a list of examples that are unlikely to fulfil these two conditions (*paragraph 100*).
- Vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services.

Relationship to other block exemption regulations

The block exemption does not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, for example (*Article 2(7); paragraph 88, Vertical Restraints Guidelines*):

- Agreements covered by the technology transfer block exemption (see Practice notes, Transactions and practices: EU Intellectual property transactions and Flowchart guides: Technology transfer block exemption).
- Agreements covered by the research and development or specialisation block exemptions (see Practice note, Transactions and practices: EU Collaborative agreements).
- Agreements covered by the motor vehicles block exemption (see Practice notes, Flowchart guides: Specific observations on selective distribution systems and The application of competition law to the motor vehicles sector.

An example of the Commission's past enforcement practice in relation to vertical agreements in the motor vehicle sector is provided by the Commission's September 2007 press release on decisions taken against DaimlerChrysler, Toyota, General Motors and Fiat (*Commission press release IP/07/1332*).

Vertical agreements in the motor vehicle sector in the EU have traditionally been governed by a separate block exemption, which covers distribution agreements relating to new motor vehicles and spare parts, and distribution agreements which concern the provision of repair and maintenance services by authorised repairers. Before 31 June 2013, these were covered by two separate block exemptions: *Regulation 1400/2002* on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (*OJ 2002 L203/30*) and *Regulation 461/2010* of the same name (*OJ 2010 L129/52*).

Regulation 1400/2002 was due to expire on 31 May 2010, and, on 27 May 2010, the Commission adopted a new motor vehicle block exemption regulation (*Regulation 461/2010*) and accompanying guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (*OJ 2010 C138/16*). The new block exemption Regulation 461/2010 prolonged the application of the then existing motor vehicle block exemption (Regulation 1400/2002) to vertical agreements relating to the purchase, sale or resale of new motor vehicles until 31 May 2013. Since 1 June 2013, the vertical agreements block exemption has applied to these agreements.

Since 1 June 2010, vertical agreements relating to the motor vehicle aftermarket (the purchase, sale or resale of spare parts or provision of repair and maintenance services) have benefited from exemption only if they satisfy the conditions of the VBER and do not contain any additional hardcore restrictions listed in the motor vehicles block exemption Regulation 461/2010. These are:

- Restrictions on the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle.
- A restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end-users.
- A restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

In April 2023, Regulation 461/2010 was amended to extend its duration from 31 May 2023 to 31 May 2028.

Safe harbour

The principle underlying the vertical agreements block exemption is that vertical restraints will be presumed legal in the absence of market power. The block exemption creates a presumption of legality for vertical agreements which are concluded by undertakings with market shares of less than 30% (*recital 8*). Below this threshold, there is presumed to be no market power and the block exemption will apply, unless the agreement contains certain hardcore restrictions (see Hardcore restrictions). The vertical restraints guidelines refer to this as the "safe harbour" created by the block exemption.

Outside the safe harbour

If the market share exceeds the 30% threshold, there is no presumption of illegality, but companies are encouraged to make their own assessment of an agreement to determine whether it restricts competition. The Vertical Restraints Guidelines are intended to assist with this analysis. If an agreement is subsequently examined by the Commission, the burden of proving that the agreement infringes Article 101(1) falls on the Commission. Where anti-competitive effects are shown, with the result that Article 101(1) applies, the company concerned may explain why it believes the conditions for individual exception under Article 101(3) are fulfilled (see Modernisation of rules implementing Article 101).

Ascertaining market share

Under *Regulation 2790/1999*, it was the market share of the supplier that was generally decisive (except in the case of exclusive supply obligations). If the market share held by the supplier did not exceed 30% of the relevant market on which it sold the contract goods or services, the block exemption would apply (*Article 3(1), Regulation 2790/1999*). That is no longer so under *Regulation 2022/720* (and before that, *Regulation 330/2010*). Now if the market share held by the supplier exceeds 30% of the relevant market on which it sells the contract goods or services or the market share held by the buyer exceeds 30% of the relevant market on which it purchases the contract goods or services, the block exemption will not apply (*Article 3(1), Regulation 2022/720*). Clearly the market on which the buyer purchases the contract goods may be different from the downstream market on which it resells the goods.

This change to the market share meant that some arrangements existing as of 1 June 2010 may have lost the benefit of the block exemption. Businesses with vertical agreements that met the conditions of Regulation 2790/1999 as of that date had a grace period of one year to review those arrangements and make necessary changes to comply with the new rules. The grace period expired on 31 May 2011.

Where in a multi-party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold both as a buyer and a supplier for the block exemption to apply (*Article 3(2)*). For example, 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% and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30% on their respective purchase markets to benefit from the block exemption.

The market share of the supplier must be calculated on the basis of market sales value data and the market share of the buyer must be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, can be used to establish the market share (*Article 8(a)*). The market share of the supplier must include any goods or services supplied to vertically integrated distributors for the purposes of sale. The Vertical Restraints Guidelines specify that the production or supply of intermediate goods or services for the supplier's own use may be relevant for the competition analysis in a particular case, but that it is not taken into account for the purposes of market definition or for the calculation of market shares under the VBER.

The VBER contains the following additional rules as to the calculation of the relevant market share:

- The market share is to be calculated on the basis of data relating to the preceding calendar year (*Article 8(b)*).
- If the market share initially does not exceed 30%, but subsequently rises above that level, the block exemption continues to apply for a period of two consecutive calendar years following the year in which the 30% threshold was first exceeded (*Article 8(d)*).

The principles to be followed in defining the relevant market itself are discussed in Practice note, Market Definition: Economic Concepts and Evidence (UK and EU).

Hardcore restrictions

The block exemption contains a "blacklist" of vertical restraints which, if included in a vertical agreement, will mean that the block exemption cannot apply (despite the fact that the market share threshold is not exceeded) (so-called hardcore restrictions) (*Article 4*). The inclusion of any such restraint prevents the entire agreement from obtaining the benefit of the block exemption, not merely the clause or sub-clause in which the restraint is contained: there is no severability for hardcore restrictions for the purposes of the block exemption. Exemption of hardcore restraints is unlikely, but undertakings can demonstrate pro-competitive effects under Article 101(3) in any individual case (see Positive effects).

The list of hardcore restrictions applies to vertical agreements concerning trade within the EU. Insofar as vertical agreements concern exports outside the EU or imports or re-imports from outside the EU (see *Javico v Yves St Laurent (Export ban)*).

The hardcore restrictions are as follows.

Resale price maintenance

Restricting the buyer's ability to determine its sale price (*Article 4(a); paragraph 185, Vertical Restraints Guidelines*). Any agreement or restrictive practice having as its direct or indirect object the establishment of a fixed or minimum resale price level to be observed by the buyer is blacklisted.

Resale price maintenance (RPM) can be applied through direct means, such as contractual provisions that directly set the price that the buyer must charge to its customers, which allow the supplier to set the resale price, or which impose a minimum price. Forbidden RPM would also include an agreement fixing the distribution margin or the maximum level of discount, making the grant of rebates or the sharing of promotional costs conditional on adhering to a given price level, linking a resale price to the resale prices of competitors, or using threats, intimidation, warnings, penalties, delay or suspension of deliveries as a means of fixing the prices charged by the buyer.

The Commission has left this unchanged from *Regulation 2790/1999* despite speculation during its review of the block exemption that it might no longer consider fixed or minimum resale prices to be hardcore restrictions, particularly given the US Supreme Court's 2007 judgment in *Leegin Creative Leather Products Inc v PSKS Inc,* in which it was held that agreements fixing minimum resale prices should be analysed on a rule-of-reason basis (*127 S. Ct. 2705 (2007)*) (see Legal update, US Supreme Court overturns 96-year old rule that minimum resale price maintenance is per se illegal). However, the 2010 guidelines did recognise that resale price maintenance create efficiencies in certain (albeit limited) circumstances and may therefore satisfy the criteria for individual exception (*paragraph 197, Vertical Restraints Guidelines*) (*see* Resale price restrictions).

The 2022 Vertical Restraints Guidelines clarify that RPM can also be achieved indirectly via minimum advertised prices (MAPs). MAPs prohibit the distributor from advertising prices below a level set by the supplier. Despite leaving the distributor free to sell at a price that is lower than the advertised price, they disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts and, therefore, remove a key parameter for price competition (*paragraph 189, Vertical Restraints Guidelines*). MAPs might be justified under Article 101(3) of the TFEU to prevent a particular distributor from using the product of a supplier as a loss leader, if it is possible to demonstrate that the distributor regularly resells a product below the wholesale price and the MAP is aimed at preventing the distributor from selling below the wholesale price (*paragraph 197(c)*).

Indirect pressure or means to achieve price-fixing can further result from the measures taken to identify price-cutting distributors, such as the implementation of a price monitoring system, the obligation to apply a most favoured customer clause which, in the context of a narrow oligopoly, would reduce the incentive to cut price, or the obligation on retailers to report other members of the distribution network deviating from the standard price level. In that context, the Vertical Restraints Guidelines note that price monitoring is increasingly used in e-commerce, where both suppliers and retailers often use price monitoring software, increases price transparency in the market and allows manufacturers to effectively track the resale prices in their distribution network. However, on their own, price monitoring and price reporting are not RPM.

The treatment of RRM as a hardcore restriction is fully applicable in the online platform economy. In particular, where an undertaking provides online intermediation services (*Article 1(1)(e), VBER*) it is a supplier in respect of those services and therefore Article 4(a) applies to restrictions imposed by the undertaking on buyers of the online intermediation services relating to the sale price of goods or services that are sold via the online intermediation services.

Article 4(a) of the VBER provides that a supplier may impose a **maximum** resale price (above which the buyer may not sell the goods or services), or **recommend** a resale price, as long as such provisions do not have the effect of a fixed or minimum resale price as a result of pressure from or incentives offered by the parties imposing the restriction. Although impositions by the supplier of a maximum resale price or recommendations of a resale price are not hardcore restrictions (*Article 4(a)*), when the supplier combines such a maximum price or resale price recommendation with incentives to apply a certain price level or disincentives to lower the sale price, this can amount to RPM (for example, where the supplier reimburses promotional costs incurred by the buyer subject to the condition the buyer does not deviate from the maximum resale price or the recommended resale price) (*paragraph 188, Vertical Restraints Guidelines*).

The 2022 Vertical Restraints Guidelines also provide guidance regarding fulfilment contracts. Fulfilment contracts are agreements where a supplier enters into a vertical agreement with an intermediary purchaser for the purposes of executing a supply agreement concluded previously between the supplier and a specific customer (*paragraph 193*). Where the supplier selects the undertaking that will provide the fulfilment services, the imposition of a resale price by the supplier is not RPM. However, where the undertaking that will provide the fulfilment services is selected by the customer, the imposition of a resale price by the supplier may amount to RPM (*paragraph 193, Vertical Restraints Guidelines*).

Examples

The Commission fined Volkswagen AG EUR30.96 million for having instructed its German dealers not to sell a certain car model at prices considerably below the recommended retail price and/or to limit or not to grant discounts to customers. Some dealers were also warned to obey "price discipline", and threatened with legal consequences, such as the termination of their dealer contract, should they disobey these instructions (*Volkswagen AG, OJ 2001 L262/14*). Volkswagen appealed the Commission decision before the General Court, arguing, in particular, that its initiatives with respect to its dealers were unilateral and that there was, therefore, no agreement between the parties. The General Court, after recalling that the Commission may not decide that unilateral conduct by a manufacturer with respect to its dealers in reality forms the basis of an anti-competitive agreement unless express or implied acquiescence by the dealers in the manufacturer attitude is established, found that the Commission had failed to prove such acquiescence with respect to Volkswagen dealers. As no agreement had been proved, the General Court annulled the Commission decision (*Volkswagen AG v Commission (Case T-208/01) EU:T:2003:326*). A similar position with respect to the existence of an agreement has been followed by the General Court and the ECJ in *Bayer* (*Adalat (OJ 1996 L201/1*); *Bayer AG v Commission (Case T-41/96) EU:T:2000:242; BAI & Commission v Bayer (Cases C-2/01 and C-3/01) EU:C:2004:2*).

In 2000, the Commission held that maximum resale prices combined with a ban on special offers, discounts or rebates contravened Article 101(1) (*Nathan and Briocolux, OJ 2001 L54/1*). Nathan, a manufacturer of educational materials provided in its agreements with its exclusive distributors for a maximum resale price and a ban on special offers, discounts, rebates or clearance sales "liable to damage" the Nathan brand. While the Commission accepted that an obligation not to exceed a maximum resale price in itself does not necessarily restrict competition, it held that the maximum resale price imposed here served as a ceiling for a range of resale prices, at the bottom end of which was a ban on promotional discounts. As a result, the agreements effectively fixed a resale price level (after discounts and rebates).

On 21 April 2015, the Commission announced that the French, Italian and Swedish competition authorities accepted commitments offered by Booking.com to remove price parity clauses from its contracts in the online hotel booking sector. The parity clauses in the contracts between Booking.com and hotels obliged the hotels to offer Booking.com the same or better room prices as the hotels makes available on all other online and offline distribution channels. The French, Swedish and Italian competition authorities considered that these clauses may harm competition, in breach of their respective national competition laws as well as Article 101 and/or Article 102 of the TFEU.

The authorities accepted final commitments from Booking.com, which include undertakings not to apply the parity terms regarding price and other conditions in relation to Booking.com's competitors. Booking.com also undertakes to not apply parity terms with respect to the number and type of available rooms. With respect to hotels' own sales, Booking.com undertakes to not require parity with respect to room prices or other conditions as regards offline sales. Further, Booking.com undertakes to not require parity regarding such room prices or other conditions that are not available online to the general public, but that are offered by the hotels only to certain customers or groups of customers. Booking.com has also undertaken to not apply equivalent measures. Booking.com can still request parity in relation to hotels' own publicly available online room prices. However, the commitments do not prevent hotels from agreeing on other terms with Booking.com. The commitments will apply to bookings made by consumers worldwide in the relevant countries and entered into force on 1 July 2015 (see Legal update, Commission announces that three national competition authorities have obtained commitments to remove price parity clauses in online hotel booking contracts).

Following these investigations, in 2016 the Belgian, Czech, French, German, Hungarian, Irish, Italian, Dutch, Swedish and UK national competition authorities and the Commission carried out a co-ordinated monitoring exercise on competition in the online hotel booking sector. Their report was published in April 2017. The monitoring exercise covered various aspects of the way hotels market and sell their rooms, focusing on room price and room availability differentiation by hotels between sales channels and online travel agent commission rates (see Legal update, Report on ECN monitoring exercise in the online hotel booking sector).

Some of the most notable recent cases in this area so far concern the Commission's investigations into the supply of e-books:

- In December 2012, the Commission found that four major e-book publishers and Apple sought to address low prices being charged by Amazon by moving to a new agency model whereby the publisher set the price. This involved agreements including a retail most-favoured nation (MFN) clause providing that each publisher would have to lower the retail price to match other retailers offering a lower price for the same e-book. The Commission considered that the MFN clause was a commitment device to ensure that the publishers had the same financial incentives to force other retailers, such as Amazon, to switch to the new agency model (see Legal update, Commission accepts binding commitments in e-books investigation).
- In May 2017, the Commission also made binding commitments offered by Amazon to address competition concerns in relation to certain clauses in Amazon's agreements with e-book publishers. The Commission was concerned that Amazon may have abused a dominant position by including "parity" or MFN clauses in its agreements with e-book publishers. These clauses required the publishers to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere and/or to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another e-book retailer. The offending clauses covered not only price but other aspects that a competitor can use to differentiate itself from Amazon, such as an alternative business (distribution) model, an innovative e-book or a promotion.

  The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon as they reduce publishers' and competitors' ability and incentives to develop new and innovative e-books and alternative distribution services. To address these concerns, Amazon has agreed not to enforce the relevant clauses and not to include them in any new contracts. In addition, publishers will be able to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a competing platform. The commitments will apply for five years and cover any e-book in any language distributed by Amazon in the EEA (see Legal update, Commission accepts commitments from Amazon to remove most favoured nation clauses from e-book distribution agreements).

As another example, in 2018, the Commission fined consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices. The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases (*Case AT. 40465 - Asus; Case AT.40469 - Denon & Marantz; Case AT. 40181 - Philips; AT. 40182 - Pioneer*; see Legal update, Commission fines four consumer electronics manufacturers for fixing online resale prices).

Resale restrictions in exclusive distribution, selective distribution and free distribution systems

Article 4(b), (c) and (d) of the VBER contain a list of hardcore restrictions and exceptions that apply depending on the type of distribution system operated by the supplier: exclusive distribution, selective distribution or free distribution.

The hardcore restrictions set out in Article 4 (b), (c)(i) and (d) of the VBER concern agreements that, directly or indirectly, in isolation or in combination with other factors controlled by the parties, have the object of restricting the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services (*paragraph 202, Vertical Restraints Guidelines*). In addition to straightforward restrictions on resale to certain customers or to customers in certain territories, this would include an obligation on the buyer to refer orders received from such customers to other distributors. It would also include indirect measures aimed at inducing the distributor not to resell to such customers, for example, the refusal or reduction of bonuses or discounts or the termination of supply. It might also result from the supplier not providing an EU-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory. If the supplier decides not to reimburse its distributors for services rendered under the EU-wide guarantee, it may be agreed with these distributors that a distributor that makes a sale outside its allocated territory will have to pay the distributor appointed in the territory of destination a fee based on the cost of the services to be carried out including a reasonable profit margin. This type of scheme is not considered a restriction of the distributors' sales outside their territory (*JCB Service v Commission (Case T-67/01) EU:T:2004:3*).

Article 4(e) of the VBER now explicitly specifies that a restriction that prevents the effective use of the internet by the buyer to sell the goods to specific customers or into specific territories also amounts to a hardcore restriction. This covers agreements restricting online sales or online advertising in a way that de facto prevents the buyer from reselling the contract goods or services, as well as agreements that do not directly prohibit but which have the object of preventing the effective use of the Internet by a buyer or its customers to resell the goods to particular customers or into specific territories (including the object of diminishing the aggregate volume of online sales of the contract goods, or preventing the use of an entire advertising channel such as search engines or price comparison services) (*paragraph 203, Vertical Restraints Guidelines*). Other examples of obligations indirectly having the object of preventing the effective use of the Internet to resell the goods to particular customers or territories include:

- Requiring the buyer to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller.
- Requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory.
- Requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel.
- Requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions.
- Prohibiting the buyer from using the supplier's trade marks or brand names on its website or in its online store.
- Prohibiting the buyer from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third party server.

For further guidance regarding online sales restrictions in vertical agreements, see Practice note, Online sales restrictions in vertical agreements.

In relation to exclusive distribution systems, the VBER provides five exceptions to the hardcore restriction set out in Article 4(b) (that is, restricting the territory into which, or of the customers to whom, the exclusive distributor may actively or passively sell the contract goods or services):

- The restriction of **active sales** into the exclusive territory or exclusive customer group reserved to the supplier or allocated by the supplier to up to five buyers is not a hardcore restriction. The new VBER allows suppliers to appoint up to five distributors per exclusive territory or customer group and to oblige its exclusive distributors to pass their active sales ban on to their direct customers. While this broadens the scope of restrictions to include suppliers' direct customers, they cannot require these direct buyers to also pass on the active sales restrictions to customers further down the distribution chain (*Article 4(b)(i); paragraph 220, Vertical Restraints Guidelines*). **Passive sales** into exclusively allocated territories or customers may not be restricted.
- A supplier that operates an exclusive distribution system in a certain territory and a selective distribution system in another territory can restrict its exclusive distributors from selling actively or passively to unauthorised distributors located in the territory where the supplier already operates a selective distribution system or which it has reserved for the operation of such a system. The supplier may also require its exclusive distributors to similarly restrict their customers from making active and passive sales to unauthorised distributors in territories where the supplier operates a selective distribution system or which it has reserved for that purpose (*Article 4(b)(ii); paragraph 223, Vertical Restraints Guidelines*). Therefore, in this scenario, suppliers can pass on active and passive sales restrictions down the distribution chain, helping them to preserve the closed nature of selective distribution systems.
- A supplier can restrict the place of establishment of the buyer to which it has allocated an exclusive territory or customer group (*Article 4(b)(iii); paragraph 224, Vertical Restraints Guidelines*).
- Suppliers are allowed to restrict active and passive sales by an exclusive wholesaler to end-users. This exception allows the supplier to keep the wholesale and retail level of trade separate. Suppliers can also choose to allow exclusive wholesalers to sell to some (specific) end-users and restrict sales to all other end-users (*Article 4(b)(iv); paragraph 225, Vertical Restraints Guidelines*).
- A supplier can restrict a buyer from actively or passively reselling components supplied for the purpose of incorporation to customers who would use them to manufacture the same type of goods as those produced by the supplier (*Article 4(b)(v); paragraph 226, Vertical Restraints Guidelines*).

In relation to selective distribution systems, the VBER provides five exceptions to the hardcore restriction set out in Article 4(c)(i) (that is, restricting the territory into which, or of the customers to whom, the members of the selective distribution system (authorised distributors) may actively or passively sell the contract goods or services):

- The VBER allows suppliers to restrict active sales by authorised distributors into a territory or customer group reserved to the supplier or allocated exclusively to up to five exclusive distributors. The supplier can also require the authorised distributor to pass this restriction on to its direct customers. This exception does not cover passive sales (*Article 4(c)(i)(1); paragraph 229, Vertical Restraints Guidelines*).
- Preventing any (active or passive) sales by members of a selective distribution system to unauthorised distributors within a territory in which the supplier operates such a selective distribution system is not a hardcore restriction. The supplier can also require the authorised distributor to pass this restriction on to its customers (*Article 4(c)(i)(2); paragraph 230, Vertical Restraints Guidelines*).
- Authorised dealers may be restricted as to the location of their business premises, prevented from running their business from different premises or from opening a new outlet in a different location. The establishment and use by the distributor of an online store is not equivalent to the opening of a physical outlet and therefore cannot be restricted (*Article 4(c)(i)(3); paragraph 231, Vertical Restraints Guidelines*).
- Suppliers are allowed to restrict active and passive sales by an authorised wholesaler to end-users. This exception allows the supplier to keep the wholesale and retail level of trade separate. Suppliers can also choose to allow authorised wholesalers to sell to some (specific) end-users and restrict sales to all other end-users (*Article 4(c)(i)(4); paragraph 232, Vertical Restraints Guidelines*).
- A supplier can prevent a member of the selective distribution system from actively or passively reselling components supplied for the purpose of incorporation to customers who would use them to manufacture the same type of goods as those produced by the supplier (*Article 4(c)(i)(5); paragraph 233, Vertical Restraints Guidelines*).

In addition to the hardcore restriction set out in Article 4(c)(i), the VBER identifies two additional hardcore restrictions that apply where a supplier operates a selective distribution system:

- Restricting cross-supplies between authorised distributors in a selective distribution system operating at the same or different levels of trade (*Article 4(c)(ii)*). Therefore, authorised distributors must remain free to purchase products from the other authorised distributors, which implies selective distribution is not compatible with a requirement for distributors to obtain all their contract products from a given source (*paragraph 237, Vertical restraints Guidelines*).

- Restricting authorised distributors operating at the retail level of trade from actively or passively selling to end-users (*Article 4(c)(iii)*). The VBER provides that this hardcore restriction is without prejudice to the exceptions in points (c)(i)(1) and (3) set out above (*paragraph 234, Vertical Restraints Guidelines*).

Therefore, the VBER explicitly allows the combination of selective and exclusive distribution in different territories within the EU, meaning members of a selective distribution system set up in one territory could be prevented from actively selling into a territory or to a customer group exclusively allocated to a maximum of five distributors, or reserved to the supplier. Conversely, a supplier is also able to prevent its exclusive distributors from selling actively or passively to unauthorised distributors located in the territory where the supplier operates a selective distribution system or which it has reserved for the operation of such a system. However, combining selective distribution with exclusive distribution in the same territory is not exempted under the VBER as such a combination would necessitate authorised distributors accepting hardcore restrictions within the meaning of Article 4(b) or (c) (*paragraph 236, Vertical Restraints Guidelines*). Suppliers may, however, commit to supply only certain authorised distributors or to not make any direct sales themselves in a specific territory.

Examples of Commission enforcement include:

- In the *Volkswagen* case, Volkswagen was fined for the ban it placed on its Italian distributors from selling to German and Austrian customers seeking to buy Volkswagen models more cheaply in Italy (*VW-Audi OJ 1998 L124/60; Volkswagen AG v Commission (Case T-62/98) EU:T:2000:180*). Subsequent guidelines on vertical restraints do, however, open up the possibility that passive sales restrictions may be considered objectively necessary in exceptional circumstances, for example, to ensure entry of a new product into the market (see Hardcore sales restrictions that may not infringe Article 101). (However, their validity could be affected by the Geo-blocking Regulation, as from 23 March 2020; see Geo-blocking Regulation.)
- In January 2021, the Commission found that Valve, owner of the "Steam" video game distribution platform, and five PC video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax), breached Article 101 by preventing consumers from purchasing video games cross-border from other member states. Valve and the five PC video game publishers had entered into bilateral agreements or concerted practices to use geo-blocked activation keys to prevent the activation of certain of these publishers' PC video games outside some member states, in response to unsolicited consumer requests (passive sales). In addition, four of the publishers, bilaterally, entered into licensing and distribution agreements with some of their respective distributors in the EEA (other than Valve), containing clauses which restricted cross-border (passive) sales of the affected PC video games within the EEA.

  The Commission concluded that these geo-blocking practices partitioned the EEA market and denied European consumers the ability to shop around between member states to find the most suitable offer.

  The five publishers co-operated with the Commission by providing evidence of added value to the investigation, and by expressly acknowledging the facts and the infringements of EU antitrust rules. The fines, imposed on the publishers, totalling over EUR6 million, therefore included reductions of 10% or 15%. Valve chose not to co-operate and the Commission adopted a prohibition decision imposing a fine of EUR1.624 million (see Legal update, Commission fines Valve and five videogame publishers of PC video games for geo-blocking practices). Valve has appealed the Commission's decision to the General Court (*Case T-172/21*) (see *Valve*).
- The restriction of cross-border sales in **non-exclusive distribution agreements** is also problematic. On 25 March 2019, the Commission imposed a fine of EUR12.555 million on Nike for banning traders from selling licensed merchandise to other countries within the EEA, in breach of Article 101. Specifically, the Commission found that, between 1 July 2004 and 27 October 2017, Nike's non-exclusive licensing and distribution agreements unlawfully restricted both passive and active out-of-territory sales by licensees, reinforcing the restrictions with threats of ending contracts and by refusing to supply; used master licensees that compelled master licensees to stay within their territories and to enforce restrictions vis-à-vis their sub-licensees; and expressly prohibited licensees from supplying merchandising products to customers, often retailers, who could be selling outside the allocated territories. Nike would also intervene to ensure that retailers stopped purchasing products from licensees in other EEA territories (see Legal update, Commission finds Nike's licensing and distribution practices infringe Article 101).

  A restriction on passive sales is a hardcore restriction. Restrictions on active sales are permitted in the context of an exclusive distribution agreement, but as Nike did not operate under an exclusive distribution system, its restriction on active sales was also a hardcore restriction.
- Similarly, on 9 July 2019, the Commission announced that it had fined Sanrio EUR6.2 million for banning traders from selling licensed merchandise (such

as Hello Kitty) to other countries within the EEA. The Commission found that Sanrio's non-exclusive licensing agreements breached Article 101 in that Sanrio imposed direct measures restricting out-of-territory sales by licensees, such as clauses explicitly prohibiting these sales, obligations to refer orders for out-of-territory sales to Sanrio and limitations to the languages used on the merchandising products. Sanrio also implemented a series of measures as an indirect way to encourage compliance with the out-of-territory restrictions. These measures included carrying out audits and the non-renewal of contracts if licensees did not respect the out-of-territory restrictions (see Legal update, Commission fines Sanrio EUR6.2 million for restricting cross-border sales of merchandising products featuring Hello Kitty characters).

- This was followed, in January 2020, by a fine of EUR14.327 million on several companies belonging to Comcast Corporation, including NBCUniversal LLC (NBCUniversal) for restricting traders from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them. The restrictions concerned merchandise products featuring the Minions, Jurassic World and other images and characters from NBCUniversal's films.

  The Commission found that NBCUniversal's non-exclusive licensing agreements breached Article 101 in imposing direct measures restricting out-of-territory sales by licensees; sales beyond allocated customers or customer groups; and online sales. Licensees were also obligated to pass on these sales restrictions to their customers. The restrictions were accompanied by indirect measures encouraging compliance with the sales restrictions (see Legal update, Commission fines NBCUniversal EUR14.3 million for restricting sales of film merchandise products).

- On 6 December 2017, the ECJ handed down its judgment on a reference from a German court on the legality of online platform bans in selective distribution systems. The national court asked whether the protection of a luxury image meets the requirements for a selective distribution system compatible with Article 101 of the TFEU, and, if so, whether third party platform bans are permitted for ensuring that branded goods are distributed according to the requisite standards (*Coty Germany GmbH v Parfümerie Akzente GmbH (Case C-230/16) EU:C:2017:941*; see Legal update, ECJ judgment on reference for a preliminary ruling from a German court regarding prohibiting authorised retailers from selling luxury goods on third-party platforms such as Amazon or eBay).

- Coty Germany is one of Germany's leading suppliers of luxury cosmetics. To preserve the luxury image of some of its brands, it markets them through a selective distribution network. Authorised retailers are also entitled to offer and sell the contract goods on the internet. Parfümerie Akzente has been distributing Coty Germany products for many years as an authorised retailer both in its shops and on the internet. Internet sales are made partly through its own on-line store and partly via the platform amazon.de. Coty amended its selective distribution agreement in 2012, so that the internet authorisation is valid provided that sales are conducted through an electronic shop window of the authorised shop and that the luxury character of the goods is preserved. Parfümerie Akzente refused to approve the amendments and Coty brought an action before the German courts seeking an order prohibiting Parfümerie Akzente from distributing the contract goods via the platform "amazon.de".

  The ECJ confirmed that a selective distribution system for luxury goods, designed primarily to preserve the luxury image of those goods, does not breach Article 101 of the TFEU, provided that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion and the criteria laid down must not go beyond what is necessary.

  The ECJ also found that Article 101 of the TFEU does not preclude a contractual clause which prohibits authorised distributors of a selective distribution network from using, in a discernible manner, third-party platforms for internet sales of the goods in question, provided that clause has the objective of preserving the luxury image of the goods in question; the clause is laid down uniformly and not applied in a discriminatory fashion; and it is proportionate in the light of the objective pursued. (The ECJ noted that it is common ground that a third-party internet platform ban has the objective of preserving the image of luxury and prestige of the relevant goods.)

  Such a third-party platform ban does not constitute a hardcore restriction and brand owners can, therefore, still benefit from the vertical agreements block exemption if the relevant conditions are met. The ECJ also stated that the object of an online marketplace ban is not the restriction of passive sales and/or the customers to which distributors can sell.

  The ECJ in *Coty* also confirmed that the judgment in *Pierre Fabre* should be confined to the particular facts of that case (an absolute ban on internet sales). *Pierre Fabre* did not involve luxury goods.

Access to spare parts

A provision in an agreement between a supplier of spare parts and a buyer who incorporates the spare parts into its own product (an original equipment manufacturer) which restricts the supplier from selling the spare parts to end-users, independent repairers or service providers not entrusted by the buyer with the repair or servicing of its goods (*Article 4(f)*). However, the original equipment manufacturer may require its own repair and service network to buy spare parts from it.

Hardcore sales restrictions that may not infringe Article 101

The Vertical Restraints Guidelines note that while hardcore restrictions are **typically** restrictions of competition by object within the meaning of Article 101(1) of the TFEU, they do not **necessarily** fall within the scope of Article 101(1), notably when the hardcore restrictions included in the vertical agreement are objectively necessary for its implementation, for instance, to ensure compliance with a public ban on selling dangerous substances to certain customers for reasons of safety or health. By way of example, the Commission notes that in cases where a new product is genuinely being tested in a limited territory or with a limited customer group, restrictions on active sales outside that test group will not be caught by Article 101(1) for the period of the testing or introduction of the product.

Similarly, the Vertical Restraints Guidelines acknowledge that while an agreement that includes a hardcore restriction is unlikely to fulfil the conditions of Article 101(3) of the TFEU, those conditions can be fulfilled in specific circumstances. For that purpose, the undertaking must substantiate that efficiencies are likely and that the efficiencies are likely to result from including the hardcore restriction in the agreement, as well as demonstrating that the other conditions of Article 101(3) are fulfilled. By way of example, the Commission notes that while cross-supplies between authorised distributors in a selective distribution system must generally remain free, restrictions on active sales may fulfil the conditions of Article 101(3) if it is necessary for authorised wholesalers located in different territories to invest in promotional activities in the territory in which they distribute the contract goods or services to support sales by authorised retailers and it is not practical to specify the required promotional activities as a contractual obligation in the agreement.

Conditions

In addition to the hardcore restrictions described above, the block exemption identifies several further obligations that fall outside the scope of the block exemption, even though the market share threshold is not exceeded (*Article 5*). Unlike hardcore restrictions, severability **does** apply to these obligations, so that the inclusion of such an obligation will mean that the benefit of the block exemption is only lost in relation to any part of the agreement from which the offending obligation cannot be severed.

The obligations in Article 5 are as follows:

- **Non-compete obligation exceeding five years**, that is, any direct or indirect non-compete obligation that exceeds five years, or is indefinite (*Article 5(1)(a)*). A non-compete obligation is defined as any direct or indirect obligation that causes the buyer not to manufacture, purchase, sell or resell competing goods or services, or to purchase from the supplier (or from someone designated by the supplier) more than 80% of the buyer's total purchases of the contract goods and services and their substitutes (calculated on the basis of the value of the buyer's purchases in the preceding calendar year, or on the basis of the volume of purchases in the preceding calendar year where this is standard industry practice) (*Article 1(f)*). The Vertical Restraints Guidelines state that if no relevant purchasing data for the buyer are available, the buyer's best estimate of its annual total requirements should be used (*paragraph 247*).

  Non-compete obligations that are tacitly renewable beyond a period of five years can now benefit from the block exemption if the buyer can effectively renegotiate or terminate the vertical agreement containing the non-compete obligation with a reasonable period of notice and at a reasonable cost (*paragraph 248, Vertical Restraints Guidelines*).

  The five-year time limit does not apply where the goods or services are resold by the buyer from premises owned or leased by the supplier (for example, petrol stations, public houses or cafés) (*paragraph 67, Vertical Restraints Guidelines*). In such cases, the non-compete obligation may be of the same duration as the period of occupancy of the premises by the buyer (*Article 5(2)*).

- **Post-term non-compete obligations.** Any direct or indirect obligation preventing the buyer, after termination of the agreement, from manufacturing, purchasing or distributing the goods or services, unless the obligation:

  - relates to the goods or services which compete with the contract goods or services;
  - is limited to the premises and land from which the buyer has operated during the contract period;
  - is indispensable for protecting know-how transferred by the supplier to the buyer; and
  - is limited in duration to a period of one year after termination of the agreement.

  It is, however, permissible to impose a restriction which is unlimited in time on the use and disclosure of know-how that has not fallen into the public domain.

  According to the definition in Article 1(1)(j) of Regulation 720/2022, the know-how must be secret and substantial, that is, it must include information that is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

- **Non-compete obligations on members of selective distribution systems.** Any direct or indirect obligation preventing the members of a selective distribution system from selling the brands of specified competing suppliers (*Article 5(1)(c); paragraph 252, Vertical Restraints Guidelines*). The guidelines state that the aim of this exclusion is to avoid a situation whereby several suppliers using the same selective distribution outlets prevent one specific competitor, or certain specific competitors, from using these outlets to distribute their products.
- **Across-platform retail parity obligations.** Any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end-users under more favourable conditions (for example, conditions concerning prices, inventory, availability) via competing online intermediation services. (*Article 5(1)(d); paragraph 253, Vertical Restraints Guidelines*). All other types of parity obligations (for example, relating to the direct sales channels ("narrow" retail parity), relating to conditions of offering services or goods to undertakings other than end-users, "most favoured customer" obligations) can still benefit from the Article 2(1) exemption (*paragraph 254, Vertical Restraints Guidelines*).

Withdrawal of block exemption

Withdrawal by Commission

The Commission has the power to withdraw the benefit of the block exemption in circumstances where it finds that a vertical agreement has effects that are incompatible with the conditions for exemption in Article 101(3) (*Article 6, Regulation 720/2022; section 7.1, paragraph 256, Vertical Restraints Guidelines*) (see Legal exception under Article 101(3)). The withdrawal may occur in two scenarios:

- Where the vertical agreement has in **isolation effects** which are incompatible with Article 101(3).
- Where an agreement has anti-competitive effects **in conjunction** with similar agreements entered into by competing suppliers or buyers (for example, where access to the relevant market or competition in that market is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints such as retail parity clauses, selective distribution systems or non-compete obligations) (*recital 20*). (Section 7.1 of the Vertical Restraints Guidelines also provides guidance on withdrawal.) The Commission has not used this power to date.

An agreement must make an appreciable contribution to the cumulative effect of parallel networks to be caught by Article 101(1) in the first place (see Cumulative effect). The Commission has the burden of proving that the agreement falls within Article 101(1) and that it does not fulfil the legal exception conditions of Article 101(3).

A withdrawal decision can only take effect from the date of the decision to withdraw, rather than any earlier date such as the date when the relevant agreement was entered into.

Withdrawal by national competition authorities

National competition authorities may also withdraw the benefit of the block exemption where an agreement has effects that are incompatible with the conditions for legal exception under Article 101(3) in the territory of that member state, or in a part of it which has the characteristics of distinct geographic market (*recital 1418, Regulation 2022/720; section 7.1, paragraph 256, Vertical Restraints Guidelines*).

The division of jurisdiction between the Commission and national competition authorities in relation to withdrawal of the benefit of the block exemption is as follows:

- The Commission has the exclusive power of withdrawal when the relevant geographic market is wider than the territory of a single member state.
- The Commission and the national authority have concurrent powers of withdrawal when the territory of the member state concerned, or a part of it, constitute the relevant geographic market. Decisions of withdrawal taken by national authorities will only have effect within the territory of the member state concerned. Where a member state has not enacted legislation enabling the national competition authority to withdraw the benefit of the block exemption, the member state may ask the Commission to initiate proceedings.
- The Commission reserves the overriding right to take on cases which raise a matter of particular EU interest or a new point of law.

Disapplication of block exemption

Where parallel networks of similar vertical restraints cover more than 50% of a relevant market, the Commission may, by regulation, disapply the block exemption from vertical agreements which contain specific restraints relating to that market (*Article 7*). The Commission has not used this power to date.

A regulation issued under Article 7 does not necessarily mean that agreements on the markets concerned are contrary to Article 101(1) (as is the case where the benefit of the block exemption is withdrawn). The effect of such a regulation is merely to restore the application of Articles 101(1) and (3) (see *section 7.2, paragraph 271, Vertical Restraints Guidelines*).

A regulation issued under Article 7 cannot take effect earlier than six months after its adoption (*paragraph 273, Vertical Restraints Guidelines*). This means that the block exemption will continue to apply during the six-month (or longer) period, giving companies time to adapt their agreements if necessary.

Entry into force of block exemption

The substantive provisions of the block exemption Regulation 720/2022 took effect on 1 June 2022, on expiry of Regulation 330/2010 (*Article 11*). There was a transitional period from 1 June 2022 to 31 May 2023 for agreements already in force on 31 May 2022 that did not satisfy the conditions for exemption in the new regulation but which, as at 31 May 2022, did satisfy the conditions for exemption in Regulation 330/2010.

The block exemption will expire on 31 May 2034. The Commission will continue monitoring the operation of the VBER and Vertical Restraints Guidelines and may revise the Guidelines in the light of future developments.

Vertical Restraints Guidelines

Vertical agreements falling outside the vertical restraints block exemption are not presumed to be unlawful. The Commission wishes companies to make their own assessment of the potential application of Article 101 to their agreements (see Outside the safe harbour). If it is established that an agreement infringes Article 101(1), the parties can still explain why they consider the conditions for legal exception under Article 101(3) to be fulfilled (see Modernisation of rules implementing Article 101).

The Commission's Vertical Restraints Guidelines, as well as explaining the VBER, are intended to assist with this analysis. The Guidelines emphasise the importance of economic analysis in the Commission's vertical restraints policy and acknowledge that vertical restraints are generally less harmful than horizontal restraints. The vertical restraints guidelines set out the factors which the Commission considers to be the most important in establishing whether a vertical restraint constitutes an appreciable restriction of competition under Article 101(1) (see Factors for the assessment under Article 101(1)). The importance of each factor will vary from case to case depending on the facts and circumstances. When assessing individual cases, the Commission practice has been to limit the application of Article 101 to those undertakings which hold a certain degree of market power where inter-brand competition may be insufficient. According to the Commission's Vertical Restraints Guidelines, the protection of inter-brand and intra-brand competition is important in those cases to achieve efficiencies and benefits for consumers. The Guidelines identify certain negative and positive effects on the market that vertical restraints may have (see Negative and positive effects of vertical restraints).

To help the assessment of vertical restraints, the Guidelines set out:

- The negative and positive effects of vertical restraints (see Negative and positive effects of vertical restraints).
- A methodology of analysis (see Methodology for assessing vertical restraints).
- Relevant factors for the assessment under Article 101(1) (see Factors for the assessment under Article 101(1)).
- Relevant factors for the assessment under Article 101(3) (see Legal exception under Article 101(3)).

Analysis of specific vertical restraints

The Guidelines also provide guidance on how the general principles outlined above are to be applied in analysing the following specific vertical restraints: single branding, exclusive supply, restrictions on the use of marketplaces, restrictions on the use of price comparison services, parity obligations, upfront access payments, category management agreements and tying (*section 8.2*).

In addition, the Guidelines also provide guidance on the analytical framework to assess exclusive distribution, exclusive customer allocation, selective distribution and franchising (*section 4.6*) and resale price restrictions (*section 6.1.1*).

A summary of the Guidelines, together with an explanation of how the Vertical Agreements Block Exemption applies and the position where it does not, is set out below as they apply to:

- Single branding (see Single branding (non-compete obligations)).
- Exclusive distribution (see Exclusive distribution).
- Exclusive customer allocation (see Exclusive customer allocation).
- Selective distribution (see Selective distribution).
- Franchising (see Franchising).
- Exclusive supply (see Exclusive supply).
- Upfront access payments (see Upfront access payments).
- Category management agreements (see Category management agreements).
- Tying (see Tying).
- Recommended and maximum prices (see Resale price restrictions).

The guidance on the treatment of restrictions on the use of marketplaces, restrictions on the use of price comparison services, and parity obligations are new additions to the 2022 Vertical Restraints Guidelines (see Online sales restrictions).

The rules applicable to agency are considered under Agency agreements.

Single branding (non-compete obligations)

The types of restraint considered here as "single branding" are non-compete clauses and quantity-forcing on the buyer, both of which have the effect of limiting the degree to which the buyer will resell or use competing goods or services. A non-compete arrangement is based on an obligation or incentive scheme that makes the buyer purchase more than 80% 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. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier, for example, minimum purchase requirements, stocking requirements and conditional rebate schemes.

The Vertical Restraints Guidelines indicate that the possible competition risks of non-compete obligations are foreclosure of the market for competing suppliers and potential suppliers, softening of competition, the facilitation of collusion between suppliers and, where the buyer is a retailer, loss of in-store inter-brand competition. (See *section 8.2.1, Vertical Restraints Guidelines.*)

Application of vertical agreements block exemption

Where both the supplier's and buyer's market shares do not exceed 30%, single branding is exempted by the VBER, subject to a limitation in time of five years for the non-compete obligation (*paragraph 300, Vertical Restraints Guidelines*).

Single branding agreements that are tacitly renewable beyond five years can still benefit from the exemption, provided that the buyer can effectively renegotiate or terminate the single-branding agreement after the five-year period. Effective termination should be taken to mean on reasonable notice and at a reasonable cost (*paragraphs 248 and 300, Vertical Restraints Guidelines*).

Position if block exemption does not apply

Above the 30% threshold or beyond the time limit of five years, the guidelines state that the market position of the supplier is the main factor in assessing the possible anti-competitive effects of non-compete obligations under Article 101(1). The extent and duration of the non-compete obligation is also important. The higher its tied market share and the longer the duration of the non-compete obligation, the more significant foreclosure is likely to be. Generally:

- Non-compete obligations of less than one year imposed by non-dominant companies are not considered to give rise to appreciable anti-competitive effects or net negative effects.
- Non-compete obligations of between one and five years imposed by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects.
- Non-compete obligations exceeding five years are, for most types of investments, not considered necessary to achieve the claimed efficiencies, or the efficiencies are not sufficient to outweigh their foreclosure effect.

In assessing the supplier's market power, the market position of the supplier's competitors is important. As long as its competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not likely where the competitors have similar market positions and can offer similarly attractive products. Foreclosure may, however, occur when several important suppliers enter into non-compete contracts with a significant number of relevant buyers on the relevant market (as the contracts then have a cumulative effect). In cases where the market share of the largest supplier is below 30%, and the combined market share of the five largest suppliers is below 50%, there is a strong likelihood that the fact that a potential entrant cannot penetrate the market profitably is not due to factors of limitation of competition through non-compete obligations, but is linked to other factors such as consumer preferences. Foreclosure through entry barriers should not be a problem where it is relatively easy for competing suppliers to create new buyers or find alternative buyers for the product. Countervailing power is also a relevant consideration, as powerful buyers will not readily cut themselves off from the supply of competing goods or services. Finally, the level of trade is important in establishing whether there is foreclosure. (See also Cumulative effect.)

The Commission has previously decided that Van den Bergh Foods' (formerly HB Ice Cream Ltd (HB)) distribution agreements providing ice-cream retailers "free of charge" freezer cabinets on condition that they were used exclusively to stock the HB's ice-creams are incompatible with Articles 101 and 102 (*Van den Bergh Foods Limited OJ 1989 L246/1*). The General Court upheld the Commission's decision, having considered that, taking into account the specific conditions of the market, the popularity of HB's ice creams, HB's strength on the market and the specific features of the products, the effect of the agreements as a whole was to restrict competition on the market. The Commission had found that HB had a dominant position on the relevant market (the market for single-wrapped items of impulse ice-creams in Ireland) and that the network of HB's agreements as a whole had, due to the space constraints inevitably experienced by retail outlets, the effect of restricting the ability of retailers to sell products of HB's competitors. In addition, the General Court stated that the provision to retailers of freezer cabinets subject to a condition of exclusivity and the running maintenance costs of those freezers represented a financial barrier to the entry of new suppliers on the relevant market and to the expansion of existing suppliers. Finally, the General Court understood that an individual exemption by the Commission was not possible, given that the exclusivity clause did not contribute to improving the production or distribution of the goods in question and did no therefore satisfied the first condition for the grant of an individual exemption (*Van den Bergh Foods v Commission (Case T-65/98) EU:T:2003:281*).

Possibility of individual exception

Where appreciable anti-competitive effects are established, the question of legal exception under Article 101(3) arises. The positive effects likely to be recognised are those relating to the free-rider, hold-up problems and capital market imperfection (see Positive effects). In the case of a relationship-specific investment (that is, an investment which cannot be used or sold unless at a significant loss, after the termination of a contract), a non-compete or quantity-forcing obligation which lasts for the period of depreciation of the investment will generally fulfil the conditions of Article 101(3). In the case of substantial relationship-specific investments, a non-compete obligation exceeding five years may be justified. However, Commission practice has considered that the provision by the supplier of a loan to the buyer is normally not in itself sufficient to justify the exemption of a foreclosure effect on the market. The transfer of substantial know-how usually justifies a non-compete obligation for the whole duration of the supply agreement, as, for example, in the context of franchising. The combination of a non-compete obligation with an exclusive distribution arrangement may, provided it does not result in anti-competitive foreclosure of other suppliers, also justify the non-compete obligation lasting for the full term of the agreement, because the non-compete obligation is likely to improve the distribution efforts of the exclusive distributor in its territory.

Exclusive distribution

In an exclusive distribution agreement, the supplier agrees to sell its products only to one distributor for resale in a particular territory (see *section 4.6.1, Vertical Restraints Guidelines*). The distributor is usually restricted from actively selling into territories that have been exclusively allocated to other distributors. According to the vertical restraints guidelines, the possible competition risks of exclusive distribution arrangements are mainly reduced intra-brand competition and market partitioning, which may, in particular, lead to price discrimination. When most or all of the suppliers in a particular market apply exclusive distribution this may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Exclusive distribution may also lead to foreclosure of other distributors.

Application of vertical agreements block exemption

Where both the supplier's and buyer's market shares do not exceed 30%, exclusive distribution systems of up to five distributors per territory or customer group are exempted by the VBER, even if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, or quantity-forcing or exclusive purchasing obligations. Where a supplier appoints more than one exclusive distributor per territory or customer group, it may prevent active sales into any territory covered by such an exclusive arrangement, regardless of whether those active sellers are members of an exclusive or free distribution system themselves. An obligation placed on suppliers to pass on such exclusivity obligations to their immediate buyers is also permissible under the block exemption regulation. However, a combination of exclusive distribution and selective distribution (that is, one system at each level of the supply chain) is only covered by the vertical restraints block exemption if active selling in other territories is not restricted.

Position if vertical agreement block exemption does not apply

Above the 30% market share threshold, the guidelines provide guidance for the assessment of exclusive distribution under Article 101(1), including the following:

- A major factor is the market position of the supplier and its competitors, as the loss of intra-brand competition is only problematic if inter-brand competition is limited. The stronger the position of the supplier, the more serious the loss of intra-brand competition. Above the 30% market share threshold there may be a risk of a significant reduction of intra-brand competition.

- Multiple exclusive dealerships, when multiple suppliers appoint the same exclusive distributor(s) in a given territory, reduce inter-brand competition and increase the risk of foreclosure or collusion, particularly where the cumulative market share of the brands distributed is high.
- Entry barriers, which may make it more difficult for suppliers to appoint new distributors or find alternative distributors, are less important in assessing the possible anti-competitive effects of exclusive distribution, as foreclosure at the supplier's level is not generally a problem unless combined with single branding.
- The foreclosure of other distributors may become an issue where there is buying power and market power downstream (for example, where a powerful supermarket chain becomes the only distributor of a leading brand), or in cases of multiple exclusive dealership (that is, when multiple suppliers appoint the same exclusive dealer).
- There is a risk of collusion on the buyer's side when exclusive distribution agreements are imposed on one or several suppliers by important buyers possibly located in different territories.
- The maturity of the relevant market is an important factor. Whereas the loss of intra-brand competition and price discrimination may be a serious problem in a mature market, it may be less relevant in a market with growing demand, changing technologies and changing market positions.
- The level of trade is also significant: the possible negative effects may differ between the wholesale and retail levels.

Possibility of individual exception

For an exclusive distribution agreement to be capable of legal exception under Article 101(3), the loss of intra-brand competition must be balanced with real efficiencies. Strong competitors will mean in general that the reduction in intra-brand competition is easily outweighed by sufficient inter-brand competition.

In assessing an agreement under Article 101(3), the Commission has recognised that exclusive distribution may lead to efficiencies, particularly where investment by the distributor is required to protect or build up a brand image. The case for such efficiencies is strongest in relation to new or complex products, or products the qualities of which are difficult to judge. Exclusive distribution may lead to savings in logistic costs due to economies of scale and transport and distribution.

According to the guidelines, where there are no foreclosure problems for other suppliers the combination of an exclusive distribution arrangement with a non-compete obligation can be exempted for the entire duration of the agreement, particularly at the wholesale level (that is, as between suppliers and wholesalers). An arrangement which combines exclusive distribution with exclusive purchasing is, however, unlikely to qualify for legal exception under Article 101(3) for suppliers with a market share above 30%, unless the parties can show very clear and substantial efficiencies leading to lower prices for all end consumers (see *JCB, Commission decision 2002/190 OJ 2002 L69/1*).

Exclusive customer allocation

In an exclusive customer allocation agreement, the supplier agrees to sell its product only to one distributor for resale to a particular class of customers (see *section 4.6.1, Vertical Restraints Guidelines*). The distributor is usually restricted from actively selling to classes of customers that have been exclusively allocated to other distributors, or reserved for the supplier. The possible competition risks of exclusive customer allocation are mainly reduced intra-brand competition and market partitioning, which may in particular lead to price discrimination. When most or all of the suppliers in a particular market apply exclusive customer allocation this may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Exclusive customer allocation may also lead to foreclosure of other distributors. The Vertical Restraints Guidelines also note that the exclusive allocation of a customer group will generally make arbitrage more difficult for buyers of the supplier's products.

Application of vertical agreements block exemption

Where both the supplier's and buyer's market shares do not exceed 30%, exclusive customer allocation is exempted by the vertical agreements block exemption even if combined with other non-hardcore restraints such as non-compete, quantity forcing or exclusive purchasing. A combination of exclusive customer allocation and selective distribution will normally constitute a hardcore restriction as this usually involves restricting the appointed distributor from making active sales to end-users.

Position if vertical agreements block exemption does not apply

Above the 30% market share threshold, the guidance provided above under exclusive distribution also applies to exclusive customer allocation.

Possibility of individual exception

The guidelines recognise that exclusive customer allocation may give rise to efficiencies, in particular where the distributors are required to make investments in, for example, specific equipment, skills or know-how. The period over which such investments are depreciated indicates the permissible duration of an exclusive customer allocation system. Generally, the case for such efficiencies is strongest in relation to new or complex products, or products requiring adaptation to the needs of the individual customer, the latter being more likely for intermediate products, that is products sold to different types of professional buyers.

The allocation of final consumers is unlikely to lead to efficiencies and is therefore unlikely to be excepted.

Selective distribution

A supplier may wish to set up a selective distribution system in a situation where it wishes to have greater control over the resale of its products (see *section 4.6.2, Vertical Restraints Guidelines*). In such a system, the supplier agrees only to supply specified approved distributors, who meet certain minimum criteria, and the distributors in return agree only to supply end-users or other distributors or dealers within the approved network.

Common examples of selective distribution systems include those used by suppliers of luxury products, such as perfumes, or technically complex products, such as hi-fi equipment, to create a retail environment in which the quality and reputation of the products is maintained.

The possible anti-competitive effects to which selective distribution agreements may give rise are reduced intra-brand competition and, especially where there is a cumulative effect, foreclosure of certain type(s) of distributors, the softening of competition and the facilitation of collusion between suppliers or buyers. However, if certain criteria are met, a selective distribution system will not be caught by Article 101(1). These criteria are considered below in Conditions for falling outside Article 101(1).

On 6 December 2017, the ECJ handed down its judgment on a reference from a German court on the legality of online platform bans in selective distribution systems. The national court asked whether the protection of a luxury image meets the requirements for a selective distribution system compatible with Article 101 of the TFEU, and, if so, whether third party platform bans are permitted for ensuring that branded goods are distributed according to the requisite standards (*Coty Germany GmbH v Parfümerie Akzente GmbH (Case C-230/16) EU:C:2017:941*; see Legal update, ECJ judgment on reference for a preliminary ruling from a German court regarding prohibiting authorised retailers from selling luxury goods on third-party platforms such as Amazon or eBay).

Coty Germany is one of Germany's leading suppliers of luxury cosmetics. To preserve the luxury image of some of its brands, it markets them through a selective distribution network. Authorised retailers are also entitled to offer and sell the contract goods on the internet. Parfümerie Akzente has been distributing Coty Germany products for many years as an authorised retailer both in its shops and on the internet. Internet sales are made partly through its own online store and partly via the platform amazon.de. Coty amended its selective distribution agreement in 2012, so that the internet authorisation is valid provided that sales are conducted through an electronic shop window of the authorised shop and that the luxury character of the goods is preserved. Parfümerie Akzente refused to approve the amendments and Coty brought an action before the German courts seeking an order prohibiting Parfümerie Akzente from distributing the contract goods via the platform "amazon.de".

The ECJ confirmed that a selective distribution system for luxury goods, designed primarily to preserve the luxury image of those goods, does not breach Article 101 of the TFEU, provided that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion and the criteria laid down must not go beyond what is necessary.

The ECJ also found that Article 101 of the TFEU does not preclude a contractual clause which prohibits authorised distributors of a selective distribution network from using, in a discernible manner, third-party platforms for internet sales of the goods in question, provided that clause has the objective of preserving the luxury image of the goods in question; the clause is laid down uniformly and not applied in a discriminatory fashion; and it is proportionate in the light of the objective pursued. (The ECJ noted that it is common ground that a third-party internet platform ban has the objective of preserving the image of luxury and prestige of the relevant goods.)

Such a third-party platform ban does not constitute a hardcore restriction and brand owners can, therefore, still benefit from the vertical agreements block exemption if the relevant conditions are met. In line with the Commission's view in the e-commerce sector inquiry, the ECJ also stated that the object of an online marketplace ban is not the restriction of passive sales and/or the customers to which distributors can sell. Authorised distributors can still use their own websites to sell products.

The ECJ in *Coty* also confirmed that the judgment in *Pierre Fabre* should be confined to the particular facts of that case (an absolute ban on internet sales). It is also worth noting that *Pierre Fabre* did not involve luxury goods. The *Coty* ruling concerned luxury products and it does not, therefore, support a blanket ban on third party websites.

The ruling suggests that an online marketplace ban is not a restriction by object within the meaning of Article 101 of the TFEU. Nor is it a hardcore restriction under the vertical agreements block exemption. If it concerns luxury or hi-tech products, there would appear to be almost a presumption that the ban is lawful. For other products, a case-by-case analysis of the effects of the ban may be needed.

On 4 April 2018, the Commission published a Competition Policy Brief (1/2018) that discussed DG Competition's view of the legality of marketplace bans following the *Coty* judgment. This concluded that the ECJ had confirmed the previous case-law according to which it is possible to operate selective distribution, including for luxury goods, in compliance with Article 101(1) of the TFEU. The brief stated that the ECJ had established a clear legal framework for assessing marketplace bans under Article 101(1):

- It must be established whether a marketplace ban escapes the application of Article 101(1) by fulfilling the criteria established in case law for selective distribution networks (whether the ban has the objective of preserving the luxury image of the goods and it is laid down uniformly and not applied in a discriminatory fashion; and it is proportionate in the light of the objective pursued).
- If this is not the case, it must be established whether a marketplace ban restricts competition under Article 101 of the TFEU. In practice, this question will however only arise where market shares of the parties are above the 30% market share threshold of Article 3 of the vertical agreements block exemption. Otherwise marketplace bans are block-exempted as the ECJ had clarified that marketplace bans do not constitute hardcore restrictions under Article 4(b) or 4(c) of the vertical agreements block exemption.

The brief comments that it would seem that a marketplace ban cannot be qualified as a "passive sales" or "customer group" restriction of competition "by object" under Article 101 of the TFEU. This is because of the ECJ's reasoning that marketplace bans do not have the object of restricting customers to which the goods can be sold (within the meaning of Article 4(b) of the vertical agreements block exemption, nor of restricting passive sales to end-users (within the meaning of Article 4(c) of the vertical agreements block exemption).

DG Competition also considered that the ECJ's ruling means that marketplace bans do not amount to a hardcore restriction under the vertical agreements block exemption irrespective of the product category concerned (luxury or non-luxury). The assessment of hardcore restrictions should (to preserve the benefit of legal certainty) not depend on the product category concerned or an analysis of the market condition. In addition, Article 4(b) of the vertical agreements block exemption applies also outside selective distribution (unlike Article 4(c)).

On 17 December 2018, the Commission announced that it had imposed a fine of EUR39.821 million on clothing manufacturer and retailer Guess following a finding that its selective distribution agreements restricted authorised retailers from online advertising and selling cross-border to consumers in other member states (see Legal update, Commission finds Guess distribution agreements infringe Article 101). Specifically, the Commission found that, between 1 January 2014 and 31 October 2017, Guess' distribution agreements restricted its authorised retailers chosen on the basis of quality criteria from:

- Using the Guess brand names and trade marks for the purposes of online search advertising.
- Selling online without a prior specific authorisation by Guess, for which the company had full discretion and which was not based on any specified quality criteria.
- Selling to consumers located outside the authorised retailers' allocated territories.
- Cross-selling among authorised wholesalers and retailers.
- Independently deciding on the retail price at which they sell Guess products.

Conditions for falling outside Article 101(1)

The Commission and the European courts have considered the compatibility of selective distribution agreements with Article 101(1) on many occasions. Subsequent guidance and case law have led to the development of a set of rules governing the circumstances in which selective distribution agreements fall outside Article 101(1). The new Vertical Restraints Guidelines reflect that guidance.

A distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. In a quantitative selective distribution system, dealers are selected on the basis of criteria, at least some of which act to limit the number of dealers, either directly (for example, by fixing the number of dealers) or indirectly (for example, by requiring minimum sales volumes). In contrast, purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product. It does not put a limit on the number of distributors. According to the Vertical Restraints Guidelines, purely qualitative selective distribution may fall outside Article 101(1), provided it fulfils the following conditions established in *Metro* (*Metro v Commission (No 2) (Case 75/84) EU:C:1986:399*):

- The products in question must be of a kind that selective distribution is necessary to ensure their proper distribution (the principle of **necessity**).
- Dealers must be selected on the basis of **qualitative** criteria, which must be applied objectively and without discrimination (the principle of **non-discrimination**).
- Restrictions imposed on distributors must not be excessive in relation to the requirements of the product (the principle of **proportionality**).

However, in exceptional circumstances Article 101(1) will apply even though these conditions are met, for example, if the proposed system removes the scope for competition between approved distributors, results in an unduly rigid pricing structure, or operates in a market where there is insufficient competition from other distribution systems.

A distribution system does not lose its selective character by virtue of the fact that the contract goods are distributed through independent channels outside the EU (*Metro v Cartier (Case C-376/92) EU:C:1994:5*).

Necessity

The Vertical Restraints Guidelines state that "necessity" means that having regard to the nature of the product concerned, such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use. There is no definitive list of products for which selective distribution has been found to be necessary, but decisions of the Commission and the European courts, as reflected in the Vertical Restraints Guidelines, indicate that selective distribution is likely to be justified in the following categories:

- Luxury goods, such as perfumes and high value cosmetics (*Yves St Laurent Parfums OJ 1992 L12/24; Parfums Givenchy OJ 1992 L236/11*).
- Technically complex products, such as photographic equipment and electrical consumer goods (*Hasselblad Ltd v Commission (Case 86/82) EU:C:1984:65; Metro v Commission (Case 75/84) EU:C:1986:399*).
- Products which combine luxury and technical complexity, such as high-quality watches (*Junghans OJ 1977 L30/10*).
- Spare parts and repairs for luxury products, such as "prestige" watches, where the provision of repair services of high and uniform quality helps maintaining the image of the brand of the primary product in the eyes of the consumer (*Watch Repair, Commission Decision rejecting the complaint (Case AT.39097)*; see Legal update, Commission closes investigation into refusal to supply spare parts by luxury watch manufacturers).

It is clear from these categories of goods that selective distribution is generally held to be justified in relation to products which have a high value or an established and valuable trade mark or cachet which the supplier would not wish to dilute by dealing with certain types of distributor, such as supermarkets or cash and carry outlets. In the case of technically complex products the use of selective distribution may be justified on the grounds that the supplier needs the distributor to provide a higher quality of service to assist consumers in the selection and operation of the products in question. Not all products for which selective distribution is justified fall neatly into these categories. Newspapers were found to justify selective distribution on the grounds of the special requirements of a product with such a short shelf-life (*Binon (Case 243/83) EU:C:1985:284*).

Examples of products which have been found not to justify selective distribution are mass-produced watches, tobacco products and plumbing fittings (*Case 31/85 ETA Fabriques d'Ebauches SA v DK Investment SA (Case 31/85) EU:C:1985:494*; *Heintz Van Landewyck Sàrl v Commission (Case 209-215/78) EU:C:1980:248*; *Grohe OJ 1985 L19/17*).

The vertical agreements block exemption exempts selective distribution agreements regardless of the product concerned and the nature of the selection criteria.

Qualitative criteria

The criteria which a potential distributor must meet to become an approved distributor must be clear, objective and based on quality rather than quantity.

Whether criteria are held to be **qualitative** will vary according to the particular product, but the following requirements to be met by dealers are generally held to be qualitative:

- To provide suitably trained staff (*Grundig OJ 1985 L233/1*).
- To sell the goods in a specialised shop or in a self-contained specialist department and requiring separate display in an attractive setting (including the presence of competing products of a similar quality, particularly in respect of luxury products) (*Villeroy and Boch OJ 1985 L376/15*).
- To provide an after-sales service under the product's warranty (*SABA OJ 1976 L28/19*).

Examples of **quantitative** restrictions are criteria based on the number or location of approved distributors.

Non-discrimination

The requirements for admission to the selective distribution system must be applied objectively and without discrimination to all distributors: the distribution system must be "open".

The time taken by a supplier to assess and admit a distributor to its distribution system can have an effect on competition between distributors. The Commission has required alterations to a distribution system to ensure that suitable distributors were admitted to the system promptly (*Yves St Laurent Parfums*). The system proposed by Yves Saint Laurent Parfums reserved to the supplier the "exclusive and discretionary right to decide, as the final arbiter" whether or not to admit a retailer into the selective distribution system. The Commission required modifications to the system so that the supplier was obliged to decide, within a precise timescale, on requests for authorisation received from prospective resellers, and to admit all qualified retailers into its network or, where appropriate, to inform the applicant expressly of the grounds on which its request has been rejected.

The requirement by a perfume supplier in *Leclerc* (see Proportionality) that retailers devote at least 60% of their business to the sale of perfume was held to be discriminatory (as well as disproportionate), on the ground that it favoured applications for approval by specialist perfumeries at the expense of those made by "multiple-product" shops with specially designated perfume sales areas which in other respects met the qualitative criteria appropriate to the sale of luxury cosmetics.

Proportionality

The restrictions and obligations contained in the selective distribution agreement must not exceed what is essential to market and sell the product effectively (*L'Oréal (Case 31/80) EU:C:1980:289*).

For example, the General Court has held that a requirement that retailers should devote at least 60% of their business to the sale of perfume was disproportionate: the fact that a retailer devoted less than 60% of its business to perfumery was not connected with the legitimate requirement of preserving the luxury image of the product (*Leclerc v Commission (Case T-19/92) EU:T:1996:190*).

The Vertical Restraints Guidelines clearly state that hardcore restrictions will not meet the proportionality test and so cannot be exempted.

Application of vertical agreements block exemption

Where the supplier's and buyer's market shares each do not exceed 30%, qualitative and quantitative selective distribution is exempted by the vertical agreements block exemption (even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution obligations) (*Article 2, VBER*).

Where a supplier appoints more than one exclusive distributor per territory or customer group (five being the maximum), it may prevent active sales by members of a selective distribution system and their direct customers into any territory covered by such an exclusive arrangement. Any restriction on the dealer's right to sell to end-users, or to sell to or buy from other authorised dealers amounts to a hardcore restraint (see Hardcore restrictions). The block exemption exempts selective distribution regardless of the nature of the product concerned and, as the Vertical Restraints Guidelines make clear, the nature of the selection criteria (which the supplier is not obliged to publish).

The Commission has established that selective distribution systems which authorise approved retailers already operating a physical sales point to sell via the internet are covered by the vertical agreements block exemption (*COMP/36.533 Yves Saint Laurent; Commission press release IP/01/713*).

Where the characteristics of the product do not require selective distribution or do not require the selection criteria, such as for the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. If appreciable anti-competitive effects occur, the benefit of the block exemption may be withdrawn.

Position if vertical agreements block exemption does not apply

The Vertical Restraints Guidelines (*section 6.2.3*) provide the following guidance for the assessment of selective distribution in cases not covered by the block exemption or in the case of cumulative effects resulting from parallel networks of selective distribution.

The market position of the supplier and its competitors is of primary importance in assessing the possible anti-competitive effects of selective distribution. The loss of intra-brand competition can only be problematic if inter-brand competition is limited. The presence of strong competitors in the market will generally mean that the reduction in intra-brand competition is easily outweighed by sufficient inter-brand competition.

However, if a majority of the main suppliers in a particular market apply selective distribution, the Commission considers that there will be an increased risk of collusion, a significant loss of intra-brand competition and possible foreclosure of certain distributors.

The cumulative effect of a series of individual selective distribution systems may lead to the withdrawal or disapplication of the block exemption. The Commission states that a cumulative effect problem is unlikely to arise where the market coverage ratio (that is, the part of the market covered by selective distribution) is below 50%. Nor is any problem likely to arise where the market coverage ratio exceeds 50%, but the aggregate market share of the five largest suppliers is below 50% (*paragraph 155, Vertical Restraints Guidelines*). Where both the market coverage ratio and the aggregate market share of the five largest suppliers is above 50%, whether or not the distribution agreement can benefit from the block exemption will depend on the number of those suppliers that apply selective distribution, whether those distributors are allocated using quantitative criteria, or whether the qualitative criteria foreclose certain distribution formats (for example, a requirement to have a brick and mortar shop).

A company with a market share of 5% or below is generally considered not significantly to contribute to a cumulative effect.

Entry barriers are also an important element of the assessment with respect to foreclosure of the market to non-authorised dealers. The Commission acknowledges that it will take much time and investment for excluded dealers to launch their own brands and obtain competitive supplies elsewhere. Furthermore, the presence of buying power increases the risk of collusion between dealers.

On 13 October 2011, the ECJ ruled that, in the context of a selective distribution system, a clause which prevents internet sales by requiring that cosmetics and personal care products are sold in a physical space in the presence of a qualified pharmacist, amounts to a restriction by object within the meaning of Article 101(1) if it is not objectively justified. Consideration of the objective justification of the clause requires an individual and specific examination of the content and objective, and the legal and economic context of which it forms a part, with regard to the particular properties of the products. Such a clause will prevent the application of the vertical agreements block exemption. However, it may benefit from individual exemption if the conditions for exemption under Article 101(3) are met. See Positive effects.

Although the ECJ's ruling relates to the old vertical agreements block exemption the old and new block exemptions are substantively identical on the point regarding the illegality of a ban on sales to end-users within a selective distribution system, so the ECJ's ruling is equally relevant to the current regime. The 2010 guidelines do also contain new guidance on restrictions of online sales within a selective distribution system and explain that, in principle, a distributor or retailer must be free to sell online, even within a selective distribution system. It may be possible to impose criteria on the detail of how the sales are made, but such criteria must be equivalent to criteria imposed on bricks-and-mortar outlets or, at least, differences in the criteria must be a reasonable reflection of differences between the two distribution modes (see Online sales restrictions).

Possibility of individual exception

According to the Vertical Restraints Guidelines, the Commission recognises that selective distribution may be efficient in leading to savings in logistical costs due to economies of scale. However, such savings are usually marginal. Selective distribution may also help solve a free-rider problem or create a brand image, depending on the nature of the product. The Guidelines provide that the use of selective distribution to achieve those types of efficiencies is generally more likely to be justified for new products, complex products or products whose qualities are difficult to judge before consumption (so-called experience products) or even after consumption (so-called credence products). Foreclosure of other suppliers is not likely to be a problem, provided other suppliers can use the same distributors.

The hardcore restrictions listed in the vertical agreements block exemption are unlikely to be exempted (*see* Hardcore restrictions). The Guidelines indicate that the conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution system at issue prevents access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online only distributors, thereby limiting distribution to the advantage of certain existing channels and to the detriment of final consumers. However, more indirect forms of quantitative selection may be acceptable, such as a requirement for minimum annual purchases that do not represent a significant proportion of the dealer's total turnover for the type of products in question, and go no further than is necessary for the supplier to recoup relationship specific investments and/or realise economies of scale in distribution. In addition, the combination of selective distribution with a location clause (protecting an authorised dealer against other authorised dealers opening up shop in its vicinity) may fulfil the Article 101(3) criteria if necessary to protect substantial and relationship-specific investments by the authorised dealer.

Franchising

Under a franchise agreement, one party (the franchisor) allows the other party (the franchisee) to exploit the franchisor's trade marks or signs and know-how for the sale and distribution of goods or services. The agreement will provide for extensive control to be exercised by the franchisor over the way in which the business is run by the franchisee, and for continuing assistance to be given by the franchisor to the franchisee, including the advertising of the brand on behalf of all franchisees. The franchisee will pay a fee or royalty to the franchisor in return for the business concept. The businesses of the franchisor and the franchisee remain separate. The franchisee provides and accepts the risk for the capital investment in the franchise and enjoys a limited right to dispose of the franchise, subject to the consent of the franchisor.

A franchise arrangement enables a franchisor to establish, with limited investment, a uniform network for the distribution of its goods or services. From the franchisee's point of view, such a system gives it the opportunity to take advantage of an already well-known name and image, as well as the practical and technical help of the franchisor in setting up the business. While franchises are commonly associated with fast food and fashion outlets, franchising is a method of distribution which has also gained popularity in an increasing number of other sectors.

The application of Article 101 to franchising agreements was first considered by the ECJ in *Pronuptia* (*see* Pronuptia (franchising)).

Application of vertical agreements block exemption

Where the market shares of the franchisee and franchisor (or the supplier designated by the franchisor) do not exceed 30%, the vertical agreements block exemption covers:

- The licensing of intellectual property rights in franchise agreements insofar as the licence provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services (see Vertical agreements and intellectual property rights).
- Vertical restraints (such as selective distribution, non-compete or exclusive distribution obligations) on the purchase, sale and resale of goods and services under a franchising arrangement.

The Vertical Restraints Guidelines provide specific guidance on the calculation of market shares in the context of franchising (*paragraph 165*).

Position if vertical agreements block exemption does not apply

The Vertical Restraints Guidelines (*section 4.6.3*) provide limited assistance in the assessment of franchising agreements which fall outside the safe harbour of the vertical agreements block exemption. They state that franchising agreements are usually a combination of different vertical restraints, namely selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof. The guidance provided in the Guidelines and summarised above in respect of these type of restraints applies also to franchising agreements. For example, a franchise agreement that results in a closed network, where the franchisees are prohibited from selling to non-franchisees, must be assessed under the principles applicable to selective distribution (*paragraph 167*). Separately, the Guidelines provide that:

- The more important the transfer of know-how, the more easily the vertical restraints fulfil the conditions for exemption (*paragraph 168*).
- Provisions that are strictly necessary for the functioning of franchising systems can be considered as falling outside the scope of Article 101(1). For example, a non-compete obligation related to the goods or services purchased by the franchisee is likely to fall outside Article 101(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases also the duration of the non-compete obligation is irrelevant under Article 101(1) as long as it does not exceed the duration of the franchise agreement itself.

Exclusive supply

An exclusive supply obligation is defined as one which causes the supplier to sell the goods or services specified in the agreement only to one buyer in general or for a particular use (see *section 8.2, Vertical Restraints Guidelines*). In the case of intermediate goods or services, exclusive supply is often referred to as industrial supply.

Application of vertical agreements block exemption

If both the supplier's and buyer's market share do not exceed 30%, exclusive supply obligations are exempted by the vertical agreements block exemption, even if combined with other non-hardcore vertical restraints such as non-compete obligations.

Position if vertical agreements block exemption does not apply

The vertical restraints guidelines state that the main competition risk of an exclusive supply obligation is foreclosure of other buyers. Factors relevant in determining the existence or possibility of foreclosure include:

- The market share of the buyer on the upstream purchase market. However, it is the strength of the buyer on the downstream market which determines whether a competition problem may arise. If the buyer has no market power downstream, no appreciable negative effects for consumers can be expected. If, on the other hand, the market share of the buyer on the downstream market exceeds 30% and the exclusive supply agreements of this buyer cover more than 30% of the upstream purchase market, negative effects can be expected. Where the market share of the buyer on the upstream market does not exceed 30%, significant foreclosure effects may still arise, especially where the market share of the buyer on its downstream market exceeds 30% and the exclusive supply relates to a particular use of the contract products.

- The extent and duration of an exclusive supply obligation. The higher the tied supply share and the longer the duration of the exclusive supply obligation, the more significant foreclosure is likely to be:
  - exclusive supply agreements of less than five years entered into by non-dominant companies require a balancing of pro- and anti-competitive effects; and
  - exclusive supply agreements exceeding five years are, for most types of investments, not considered necessary to achieve the claimed efficiencies, or the efficiencies are not sufficient to outweigh their foreclosure effect.
- The market position of competing buyers on the upstream market, as it is only likely that competing buyers will be foreclosed for anti-competitive reasons if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where these competitors have similar buying power and can offer the suppliers similar sales possibilities.
- The existence of countervailing power on the part of suppliers, as important suppliers will not easily be cut off from alternative buyers. Therefore, foreclosure is mainly a risk in the case of weak suppliers and strong buyers. In case of strong suppliers, the exclusive supply obligation may be found in combination with a non-compete obligation. Where there are relation-specific investments involved on both sides (the hold-up problem (see Positive effects) the combination of exclusive supply and non-compete (that is, reciprocal exclusivity in industrial supply agreements) is usually justified up to the level of dominance.
- The level of trade and nature of the product. Foreclosure is less likely in the case of an intermediate product and where the product is homogeneous.

Possibility of individual exception

The Commission considers that efficiencies can be expected in the case of a hold-up problem and this is more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution do not appear likely to justify exclusive supply obligations. A less restrictive alternative may be the imposition of quantity-forcing obligations on the supplier, such as a minimum supply requirement (see also Modernisation of rules implementing Article 101).

The Vertical Restraints Guidelines state that agreements lasting more than five years are unlikely to be exempted under Article 101(3), as most types of investments would not be considered necessary to achieve any claimed efficiencies, or the efficiencies themselves would be insufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

Upfront access payments

Upfront access payments are fixed fees that suppliers pay to distributors at the beginning of a relevant period, to obtain access to their distribution network and remunerate services provided to the suppliers by the retailers, for example, slotting allowances and "pay-to-stay" fees.

Application of vertical agreements block exemption

If both the buyer's and supplier's market shares do not exceed 30%, upfront access payments are block exempted.

Position if vertical agreements block exemption does not apply

The Vertical Restraints Guidelines state (*section 8.2.6*) that the main competition risk of upfront access payments is foreclosure of other distributors if such payments induce the supplier to channel its products through only one or a limited number of distributors. In such a case, given the similarities with an exclusive supply type of obligation, the Vertical Restraints Guidelines provide that the guidance relating to exclusive supply obligations may be applied by analogy. Exceptionally, upfront access payments may also result in foreclosure of other suppliers, if the widespread use of upfront access payments increases barriers to entry for small entrants. To assess the likelihood of this type of negative effect, the guidance relating to single branding obligations may be applied by analogy (*paragraph 381, Vertical Restraints Guidelines*).

Possibility of individual exception

The Vertical Restraints Guidelines recognise that the use of upfront access payments may contribute to an efficient allocation of shelf space for new products, reducing asymmetry in information between suppliers and distributors as regards the possession of information on the potential for success of new products to be introduced on the market. A supplier is more likely to pay an upfront access fee if there is a low probability of failure of the product introduction. The distributor will, therefore, receive a signal of which products are most likely to be successful. The use of upfront access fees may also prevent free-riding by shifting the risk of product failure back to the suppliers, contributing to an optimal rate of product introductions.

Category management agreements

Category management agreements are agreements by which a distributor entrusts the supplier (category captain) with the marketing of a category of products, including in general not only the supplier's products, but also the products of its competitors. The category captain may therefore influence product placement, promotion and selection.

Application of vertical agreements block exemption

If both the buyer's and supplier's market shares do not exceed 30%, category management agreements are block exempted.

Position if vertical agreements block exemption does not apply

The Vertical Restraints Guidelines state (*section 8.2.7*) that the main competition risk of category management agreements is foreclosure of other suppliers, if the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. Relevant factors in assessing upstream foreclosure effects will be the market coverage of the agreements, the market position of competing suppliers and the possible cumulative use of such agreements. Category management agreements may also facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors in a market and provides these distributors with a common point of reference for their marketing decisions. Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information.

Possibility of individual exception

The Vertical Restraints Guidelines recognise that category management agreements may lead to efficiencies, through allowing distributors access to the supplier's marketing expertise for a certain group of products. They may also lead to economies of scale and to higher customer satisfaction (as they help to better meet demand expectations). In general, the higher the inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

Tying

Tying exists when the supplier makes the sale of one product or service conditional on the purchase of another distinct product or service from the supplier or someone designated by the supplier (*see section 8.2.8, Vertical Restraints Guidelines*). The first product or service is referred to in the vertical restraints guidelines as the "tying" product or service and the second is referred to as the "tied" good or service.

The Guidelines point out that if the tying is not objectively justified by the nature of the products or commercial usage, it may constitute an abuse for the purpose of Article 102 (see Practice note, Competition regime: Article 102: Tying and bundling). Article 101 may apply to horizontal agreements or concerted practices between competing suppliers to make the sale of one product or service conditional upon the purchase of another distinct product or service. Tying may also constitute a vertical restraint where it results in a single branding type of obligation for the tied product or service (see Single branding (non-compete obligations)).

According to the Guidelines, what is considered as a distinct product is first determined by the requirements of the buyer. Therefore, two products are distinct if, in the absence of tying, from the buyer's perspective these products are purchased by it on two different markets. The sale of shoes with laces, for example, is not a tying practice because customers want to buy shoes with laces.

Application of vertical agreements block exemption

Tying is exempted by the vertical agreements block exemption when the market share of the supplier on both the market for the tied product and the market for the tying product and the market share of the buyer on the relevant upstream markets do not exceed 30%. It may be combined with other non-hardcore vertical restraints such as non-compete or quantity forcing in respect of the tying product, or exclusive sourcing.

Position if vertical agreements block exemption does not apply

In analysing the application of Article 101(1), the main negative effect of tying is foreclosure of the market for the tied product. The market position of the supplier on the market for the tying product or service is of primary importance in assessing the possible anti-competitive effects of tying. The extent to which the supplier's position on the market equates to genuine market power depends on the market position of competitors, entry barriers and the existence of countervailing power on the part of buyers. The potential for foreclosure is increased where tying is combined with a non-compete obligation in respect of the tied product.

Possibility of individual exception

The guidelines indicate that, above the 30% market share threshold, legal exception for tying under Article 101(3) requires that there are clear efficiencies that are transmitted, at least in part, to consumers. Such efficiencies may arise where tying obligations facilitate joint production or joint distribution, where they allow the supplier to purchase large quantities of the tied product for resale with the tying product that it produces, or where tying is necessary to ensure a certain uniformity or product standardisation. However, consumers are unlikely to benefit if retailers are regularly able to obtain supplies of the same or similar products on the same or better conditions that those offered by the supplier which applies the tying practice.

Resale price restrictions

Application of block exemption

If both the supplier's and the buyer's market shares do not exceed 30%, the practice of **recommending** a resale price to a reseller, or of requiring the reseller to observe a **maximum** resale price, is covered by the vertical agreements block exemption, 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 (see *section 6.1.1, Vertical Restraints Guidelines; Article 4(a), VBER*).

Position if block exemption does not apply

If the market share of a supplier exceeds 30%, the Guidelines state that the practice of **recommending** a resale price may lead to a uniform application of that price level by resellers, because they may use it as a focal point and may find it difficult to deviate from the preferred resale price proposed by such an important supplier on the market (*paragraphs 199-200*). In such circumstances, the recommendation of a resale price may violate Article 101(1) if it leads to a uniform price level. The Commission considers that an important factor for assessing possible anti-competitive effects of recommended or maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended or maximum resale price will lead to a more or less uniform application of that price level by the resellers, because they may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier.

As regards minimum or fixed resale prices (resale price maintenance or RPM), these are treated as hardcore restrictions and will be presumed to fall within the scope of Article 101(1). The Vertical Restraints Guidelines set out several ways in which such restrictions are harmful to competition. They will therefore be illegal unless they satisfy the Article 101(3) exception criteria.

Possibility of individual exception

The Vertical Restraints Guidelines accept that RPM can lead to efficiencies in certain (albeit limited) circumstances. In particular, such restrictions may facilitate new entry, prevent free-riding and provide incentives to offer pre-sale services. Where undertakings rely on an efficiency defence for RPM, they must be able to substantiate this with concrete evidence and show that all the conditions of Article 101(3) are fulfilled in the individual case. The Guidelines (*paragraph 197*) provide the following:

- Where a manufacturer introduces a new product, resale price maintenance may be permitted where it provides retailers with the means and incentives to increase promotional efforts and expand overall demand for the product, so making the entry a success. Article 101(3) of the TFEU also requires that there are no realistic and less restrictive alternative means of incentivising the distributors to promote the product. To meet that requirement, suppliers may, for example, demonstrate that it is not feasible in practice to impose on all buyers effective promotion obligations by contract.
- Resale price maintenance may be necessary to organise in a franchise system or "similar distribution system" a co-ordinated short term (for example, a two to six week) low price campaign. In such a case, given its temporary character, the imposition of fixed retail prices may be considered on balance pro-competitive.
- A minimum resale price or minimum advertised price (MAP) can be used to prevent a particular distributor from using the product of a supplier as a loss leader. Where a distributor regularly resells a product below the wholesale price, this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image. In that case, preventing that distributor from selling below the wholesale price, by imposing on it a targeted minimum resale price or MAP may be considered on balance pro-competitive.
- In some situations, the extra margin provided by RPM may allow retailers to provide additional pre-sales services, in particular in the case of complex products. If enough customers take advantage of such services to choose a product but subsequently purchase at a lower price with retailers that do not provide such services (and hence do not incur those costs), high-service retailers may reduce or stop providing pre-sales services, which enhance the demand for the supplier's product. The supplier must demonstrate that there is a risk of free riding at the

distribution level, that fixed or minimum resale prices provide sufficient incentives for investments in pre-sale services and that there is no realistic and less restrictive alternative means of overcoming such free riding.

Separately, maximum resale prices can help avoid "double marginalisation" or may help to ensure that the supplier's brand competes more fiercely with other brands distributed by the same distributor, including private label products (*paragraph 201, Vertical Restraints Guidelines*).

Online sales restrictions

The 2022 Vertical Restraints Guidelines provide additional guidance for the assessment of restraints specific to the Internet economy, including restrictions on the use of marketplaces (*section 8.2.3*), restrictions on the use of price comparison services (*section 8.2.4*), and parity obligations (*section 8.2.5*). The treatment of vertical restraints in relation to internet sales is considered in more detail in Practice note, Online sales restrictions in vertical agreements.

Sustainability agreements

The new Vertical Restraints Guidelines recognise that sustainable development is a core principle and policy objective of the EU. It includes, among other things, addressing climate change, limiting the use of natural resources, reducing waste, and promoting animal welfare. Given that the EU's objectives can be furthered by efficient supply and distribution agreements between undertakings, the new VBER was updated to provide specific guidance on agreements that pursue sustainability objectives (*paragraph 8, Vertical Restraints Guidelines*).

Vertical agreements that pursue sustainability objectives (or contribute to a digital and resilient single market) are not a distinct category of vertical agreements. They must be assessed using the principles set out in the Guidelines, while considering the specific objective that they pursue, and can benefit from the exemption under Article 2(1), provided the conditions are met. Where the block exemption does not apply, such agreements may nonetheless fulfil the conditions of Article 101(3) (*paragraph 9, Vertical Restraints Guidelines*).

The new Vertical Restraints Guidelines provide some examples illustrating the assessment of vertical agreements that pursue sustainability objectives:

- In the context of a selective distribution system, qualitative criteria may refer to the achievement of sustainability objectives (that is, climate change, protection of the environment or limiting the use of natural resources). For example, suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means, such as cargo bikes instead of motor vehicles. Qualitative criteria relating to sustainable development may be different for online and offline sales channels (*paragraphs 144 and 235, Vertical Restraints Guidelines*).
- Non-compete obligations may be used to address a hold-up problem for investments pursuing sustainability objectives, by incentivising long-term investment in sustainable technology. For example, where an energy supplier wishes to invest in a hydropower plant or wind farm, it may only be willing to take that long-term investment risk if a sufficient number of buyers commit to purchasing renewable energy for a longer period. Such a vertical agreement may be pro-competitive, because the long-term non-compete obligation would be necessary for the investment to take place. Therefore, such non-compete obligation may fulfil the conditions of Article 101(3) of the TFEU if the supplier's investment has a long depreciation period, exceeding the five years set out in the block exemption (*paragraph 316, Vertical Restraints Guidelines*).

Agency agreements

Under an agency agreement, an agent is appointed by the principal to negotiate, or to negotiate and conclude, contracts with customers on the principal's behalf. An agent is paid commission on the sales they make, usually on a percentage basis. An agent may, for example, be a self-employed individual representing a single principal in a small area, or a company appointed for an overseas territory representing several different principals.

There are important differences between agency agreements and distribution agreements. Under a distribution agreement, the supplier sells its products to the distributor, who (having acquired ownership of the products) then sells them on to its customers, adding a margin to cover its own costs and profit. The distributor contracts both with the supplier and with its customer. In the case of an agency, however, the only contract for sale of the products is made between the principal and the customer. The agent generally has no contractual liability to the customer. An agent therefore does not assume the higher level of risk that is incurred by the distributor in reselling the products and contracting with customers, and this is usually reflected in the lower level of commission earned by an agent compared to the remuneration or margin received by a distributor.

The principal reason why a supplier may wish to appoint an agent rather than a distributor is the level of control which the supplier can enjoy over the agent's activities. This may allow the supplier, among other things, to maintain strict supervision over the marketing and pricing of the product.

The Commercial Agents Directive required member states to harmonise their national rules relating to commercial agency agreements and to introduce minimum standards of protection for self-employed commercial agents, including the right to payment of compensation on termination of an agreement (*Directive 86/653 OJ 1986 L382/17*). Although beyond the scope of this Practice note, it is important to consider these mandatory rules when drafting an agency agreement.

For a flowchart guide and overview of the application of Article 101(1) to agency agreements, see Practice note, Flowchart guides: Specific observations on agency agreements.

Application of Article 101(1)

Article 101(1) only applies to an agreement between two or more independent undertakings (see Practice note, Competition regime: Article 101: Agreement, decision or concerted practice between undertakings). It will, therefore, not apply to an agency agreement if the principal and agent are so closely integrated that they are to be regarded as part of the same economic unit, just as agreements between employers and employees, or a parent and its subsidiary, generally fall outside Article 101(1) (see, for example, *Viho v Commission (Case C-73/95P) [1996] ECR I-5457*). The criteria which must be satisfied if the principal and agent are to be regarded as so closely integrated that they form a single economic undertaking are considered below in When is an agent independent?.

The obligation assumed by an agent to work exclusively for one principal for a certain period of time entails a limitation of supply on that market. The obligation assumed by the other party to the contract, to appoint it sole agent for a given territory, involves a limitation of demand on the market. Nevertheless, the Commission views these restrictions as resulting from the special obligation between the commercial agent and its principal to protect each other's interests and therefore considers that they involve no restriction of competition.

When is an agent independent?

The Vertical Restraints Guidelines state that there are three types of financial or commercial risks that are relevant to the assessment of whether an agent is independent (*paragraph 31*):

- Those that are directly related to the contracts negotiated or concluded by the agent on behalf of the principal, such as financing of stocks.
- Those that relate to market-specific (often sunk) investments, that is, investments that are required to be able to negotiate or conclude the contracts on behalf of the principal.
- Risks related to other activities undertaken on the same product market, to the extent that the principal requires the agent to undertake such activities for its own risk, and not as an agent on behalf of the principal.

The agency agreement is considered a genuine agency agreement and falls outside Article 101(1) if the agent does not bear any of the above risks, or bears them only insignificant degree. Conversely, where the agent does bear such risks they will be regarded as an independent dealer.

The question of risk is to be assessed on a case-by-case basis, taking account of the economic reality of the situation rather than the legal form. Nonetheless, the Guidelines state that Article 101(1) will generally not apply to provisions governing the sales or purchases to be made on behalf of the principal if property in the goods sold or bought does not vest in the agent, or the agent does not itself supply the services, and in particular where the agent does not undertake any of the activities set out in *Activities not to be undertaken by an agent*.

In October 2001, the Commission held that Mercedes-Benz agents in Germany had to bear several commercial risks linked to their function as agent which resulted in Article 101(1) being applicable to the agreements between them and Mercedes-Benz (*Mercedes-Benz OJ 2002 L257/1*). In reaching this conclusion, the Commission focused on the following:

- If an agent made price concessions on the sale of new vehicles or granted volume or user discounts associated with the vehicle(s) whose sale they negotiated, these were deducted from it commission.
- The agent bore the transport costs of car delivery and the "transport cost risk" (that is, the risk that the customer did not pay for the transport).
- The agent used its own resources for sales promotion, for example, acquiring demonstration vehicles on its own account.
- Although the agent was paid a "Guarantee indemnity" by Mercedes-Benz, the agent had to make sure that their actual cost did not exceed the standard indemnity levels.
- The agent had to finance a workshop, offer emergency services and keep a stock of spare parts.

However, in a 2005 judgment (*DaimlerChrysler AG v Commission (Case T-325/01) EU:T:2005:322*), the General Court disagreed with the Commission's assessment. It concluded that in fact it was Mercedes-Benz, not the agents, which assumed all the risks of a transaction, including failure to deliver, delivery of a faulty vehicle and the buyer's insolvency. The fact that an agent could freely grant discounts out of its sales commission did not constitute a price risk for the agent. The General Court also noted that dealers' responsibility for transport of new vehicles in practice gave rise to only minimal risks, in part because many clients collected their new vehicles from the factory. The court also considered that the Commission exaggerated the risks involved in an agent using its own resources for purposes of sales promotions and purchase of demonstration vehicles, and that the Commission had failed to show that obligations in relation to repairs and after-sales service implied significant economic risks. The court therefore declared that the agency agreements between Mercedes-Benz and the German agents fell outside the scope of Article 101(1).

In a judgment in 2006, the ECJ explicitly linked the question of the applicability of Article 101(1) to commercial agency agreements to that of classifying commercial agents as independent economic operators (*Confederación Española de Empresarios de Estaciones de Servicio v CEPSA (Case C-217/05) EU:C:2006:784*).

The court ruled that:

- The question of risk must be analysed on a case-by-case basis, taking account of the real economic situation. To that end, it is necessary to apply criteria such as ownership of the goods, the contribution to the costs linked to their distribution, their safe-keeping, liability for any damage caused to the goods or by the goods to third parties, and the making of investments specific to the sale of those goods.
- Article 101(1) applies to an exclusive fuels distribution agreement between a supplier and a service-station operator where the latter operator assumes, to a non-negligible extent, one or more financial and commercial risks linked to selling to third parties.
- The fact that the intermediary in reality bears only a negligible share of the risks does not render Article 101 applicable. In such a case, only the obligations imposed on the intermediary in the context of the sale of the goods to third parties on behalf of the principal fall outside the scope of Article 101. An agency contract may contain clauses concerning the relationship between the agent and the principal, such as exclusivity and non-competition clauses, to which Article 101 applies.

The Vertical Restraints Guidelines provide that an agent can also act as an independent distributor of some goods or services of a supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated, for example because the goods in question have different features (*paragraph 36*). That said, the Guidelines indicate that where an agent undertakes activities as an independent distributor for the same supplier (especially in the same relevant market), there is a risk that the agency activity might influence its decision making in relation to the independent activity, for example because it might be influenced by the principal's pricing policy that it must follow as an agent. In such a scenario, the assessment of whether an agency relationship meets the conditions to fall outside Article 101(1) of the TFEU also becomes increasingly complex as it might be difficult to delineate which (sunk) investments and costs relate to the agency function or the independent activity. The Vertical Restraints Guidelines provide guidance on how to conduct that assessment in paragraph 39.

The 2022 Vertical Restraints Guidelines now also provide specific guidance regarding agency in relation to online platforms, noting that agreements by undertakings in the online platform economy will typically not meet the conditions (set out above) to be categorised as agency agreements outside the scope of Article 101(1) TFEU (*paragraph 46*). The Guidelines set out multiple reasons for reaching that conclusion, including that:

- These companies typically make significant market-specific investments (including in software or after-sales services), as a result of which they bear significant financial or commercial risks associated with their role as an intermediary.
- They typically serve a very large number of sellers, preventing them from becoming part of any of those sellers' undertakings.
- There is a possibility the commercial strategy is determined by the intermediary rather than the sellers, among others because of a likely size and bargaining power imbalance that might result from particular features of the platform economy (including network effects).

Inherent restrictions falling outside Article 101(1)

The Vertical Restraints Guidelines provide that obligations of the following kind undertaken by the agent will generally be considered an inherent part of an agency agreement. This is because each relates to the principal's ability to delineate the scope of the agent's activity, which is essential if the principal is to take the risks and therefore to be in a position to determine commercial strategy:

- Limitations on the territory in which the agent may sell those goods or services.
- Limitations on the customers to whom the agent may sell.

- Restrictions as to the price and conditions at which the agent must sell or purchase goods or services on behalf of the principal.

Application of Article 101(1) even where agency relationship exists

While Article 101 will not apply to those aspects of a (genuine) agency relationship that relate to the scope of the agent's activities in relation to the contract goods or services, it can apply to provisions which concern the relationship between the agent and the principal, such as those restricting the principal from appointing other agents for the same activity, territory or customer group (exclusive agency), or those preventing the agent from acting as agent or distributor for rivals of the principal (single branding). The Vertical Restraints Guidelines indicate that the former will in general not lead to anti-competitive effects, but that single branding and post-term non-compete provisions can give rise to foreclosure issues in certain circumstances.

Article 101(1) may also apply where the agency agreement implements a horizontal agreement or concerted practice, for example when several principals use the same agents while collectively excluding others from using those agents, or use the agents for collusion on marketing strategy or to exchange sensitive market information.

Also, even where there is a true agency relationship, any agreements concluded between the agent and customers will be subject to Article 101(1), and are likely to be imputed to the principal on the basis that the principal and the agent are part of the same economic entity (see Practice note, Competition regime: Article 101: Agreement, decision or concerted practice between undertakings).

Legal exception under Article 101(3)

An agency agreement that falls within Article 101(1), for example, because the agent bears appreciable economic risks, may fall within the scope of the vertical agreements block exemption (see Vertical agreements block exemption) and, failing that, may be capable of legal exception under Article 101(3). In practice, it will be assessed in the same way as the other forms of distribution described above, depending on the restrictions imposed on the agent and/or principal.

Restrictions unlikely to be excepted

If an agency agreement does fall within Article 101(1), restrictions that are unlikely to benefit from exception include:

- Any restriction on the agent's ability to respond to unsolicited orders from customers outside the exclusive territory.
- Any prohibition on the agent offering customers a rebate or discount out of its commission.
- Any excessive post-termination non-compete clauses. Under the Commercial Agents Directive, such a clause will in any event be invalid unless it is in writing, does not exceed a period of two years from the termination of the agreement, and is limited in scope in terms of geographical area, clients and products.

Restrictions that may be excepted

The Commission considered the terms which were capable of exception in an agency agreement in a transaction involving the establishment of a joint venture company, Eirpage Ltd, to sell telephone paging equipment in Ireland (*Eirpage OJ 1991 L306/22*). Eirpage sold the paging service through non-exclusive agents using a standard agreement. Some of the agents sold competing paging systems. The Commission required certain amendments to the agreement before granting legal exception under Article 101(3), including:

- Clarification that, when dealing with potential customers, the agent was free to promote its own service first, or at least on the same basis as the Eirpage service. Eirpage's services would need to be promoted first only if sales leads were passed to an agent by Eirpage, and if these were not suitable to the customer the agent was then free to promote its own service.
- The redrafting of an absolute obligation on agents of loyalty to Eirpage "in all matters" to reflect the agent's freedom to continue pursuing its own interests.
- The deletion of an obligation to bring to Eirpage's attention any information received by the agent which was likely to be of benefit to Eirpage in marketing the services.
- Clarification that the designation "Eirpage authorised agent" was subsidiary to the agent's own denomination.
- The deletion of a three-year post-term non-compete obligation preventing the solicitation of persons who at the time of termination were Eirpage subscribers.
- The addition of a provision in the joint venture agreement that direct competitors of Eirpage were not to be appointed agents.

Geo-blocking Regulation

The Commission's Digital Single Market Strategy, announced in May 2015, aimed to break down barriers to cross-border online activity, and included legislative proposals to make cross-border e-commerce easier and end unjustified geo-blocking (see Legal update, Commission announces Digital Single Market Strategy). Geo-blocking can be a result of a unilateral decision by market players, of agreements among competitors to share the market, or of vertical agreements, that are used by online sellers that result in the denial of access to websites based in other member states. The Commission has now taken steps to tackle geo-blocking that arises where traders in one member state block or limit access to their online interfaces (such as websites and apps) by customers from other member states, who wish to enter into cross-border transactions.

Competition law addresses abusive unilateral conduct of dominant undertakings and anti-competitive agreements or concerted practices between two or more undertakings, but not unilateral conduct of non-dominant undertakings.

On 28 February 2018, the Council formally adopted Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment (*OJ 2018 L60/1*) (Geo-blocking Regulation). This came into force on 3 December 2018 (with a transitional period for some passive sales restrictions). The Geo-blocking Regulation addresses the gap not covered by competition law, by prohibiting unilateral practices that lead to market partitioning.

It seeks to address both direct and indirect discrimination, based on information that indicates the physical location of customers, such as their IP address, delivery address, payment details or choice of language. The Geo-blocking Regulation prohibits the use of technological and other measures to block or limit a customer's access to a trader's online interface, other than in certain limited circumstances. It also prevents traders from applying different levels of access to goods or services or different conditions for payment on the same grounds without objective justification. The Geo-blocking Regulation only applies to cross-border transactions. The protection against discrimination based on nationality, place or residence or place of establishment applies both to consumers and to undertakings that act as customers, but not to B2B agreements for resale, such as selective and exclusive distribution (*recital 16*) (see Legal update, Digital Single Market Strategy: Council formally adopts geo-blocking Regulation at first reading).

The Geo-blocking Regulation does not affect agreements restricting active or passive sales within the meaning of the VBER where these fall outside its scope (specifically the prohibitions in Articles 3, 4 and 5). However, passive sales restrictions that infringe the Geo-blocking Regulation will be void automatically (*Article 6, Geo-blocking Regulation*).

On 20 September 2018, the Commission published updated guidance on unjustified geo-blocking (see Legal update, Updated guidance on ending unjustified geo-blocking). As well as addressing the respective rights and obligations of traders and consumers, and enforcement, the guidance addressed other matters beyond the scope of the Geo-blocking Regulation but of wider interest in the e-commerce sphere, including:

- Cross-border deliveries of goods and online payments.
- The meaning of "directing activities", which is relevant in the context of consumer protection.
- The Mini-One-Stop-Shop for providers of electronically supplied services.

The application of the Geo-Blocking Regulation to particular restrictions is considered in Practice note, Online sales restrictions in vertical agreements. An overview of the Geo-blocking Regulation is provided in Article, Geo-blocking: new rules for traders. For a detailed note dealing with the background to and rules in the Geo-blocking Regulation, see Practice note, Unjustified Geo-blocking Regulation.

Application of Article 102 to vertical agreements

Article 102 of the TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market, or a substantial part of it, if the abuse may affect trade between member states. A company does not have to be in a monopoly position to be dominant, but a large market share (more than 40%) could indicate a dominant position. A company is generally in a dominant position if it can behave without regard to other participants in the market.

Dominance is not prohibited by Article 102, only its abuse. Examples of abuses of a dominant position which are particularly relevant to vertical agreements or relationships are:

- Discriminatory pricing (see Practice note, Transactions and practices: EU Pricing: Discounts, discriminatory pricing and delivered pricing).
- Predatory pricing (that is, pricing at very low levels with a view to excluding competitors) (see Practice note, Transactions and practices: EU Pricing: Predatory pricing).
- Refusal to supply without justification (see Practice note, Competition regime: Article 102: Refusal to supply).
- Fidelity rebates and English clauses (see Practice note, Competition regime: Article 102: Pricing abuses).

- Imposition of non-compete obligations on buyers (see Single branding (non-compete obligations)).
- Tying (see Practice note, Competition regime: Article 102: Tying and bundling).

The possible application of Article 102 should be considered if a supplier or distributor has a dominant position in the relevant market. Restrictions which would be capable of exception under Article 101(3) in other circumstances, including those permitted under the block exemptions, may constitute abuses under Article 102, particularly if they have the effect of materially restricting the supply of the relevant type of product within the market as a whole (market foreclosure). However, not all restrictive agreements entered into by dominant undertakings constitute an abuse of dominance, and, where they do not, it is in principle possible (albeit less common) for such agreements to satisfy the criteria for Article 101(3) exception.

In 2001, the Commission fined Michelin EUR19.76 million for infringement of Article 102. The Commission found that Michelin had abused its dominant position on the French market for replacement tyres for trucks and buses by implementing a commercial and pricing policy towards its dealers based on a complex system of discounts, refunds and/or other financial advantages mainly aimed at tying the dealers of the company and at maintaining the company's market share and consequently undermining competition in the internal market (*Michelin OJ 2002 L143/1*). The Commission's decision was subsequently upheld by the General Court (*Michelin v Commission (Case T-203/01) EU:T:2003:250*).

In *Van den Bergh Foods Ltd*, the General Court noted that HB had a dominant position on the relevant market (the market for single-wrapped items of impulse ice-creams in Ireland) and that, although the provision to ice cream retailers of freezer cabinets on a condition of exclusivity constitutes a standard practice on the relevant market, that activity may restrict competition where it is entered into by an undertaking with a dominant position. The General Court stated that the exclusivity clause had the effect of preventing the retailers concerned from selling other brands of ice creams and preventing competitors from gaining access to the market and concluded that, by inducing retailers, by those means, to obtain supplies exclusively from HB, HB had abused its dominant position on the market (*Van den Bergh Foods v Commission (Case T-65/98) EU:T:2003:281*).

In the case of an agency agreement, Article 102 may apply if the principal is in a dominant position, even though Article 101 may not apply at all because the agent is considered to be fully integrated into the principal's business. A dominant principal may be treated as responsible for abuses committed by its agent.

In December 2008, the Commission published its guidance on the application of Article 102 to abusive exclusionary conduct, which sets out the Commission's enforcement priorities (see Legal update, Commission publishes guidance paper on application of Article 82 to exclusionary abuses). The guidance does not cover the separate category of "exploitative" abuses, such as excessive pricing and discrimination between customers that does not result in foreclosure of rivals. The guidance states that the Commission will, as a rule, only pursue enforcement action against conduct that has or is likely to result in anti-competitive foreclosure, notwithstanding case law of the EU courts which suggests that a conduct may be found to be abusive in the absence of concrete effects on the market, if it is of a kind that "tends to" restrict competition (see Legal updates, ECJ dismisses British Airways' appeal and General Court dismisses Intel abuse of dominance appeal (however, see Legal update, Advocate General recommends General Court judgment dismissing Intel abuse of dominance appeal be set aside).

In addition, while there is no formal provision for exception from Article 102, the Commission has stated in its guidance that it will not, as a rule, take enforcement action against conduct that can be shown to be necessary for the achievement of economic benefits that outweigh its anti-competitive effects, and which are or will be passed on to consumers. However, the Commission's guidance is not binding on national competition authorities or on the courts of the EU or its member states. Consequently, when assessing vertical arrangements entered into by dominant companies, certain types of restriction may give rise to competition risks even in the absence of actual anti-competitive effects.

In May 2019, the Commission fined Anheuser-Busch InBev SA (AB InBev) EUR200,409,000 for abusing its dominant position in the Belgian beer market. The Commission found that AB InBev pursued a deliberate strategy to restrict supermarkets and wholesalers from buying Jupiler beer at lower prices in the Netherlands and importing it into Belgium. The overall objective of this strategy was to maintain higher prices in Belgium by limiting imports of less expensive Jupiler beer products from the Netherlands. It achieved this, in particular, by changing its packaging, limiting volumes, refusing to supply and restricting access to discounts (see Legal update, Commission fines AB InBev for abusing dominance by hindering parallel imports).

For more detail on Article 102, see Practice note, Competition regime: Article 102.

Main changes introduced by Regulation 2022/720

On 10 May 2022, the European Commission adopted a revised Vertical Agreements Block Exemption Regulation (2022 VBER) and accompanying revised Vertical Restraints Guidelines. The Commission considers that Regulation 2790/1999 and its accompanying guidelines have worked well in practice. However, it has identified two major developments that have an impact on vertical agreements:

- An increase in online restrictions and vertical agreements in the platform economy.
- An increase in agreements that pursue sustainability objectives.

The 2022 VBER and Vertical Restraints Guidelines reflect these developments, as well as other changes in the competition legislation framework, new case law and new economic thinking.

In particular, the Commission's updates focus on adjusting the safe harbour to ensure that it is neither too generous nor too narrow, although the market share threshold itself was not adjusted.

The 2022 Block Exemption Regulation introduced the following main changes compared to Regulation 330/2010:

- **Definition of active/passive sales.** Article 1(1), points (l) and (m) of Regulation (EU) 2022/720 provide definitions of active and passive sales. With regard to active sales, one significant change is that offering a website in the language that is not commonly used in the distributor's home country is now accepted as being a form of active selling, although the Commission takes the view that English is commonly used in all EU countries. In addition, the Commission also clarifies that setting up an online store with a country-specific top-level domain for a territory other than that in which the seller is established also amounts to active selling into that country. With regard to passive sales, the 2022 VBER clarifies that sales that result from responding to invitations to tender or participating in public procurement procedures can also constitute passive selling into that territory.
- **Dual distribution.** The 2022 VBER extends the exemption for dual distribution, which was previously only available if the supplier was a manufacturer, to suppliers that are wholesalers or importers too. Certain conditions apply regarding the exchange of competitively sensitive information and to online platforms or intermediation services (see below).
- **Exclusive distribution.** Suppliers can now appoint a maximum of five exclusive distributors for a given territory or customer group. Suppliers can restrict active sales into such territories (or to such customer groups) and can also require distributors to impose such restrictions on their own customers, in certain circumstances.
- **Selective distribution.** Suppliers operating a selective distribution system can prevent all distributors from selling to unauthorised distributors located within the selective distribution territories. As in exclusive distribution, suppliers are now permitted to require distributors to pass on these restrictions to their customers, but this right for selective distribution systems is unqualified.
- **Evergreen clauses/non-compete agreements.** The 2022 VBER no longer treats tacitly renewable restrictions as being indefinite and so outside the scope of the block exemption. Instead, once the distributor can effectively renegotiate or terminate the vertical agreement with a reasonable period of notice and at a reasonable cost, non-compete agreements do not need to be renegotiated after five years.
- **Dual pricing and criteria for online sales.** Under the 2022 VBER, a supplier is permitted to charge a higher wholesale price for products that a distributor sells online and a lower price for products that are resold in physical stores, provided that the wholesale price takes into account the different investments and costs incurred by the distributor in the two channels. Under the 2010 VBER, dual pricing was not permitted, and suppliers were required to ensure that the criteria they imposed on authorised distributors were "overall equivalent" to those applicable for offline sales. The latter is no longer required under the 2022 VBER, per the recognition of dual pricing.

- **Online platforms or online intermediation services:**
  - dual distribution: if an online platform sells on their own behalf in competition with third-party sellers on their own platform, in respect of their supply of online intermediation services, then they cannot benefit from the dual distribution exemption outlined above. However, where an agreement to buy or resell products does not relate to their provision of online intermediation services, they can benefit from the exemption provided the other conditions of the VBER are met;
  - parity clauses: the 2022 VBER clarifies that wide parity clauses (requiring a party that sells through an online platform not to sell its products on better terms on any competing platform) are excluded from the scope of the VBER. However, narrow parity clauses (where a party undertakes not to sell on more favourable terms through a specific sales channel (commonly its own website) than on an online platform) continue to be block exempted; and
  - new hardcore restriction of preventing effective use of the internet: Article 4(e) now establishes that restrictions on the effective use of the internet to sell the contract goods or services, by means of a territorial or customer restriction, will constitute a hardcore restriction. Nevertheless, the supplier may impose other restrictions on online sales or restrictions on online advertising that do not have the object of excluding an entire online advertising channel.

The main changes to the Vertical Restraints Guidelines as compared to those of 2010 are:

- **Case law on online restrictions.** The new Guidelines provide guidance based on several recent judgements of the Court of Justice, in particular the *Coty* judgement, stating that a ban on distributors using online platforms is acceptable under the VBER. If the VBER is not applicable, the Guidelines also provide guidance on when such a ban will or will not be acceptable.
- **Online platforms as genuine agents.** The Guidelines clarify that online platforms will not generally meet the conditions for being "genuine agents" in respect of products that they resell on behalf of suppliers. This means that suppliers cannot set resale prices for its online platform distributors and then try to exempt such behaviour based on the VBER. However, suppliers remain free to set prices when using a platform as an online intermediary for their own direct sales to customers.
- **Price comparison tools.** The Guidelines contain a new section explaining when restricting the use of price comparison tools will fall within the VBER and how the Commission will assess those restrictions on their use that are not exempt under the VBER. In particular, an outright ban on the use of price comparison tools will not be exempt, as this is equivalent to the hardcore restriction of restricting the use of an entire online advertising channel. However, restrictions on the use of price comparison tools in a particular territory or to a particular customer group may be compatible with the VBER, if an exclusive distribution agreement is in operation in that territory.
- **Resale price maintenance and minimum advertised price.** While RPM and MAP are still considered hardcore restrictions and so excluded from the scope of the VBER, the Guidelines now provide some guidance on their assessment under Article 101(1) and 101(3). In particular, if specific customers have prior agreements with the supplier, then a supplier can impose a price on the distributors to be charged to those specific customers.
- **Article 101(3)**. The Guidelines state that it may be possible to justify RPM or MAP restrictions if such measures are used to prevent a particular distributor from using the supplier's product as a loss leader. For example, where the supplier regularly resells a product below the wholesale price in a way that damages the brand image of the product, reduces overall demand for it and undermines the supplier's incentives to invest in quality and brand image. Suppliers wishing to rely on this possibility will need to take particular care to develop strong evidence for their justifications and to ensure that they correctly calculate the net wholesale price that is used as a basis for the restriction.

Factors for the assessment under Article 101(1)

- Nature of the agreement.
- Market position of the supplier.
- Market position of the parties.
- Market position of competitors (upstream and downstream).
- Market position of the buyer of the contract goods or services.
- Entry barriers.
- Dynamics of the market.
- Level of trade.
- Nature of the product or service.
- Other factors such as the cumulative effect of similar agreements, the duration of the agreement and the regulatory environment.

(*Section 8.1.1, Vertical Restraints Guidelines*.)

Negative and positive effects of vertical restraints

Negative effects

The Vertical Restraints Guidelines identify the following negative effects that vertical restraints may have on the market (*section 2.2*):

- Foreclosure of other suppliers or other buyers by raising barriers to entry or expansion.
- Reduction of inter-brand competition between the companies operating on a market, including the facilitation of explicit or tacit collusion amongst suppliers or buyers.
- Reduction of intra-brand competition between distributors of the same brand.
- The creation of obstacles to market integration, including (most of all) limitations on the freedom of consumers to purchase a product or service in any member state they choose.

Positive effects

The Vertical Restraints Guidelines (*section 2.1*) also recognise several positive effects of vertical restraints, including:

- Solving a "free-rider" problem, where (in the absence of an appropriate restriction) one distributor may free-ride on the promotional efforts of another distributor.
- Addressing a certification free-rider issue, where certain ("premium") distributors in specific sectors have a reputation for stocking only quality goods or providing quality services and where selling through these distributors may be crucial. If the supplier cannot ensure that the distribution of its products is limited to such premium distributors, it runs the risk of not being listed by such distributors, hence the use of exclusive or selective distribution may be justified.
- Enabling new markets to be entered or opened up.
- Persuading one party to commit to the long-term investments necessary for a specific relationship (resolving the so-called hold up problem, whereby an investor may not commit the necessary investments before particular supply arrangements are fixed).
- Permitting the transfer of substantial know-how.
- Obtaining economies of scale.
- Enabling the creation of a brand image through uniformity and quality standardisation.

These are only some examples of the situations in which, under certain conditions, vertical agreements are likely to help realise efficiencies and the entry of new markets in a way which may offset possible negative effects. In general, vertical restraints will be viewed more favourably if they are of limited duration and assist in the introduction of new and complex products or the protection of specific investments.

Calculating turnover

The relevant turnover is that achieved by the relevant party to the agreement and its connected undertakings during the last financial year in respect of all goods and services, excluding all taxes and other duties. No account is taken of dealings between the party to the agreement and its connected undertakings, or **between** the connected undertakings themselves (*Article 9(1), VBER*).

"Connected undertakings" are undertakings in respect of which a party to the agreement directly or indirectly has the power to exercise more than half the voting rights, or has the power to appoint more than half the members of the board, or has the right to manage the undertaking's affairs. Undertakings which have these powers directly or indirectly over a party to the agreement are also connected undertakings (*Article 1(2), VBER*).

The benefit of the block exemption will not be lost if, during any period of two consecutive financial years, the relevant turnover threshold is exceeded by no more than 10% (*Article 9(2), VBE*R).

Vertical agreements and intellectual property rights

The Vertical Restraints Guidelines identify the following intellectual property rights (IPRs) as most commonly directly related to vertical agreements:

Trade marks

A trade mark licence to a distributor is generally necessary for, and ancillary to, the distribution of goods or services in a particular territory. If it is an exclusive licence, the agreement is for exclusive distribution and falls within the scope of the vertical agreements block exemption (*paragraph 80, Vertical Restraints Guidelines*).

Copyright

A copyright holder may require resellers of goods covered by the copyright (such as books or software) to resell subject to the condition that buyers (that is, either another reseller or the end user) are obliged not to infringe the copyright. Such obligations are exempted by the block exemption, to the extent that they are caught by Article 101(1) at all. The licensing of software copyrights for the purpose of mere reproduction and distribution of the protected work is not covered by Commission Regulation 316/2014 but is instead covered by analogy by Regulation 2022/720 and the Vertical Restraints Guidelines. Agreements relating to the sale of hard-copy software, where the reseller does not acquire a licence to any rights over the software, are regarded as agreements for the supply of goods for resale for the purpose of the block exemption (*paragraphs 81-84, Vertical Restraints Guidelines*).

Know-how

A franchise agreement is an example of a situation in which know-how is communicated to the buyer for marketing purposes. Typically, rights in respect of trade marks or logos and know-how are licensed for use in connection with the distribution of the franchised goods or services. Licences of IPRs in franchise agreements are covered by the vertical agreements block exemption in so far as they do not constitute the primary object of the agreement and are directly related to the use, sale or resale of the franchised goods or services. According to the guidelines, the following obligations of a franchisee are generally considered to be necessary to protect the franchisor's IPRs (*paragraph 87, Vertical Restraints Guidelines*):

- Not to engage, directly or indirectly, in any similar business.
- Not to acquire financial interests in the capital of a competing firm which would give the franchisee the power to influence the economic conduct of that firm.
- Not to disclose the know-how provided by the franchisor to third parties, as long as the know-how is not in the public domain.
- To communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience.
- To inform the franchisor of infringements of licensed IPRs, to take legal action against infringers or to assist the franchisor in any legal action against infringers.
- Not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise.
- Not without the franchisor's consent to assign the rights and obligations under the franchise agreement.

Javico v Yves St Laurent (export ban)

Yves St Laurent had entered into an agreement appointing Javico to distribute products in Russia and the Ukraine. The agreement prevented Javico from exporting the products outside these countries.

Yves St Laurent terminated the agreement with Javico after detecting the products within the EU and instituted proceedings in the French courts. The French appeal court stayed proceedings pending a ruling from the ECJ on the interpretation of Article 101(1) and (3).

The ECJ concluded that the export ban did not in the circumstances have the object of preventing, restricting or distorting competition within the EU or affecting trade between member states. However, the question of whether there was such an effect needed to be assessed by taking into account:

The structure of the market for the products in question - was it oligopolistic, allowing only limited competition within the EU network for distribution of the product?

- The supplier's market position: did the supplier account for a large proportion of the EU market for the product in question?
- Prices: was there an appreciable difference between the prices of the product outside the EU and within the EU? There would be a restriction on competition where prices charged for the product in Russia and the Ukraine were much lower than in the EU. However, an appreciable difference between the prices would not be liable to affect competition if it was eroded by the level of customs duties and transport costs resulting from the export of the products to a non-EU country followed by its re-import into the EU. In this regard, the existence of free trade agreements eliminating customs duties should be considered.
- The effect on trade: did the restrictions have an appreciable effect on trade between member states? The ECJ said that there would be no appreciable effect on trade between member states if the products intended for non-EU markets accounted for only a very small percentage of the total market for those products in the EU.

Although it was decided on the particular facts of this case that an export ban on a distributor outside the EU did not infringe Article 101, the case contains useful guidance as to the circumstances in which such an infringement may occur.

(*Javico v Yves St Laurent (Case C-306/96) EU:C:1998:173.*)

By object restrictions in agreements between non-competitors

The Commission Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the de minimis notice, published on 25 June 2014 discusses the following restrictions by object in agreements between non-competitors:

- **Sales restrictions on buyers.** A restriction on a buyer as to where (the territory) or to whom (the customers) the buyer can sell the contract products, actively and/or passively, is a hardcore restriction and generally considered a restriction by object. Such a restriction may result from direct obligations on the buyer but also from indirect measures aimed at inducing the buyer not to sell to particular customers or territories (for example, refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported). However, restrictions which restrict the buyer's place of establishment are not hardcore restrictions.

  However, in accordance with the vertical agreements block exemption, the following restrictions do not prevent an agreement from benefiting from the safe harbour of the de minimis notice as they are not hardcore restrictions:

  - where a supplier operates an exclusive distribution system, prohibiting the buyer from actively selling in the territory or to the customer group reserved for the supplier or allocated exclusively to a maximum of five other exclusive distributors, and restricting active or passive sales by the exclusive distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;

- within selective distribution systems, restricting active sales by the members of the selective distribution system and their direct customers, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five exclusive distributors, and prohibiting authorised distributors, within the territory where the selective distribution system operates, from selling to distributors who are not members of the selective distribution system. This does not apply to restrictions on selected distributors on reselling spare parts for motor vehicles to independent repairers;
- as regards restrictions on the resale of components, prohibiting the buyer from selling components, supplied for the purpose of incorporation in another product, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- prohibiting a buyer, who operates as a wholesaler, from reselling passively or actively to end users.

• **Sales restrictions on licensees.** In the case of technology transfer agreements, it is only restrictions of the licensee's passive sales (and not of its active sales) to a particular territory or customer group that are hardcore restrictions and which are generally considered restrictions by object.

  However, when the licensee is a member of a selective distribution system and operates at the retail level, restrictions of both the licensee's active and passive sales to end-users are hardcore restrictions, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

  In accordance with the technology transfer block exemption, the following are not hardcore restrictions and so do not prevent an agreement from benefiting from the safe harbour of the de minimis notice:

  - restricting the licensee's passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
  - agreeing with the licensee that the contract products may only be produced for its own use (provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products);
  - agreeing that the licensee may only produce the contract products for a particular customer, where the licence was granted to create an alternative source of supply for that customer (so called dual sourcing);
  - prohibiting a licensee operating at the wholesale level from selling to end-users; and
  - prohibiting members of a selective distribution system from selling to unauthorised distributors.

• **Sales restrictions on the supplier.** Restrictions, agreed between a supplier of components and a buyer who incorporates those components, on the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods, are hardcore restrictions which are generally considered to be restrictions by object.

  Certain hardcore restrictions are specific to the motor vehicle sector, for example:

  - in the context of an agreement between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles, and a supplier of such components, restrictions on the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts are hard core restrictions and generally considered restrictions by object; and
  - in the context of an agreement between a supplier of spare parts, repair tools or diagnostic tools or other equipment and a manufacturer of motor vehicles, restrictions of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users are considered hardcore restriction.

• **Resale price maintenance**. Restrictions of a buyer's ability to determine its minimum sale price generally constitute restrictions by object. However, restrictions imposing maximum sale prices or recommending sale prices are not restrictions by object, provided that they do not amount to fixed or minimum sale prices as a result of pressure from, or incentives offered by, any of the parties.

In technology transfer agreements, any restrictions on the licensor's or the licensee's ability to determine their sale prices are hardcore restrictions which are generally considered to be restrictions by object, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price.

Indirect means of vertical price-fixing also constitute restrictions by object, such as an agreement obliging the buyer to add a specific amount or percentage on top of its purchase price to establish its sale price or requiring that the buyer complies with maximum discount levels.

Active and passive sales

The VBER (Article 1(1)(l) and (m) and Vertical Restraints Guidelines indicate that **active** sales include either:

- Actively targeting customers inside another distributor's exclusive territory or exclusive customer group, for example, by direct mail, unsolicited emails or visits or other means of direct communication.
- Actively targeting a specific customer group or customers in a specific territory allocated exclusively to another distributor through targeted advertising and promotion, offline or online. For example, online advertising targeting customers according to their particular characteristics, including their geographic location or personal profile.

(*Paragraph 214*.)

Passive selling, however, means responding to unsolicited requests from individual customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups, where it is not possible to prevent the advertising to be seen by those customers is considered passive selling (for example, sponsored content on the website that may be accessed by any visitor to that website, or the use of price comparison services with generic and non-country-specific domain names). In addition, sales that result from responding to invitations to tender or participating in public procurement procedures can also constitute passive selling into that territory.

The use of the internet to sell products is generally considered to be a form of passive sale, provided that the seller does not actively target the specific customer or the specific territory or customer group to which the customer belongs (*paragraph 212*) (see Online sales restrictions).

Pierre Fabre Dermo-Cosmétique (selective distribution)

On 13 October 2011, the ECJ ruled that, in the context of a selective distribution system, a clause which prevents internet sales by requiring that cosmetics and personal care products are sold in a physical space in the presence of a qualified pharmacist, amounts to a restriction by object within the meaning of Article 101(1) of the TFEU if it is not objectively justified. Consideration of the objective justification of the clause requires an individual and specific examination of the content and objective, and the legal and economic context of which it forms a part, with regard to the particular properties of the products. Such a clause will prevent the application of the vertical agreements block exemption. However, it may benefit from individual exception if the conditions under Article 101(3) of the TFEU are met.

The ECJ's ruling concerns a French manufacturer and seller of cosmetics and personal care products, Pierre Fabre Dermo-Cosmétique SAS (PFDC). PFDC's distribution contracts for cosmetics and personal care products under the Avène, Klorane, Galénic and Ducray brands require sales to be made in a physical space in the presence of a qualified pharmacist. This has the de facto effect of preventing all internet sales.

In 2006, the French Conseil de la concurrence opened an investigation into practices in the distribution sector for cosmetics and personal care products. In 2007, the Conseil de la concurrence accepted binding commitments from all the undertakings under investigation, other than PFDC, by which they agreed to allow the members of their selective distribution networks to sell their products online. In October 2008, the Conseil de la concurrence reached a decision finding that PFDC had infringed Article L.420-1 of the French Commercial Code and Article 101 of the TFEU. The Conseil de la concurrence found, inter alia, that the requirement in PFDC's distribution contracts that sales of the products in question must be made in a physical space in the presence of a qualified pharmacist constituted a de facto ban on internet selling, equivalent to a restriction of authorised distributors' active or passive sales and necessarily had the object of restricting competition. In addition, the ban was found to limit the commercial freedom of PFDC's distributors by excluding a means of marketing its products which also restricted the choice of consumers wishing to purchase products online. The Conseil de la concurrence concluded that the de facto ban on internet sales constituted a hardcore restriction of competition. Therefore, PFDC's distribution agreements did not fall within the vertical agreements block exemption in force at the time (*Regulation 2790/1999*). In addition, they did not satisfy the criteria for individual exemption under Article 101(3) of the TFEU.

The PFDC appealed against the Conseil de la concurrence's decision to the Paris Court of Appeal. The Court of Appeal decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling. It asked whether the general and absolute prohibition to sell goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, constituted a hardcore competition restriction by object under Article 101 of the TFEU which was not covered by the block exemption, but that could possibly benefit from an individual exemption as in Article 101(3) of the TFEU

The ECJ ruled that:

- The clause in PFDC's distribution agreements requiring a qualified pharmacist to be present at a physical sales point amounted to a de facto prohibition on authorised distributors from any form of internet selling. The ban on internet selling was, therefore, liable to restrict competition because it significantly reduced the ability of authorised distributors to sell PFDC products to customers outside the authorised distributor's contractual territory or area of activity.
- The referring court needs to consider whether the clause banning internet sales in PFDC's distribution agreements can be justified as a proportionate means of achieving a legitimate aim. The ECJ stated that it is undisputed that PFDC's resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, the ECJ has not previously accepted arguments relating to the need to provide individual advice to the customer and to ensure its protection against the incorrect use of products in the context of non-prescription medicines and contact lenses to justify an internet sales ban. The ECJ also noted that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition.
- A general and absolute ban on internet sales restricted both active and passive sales and so fell foul of Article 4(c) of Regulation 2790/1999. PFDC argued that sales via the internet should be considered equivalent to a prohibition on operating out of an unauthorised establishment. The ECJ agreed with the Paris Court of Appeal in holding that the internet may not be considered as a virtual place of establishment in this context, but rather as a method of selling and marketing goods. The sale via the internet of contract goods by an authorised dealer does not constitute operating out of an unauthorised place of establishment pursuant to Article 4(c) of Regulation 2790/1999. Accordingly, an absolute ban on internet selling in a selective distribution agreement will cause the agreement to lose the benefit of the block exemption under Article 4(c).
- The ECJ did not consider that it had adequate information to assess whether PFDC's selective distribution agreements satisfied the conditions set out in Article 101(3) of the TFEU and declined to give further guidance on this point to the Paris Court of Appeal.

Although the ECJ's ruling relates to the old vertical agreements block exemption the old and new block exemptions are essentially identical on the point regarding the illegality of a ban on sales to end users within a selective distribution system, so the ECJ's ruling is equally relevant to the current regime. However, the

2010 guidelines do contain new guidance on restrictions of online sales within a selective distribution system and explain that, in principle, a distributor or retailer must be free to sell online, even within a selective distribution system. It may be possible to impose criteria on the detail of how the sales are made, but such criteria must be equivalent to criteria imposed on bricks-and-mortar outlets or, at least, differences in the criteria must be a reasonable reflection of differences between the two distribution modes.

(*Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence (Case C-439/09) EU:C:2011:649*.)

Pronuptia (franchising)

The applicability of Article 101(1) to franchise agreements was first considered by the ECJ in *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis (Case 161/84) EU:C:1986:41*. Mrs Schillgalis had a franchise for the hire and sale of wedding clothing in Hamburg and was in dispute with Pronuptia, the franchisor, over her royalty payments under the franchise agreement. In the course of the litigation it was argued that the agreement was void as it contravened Article 101.

Provisions falling outside Article 101(1)

The ECJ held in *Pronuptia* that two essential elements were required for a franchise agreement to function effectively:

- The franchisor must be able to communicate its know-how to the franchisees and provide them with the necessary assistance to enable them to apply its methods, without running the risk that that know-how and assistance might benefit competitors, even indirectly; and
- The franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing its business name or logo.

Provisions which were designed to protect these interests would fall outside the scope of Article 101(1).

The ECJ found that the following provisions could be essential in protecting the franchisor's interest in preventing its know-how and assistance from benefiting competitors, and so fall outside Article 101(1):

- A prohibition on the franchisee (for the duration of the contract and a reasonable period after its expiry) from opening a shop of the same or a similar nature in an area where they may compete with a member of the network. For example, in *Yves Rocher*, a one-year post-term ban on the franchisee opening a retail cosmetics store within the exclusive contract territory was found to fall outside Article 101(1). However, post-term non-compete provisions of more than a year are likely to fall within Article 101(1).
- An obligation on the franchisee not to transfer its shop to another party without the prior approval of the franchisor.

The following provisions were held by the ECJ to be capable of falling outside Article 101(1) on the grounds that they were essential in maintaining the identity and reputation of the franchisor's network:

- A franchisee's obligation to apply the business methods developed by the franchisor and to use the know-how provided.
- A franchisee's obligation to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions, where such obligation is intended to ensure uniform presentation in conformity with certain requirements and not to change the location of the shop without the franchisor's approval.
- A prohibition on the assignment by the franchisee of its rights and obligations under the contract without the franchisor's approval.
- In certain circumstances, a provision requiring the franchisee to sell only products supplied by the franchisor or a supplier selected by the franchisor where this is considered necessary for the protection of the network's reputation. This may be necessary where, as in the case of the fashion goods subject to the Pronuptia franchise, it is impractical to lay down quality specifications or it is too expensive to ensure that such specifications are observed. However, such a provision must not prevent the franchisee from obtaining those products from other franchisees.
- A provision requiring the franchisee to obtain the franchisor's approval for all advertising

(provided that the provision is limited to the nature of the advertising and is not used, for example, to influence prices charged by franchisees). In *Yves Rocher*, for example, such a clause enabled the franchisor to ensure that the theme of natural beauty from plants, on which the network's image was based, was followed in the adverts.

Provisions caught by Article 101(1)

In *Pronuptia*, the ECJ identified certain provisions in franchising agreements which would infringe Article 101(1), including those which either:

- Share markets between the franchisor and franchisee, or between franchisees.
- Prevent franchisees from engaging in price competition with each other.

English clauses

The guidelines provide that a so-called English clause (under which the buyer is required to report any better offer to the supplier, and may only accept such offer if the supplier does not match it), can be expected to have the same effect as a non-compete obligation, especially when the buyer has to reveal who made the better offer. It may however also operate as a form of quantity-forcing. Quantity-forcing is a lesser form of non-compete obligation where incentives or obligations agreed between the supplier and the buyer require the buyer to concentrate its purchases to a large extent on one supplier. This may, for example, take the form of minimum purchase requirements or non-linear pricing practices such as quantity rebate schemes, loyalty rebate schemes or a two-part tariff (a fixed fee plus a price per unit). Quantity-forcing on the buyer will have similar but less clear foreclosure effects than a non-compete obligation. The assessment of all these different forms of quantity-forcing will depend on their effect on the market. English clauses or fidelity rebates imposed by dominant companies will constitute abuses prohibited by Article 102 of the TFEU (see Practice note, Competition regime: Article 102).

Activities not to be undertaken by an agent

- Acquiring the property of the goods bought or sold under the agency agreement and supplying services bought or sold under the agency agreement. Nevertheless, the agent may still temporarily, for a brief period of time, acquire the property of contract goods, provided it does not incur any costs or risks.
- Contribution to the costs relating to the supply or purchase of the contract goods or services, including transport costs.
- Investment in sales promotion, such as contribution to advertising budgets of the principal.
- Maintenance at the agent's own risk of the stocks of the goods covered by the contract.
- Activities within the same product market required by the principal, unless those activities are fully reimbursed by the principal.
- Market-specific investments in equipment, premises or personnel; for example, the petrol tank in petrol retailing, or specific software to sell insurance policies in the case of insurance agents.
- Liability to third parties for harm caused by the products sold.
- Liability for customers' non-performance of the contract (with the exception of the loss of the agent's commission, unless the agent is liable).

The list is not exhaustive.

However, where the agent regularly incurs one or more of the above risks or costs, Article 101(1) may apply (*Vertical Restraints Guidelines, paragraphs 33-34*). The 2022 Vertical Restraints Guidelines also specifically state that agreements entered into by undertakings active in the online platform economy generally do not meet the conditions to be categorised as agency agreement, as the undertakings typically make significant market-specific investments, for example, in software, advertising and after-sales service, thereby bearing financial and commercial risk (*paragraph 46*).

Cumulative effect

While vertical agreements may individually have no appreciable effect on competition or trade between member states, they may be caught by Article 101(1) where one or more parallel networks of similar agreements cumulatively results in foreclosure.

The ECJ has held that in assessing whether there is a foreclosure effect, the existence of a series of similar contracts is not sufficient to support a finding that the relevant market is inaccessible; opportunity for access should be taken into account (*Delimitis v Henniger Bräu AG (Case C-234/89) EU:C:1991:91*). The ECJ stated that it was necessary to examine whether there were real concrete possibilities for a competitor to penetrate the series of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. The conditions under which competitive forces operated on the market also had to be taken into account (the number and size of producers present on the market, the degree of market saturation, the existence of consumer loyalty to existing brands, and so on) (*paragraphs 20-22*).

This approach has been followed by the General Court, which has held that, to the extent of any cumulative effect, only agreements which may make a significant contribution to the partitioning of the market are prohibited under Article 101(1) (*Langnese-Iglo v Commission (Case T-7/93) EU:T:1995:98, at paragraph 99*). The extent of the contribution made by individual agreements will depend on the position of the contracting parties in the relevant market and on the duration of the agreement.

In a subsequent decision regarding beer supply agreements (), the General Court rejected Mr and Mrs Roberts' complaint against Greene King, a brewer of beer, on the basis that Greene King's market share of less than 1% was too small to contribute significantly to foreclosure of the UK on-trade beer market (*paragraph 85*). (See also *Shaw others v Commission (Case T-131/99) EU:T:2002:83; Joynson v Commission (Case T-231/99) EU:T:2002:84.*)

The ECJ has also held that a cumulative effect can only arise from "similar agreements" (*Neste Markkinointi Oy v Yötuuli Ky (Case C-214/99) EU:C:2000:679*). Neste, the leading supplier of petrol in Finland, had some 573 exclusive purchase agreements with service stations. Most of these were fixed term agreements with a duration of more than 12 months. However, it also had 27 agreements of more than ten years' duration, which could be terminated at any time with 12 months' notice. The ECJ found that fixed term contracts concluded for several years were more likely to restrict access to the market than those that could be terminated on short notice, and that the 27 agreements with notice periods therefore could be assessed separately from the rest of Neste's network. Because these agreements represented a small percentage of the market and as the one-year notice was reasonable, they did not make a significant cumulative effect to foreclosure of the market and were not caught by Article 101(1).