

Vertical Agreements 2013

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Bulgaria

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Antitrust law

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

The following are the legal sources setting out the antitrust law applicable to vertical restraints:

- Act on Protection of Competition (APC), published in the State Gazette (SG) No. 102/28.11.2008, as last amended in SG No. 38/18.05.2012;
- Decision No. 55/20.01.2011 of the Commission for Protection of Competition (CPC) for Block Exemption from the Prohibition of article 15, paragraph 1 of the APC relating to certain categories of agreements, decisions or concerted practices (Decision No. 55/2011); and
- Decision No. 125/12.02.2009 of the CPC for Adoption of Rules Relating to Agreements with Insignificant Effect on Trade (De Minimis Decision).

There is no full database of Bulgarian competition laws and regulations in English. Some relevant translations (including the Act on Protection of Competition) may be found on the CPC website, www.cpc.bg/General/Legislation.aspx.

Types of vertical restraint

- 2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Bulgarian competition law does not contain a definition of vertical restraints. Instead, Decision No. 55/2011 makes direct reference to the definition for vertical agreements set out in article 1, paragraph 1, item (a) of Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices (Regulation (EU) 330/2010).

Thus, the types of vertical restraints that are subject to Bulgarian antitrust law are the same as defined in EU antitrust rules. Those types may be summarised as follows (non-exhaustively):

- price restraints such as resale price maintenance (minimum price imposition and price-fixing are prohibited and blacklisted under block exemption rules while maximum or recommended price arrangements are generally allowed); and
- non-price restraints such as the following:
 - non-compete clauses (eg, restrictions on a distributor not to buy, distribute or manufacture competitive products for the term of a distribution agreement and after its termination);
 - exclusivity clauses;
 - selective distribution undertakings (ie, the contractual undertaking of a seller to supply only certain distributors,

which have been selected on the basis of predefined objective criteria within a specified territory); and

- other territorial restraints, for example, the prohibition on a buyer (distributor) to resell the contract goods or services outside their assigned contract territory.

Legal objective

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

The general aim of Bulgarian competition law as stated in article 1 of the APC is ‘to ensure protection and conditions for promotion of competition and free initiative in the economic activity’.

Yet there are certain limitations to that principle. For instance, similarly to article 106, paragraph 2 of the TFEU, undertakings entrusted by the Bulgarian state or municipalities with the operation of services of public interest are exempt from the application of national competition rules insofar as such application would prevent them from carrying out the tasks entrusted to them, provided, however, that competition in the country is not materially affected by the exemption (APC, article 2, paragraph 1, item 3).

Further, the de minimis exception (see question 8) aims to strike a balance between the leading principle of protection of competition and the need for allowing small businesses to expand.

Responsible authorities

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

The CPC has exclusive competence to enforce the provisions of the APC. The CPC also acts as the national competition authority, which applies EU competition law.

The CPC is an administrative collective body consisting of seven members, elected by parliament for five years. The Council of Ministers has no competence in the field of competition law.

The decisions of the CPC are subject of appeal before the Supreme Administrative Court (SAC). Appeals are heard by three judges. The decisions of the court of appeal are subject of cassation before a five-member chamber of the same court, whose decisions are final.

Jurisdiction

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Bulgarian rules on vertical restraints apply only to agreements, decisions of associations or concerted practices which have effect in the country. There are no cases known to us where extraterritorial application of national competition rules has been made, including cases in a pure internet context.

Agreements concluded by public entities

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

The APC generally applies to the activities of undertakings carrying out services in public interest. Nevertheless, as stated in question 3, they are exempt from the application of national competition rules if such application will prevent them in fact or in law from carrying out the tasks entrusted to them, provided, however, that competition in the country is not materially affected by the exemption.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Decision No. 55/2011 refers, among other EU acts, to Commission Regulation 461/2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector. Thus, Decision No. 55/2011 transposes into national law the conditions for block exemption of agreements in the motor vehicle sector as set out in Regulation (EC) 461/2010.

General exceptions

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

Article 16 of the APC provides that the prohibition of restrictive agreements, decisions and concerted practices does not apply to those having immaterial effect on competition. The immaterial effect is measured by the market share in the relevant market of the parties involved (that is, if the aggregate market share in the relevant market of the parties involved does not exceed 10 per cent if the parties are competitors or 15 per cent in each of the relevant markets concerned if the participating undertakings operate in different relevant markets). However, the de minimis exemption does not apply regardless of the involved parties' market share if their respective agreements, decisions and concerted practices have as their object or effect:

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

Agreements

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

There is no statutory definition for 'agreement' in Bulgarian antitrust law. The concept of 'agreements, decisions of associations of undertakings or concerted practices' has been developed through the case law of the CPC and the SAC, based on the respective EU law concepts.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The CPC has held in many cases that the agreements between undertakings may exist in various forms. An agreement does not need to be in written form or otherwise formalised; for the application of rules on vertical restraints it would suffice that the anti-trust authority establishes the concurrence of will of at least two independent undertakings (please see, for instance, Decision No. 1370/17.12.2009; Decision No. 404/406/2009 of the CPC and Decision No. 472/24.04.2012).

Similarly to EU competition law, Bulgarian rules on vertical restraints would also catch decisions of associations of undertakings and concerted practices. 'Concerted practice' is defined by the law as 'coordinated action or abstaining from action of two or more undertakings'.

Parent and related-company agreements

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

In its case law the CPC adopts the view that rules on vertical restraints apply only to agreements between independent undertakings (Decision No. 623/23.06.2009, Decision No. 1368/17.12.2009 of the CPC). The independence of an undertaking is assessed not on the basis of their organisational form but of the actual freedom and ability of that undertaking to solely determine its market behaviour. If an undertaking lacks the real autonomy to determine its market behaviour independently from its parent company, the two are regarded as a single economic unit within which there could be no competitive relationship; thus no restrictive agreements can exist between the parent company and the subsidiary (Decision No. 601/17.07.2008 of the CPC).

Agent-principal agreements

- 12 In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Agent-principal agreements are not specifically regulated by Bulgarian national law on vertical restraints. Nevertheless, it can be reasonably expected that the CPC would apply the EU law criteria for applicability of the vertical restraints as set out in section II.2 of Commission Notice Guidelines on Vertical Restraints (2010/C 130/01). Thus, an agreement in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment would be subject to review under the general prohibition of restrictive agreements if material financial or commercial risks of the agency services' related activity are borne by the service provider.

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

No.

Intellectual property rights

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

By way of reference to Regulation (EU) 330/2010, article 2, paragraph 3, Decision No. 55/2011 provides for exemption of vertical agreements' provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions are auxiliary to the primary object of such agreements, are directly related to the use, sale or resale of goods or services by the buyer or its customers and do not contain restrictions of competition which are not exempted.

Further, Decision No. 55/2011 exempts certain agreements for technology transfer by way of reference to article 1, paragraph 2, items (a) to (d) and article 2 of Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of article 81(3) of the EC Treaty to categories of technology transfer agreements (Regulation (EC) No. 772/2004).

Analytical framework for assessment

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

It should be noted that Bulgaria is a civil law jurisdiction. Therefore, an extrapolation of the concepts of violations per se and the rule of reason, which have been elaborated through the case law of common law countries, to Bulgarian antitrust law and practice might not be perfectly justifiable.

Statutory framework

National antitrust law copies the framework introduced by EU law.

General prohibition

Article 15, paragraph 1 of the APC sets out a general prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in the relevant market. The law provides a non-exhaustive list of prohibited collusive acts and behaviour (which are regarded as violations per se), as follows:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- sharing markets or sources of supply;
- limiting or controlling production, markets, technical development, or investment;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts or their performance.

Any agreements or decisions prohibited pursuant to article 15, paragraph 1 of the APC are deemed to be null and void (article 15, paragraph 2 of the APC).

De minimis exception and individual exemption

Agreements of minor importance are generally excluded from the scope of the general prohibition under article 15 of the APC (see article 16 of the APC). Further, even if they fall under the general prohibition set out by article 15, collusive agreements, decisions or practices would nevertheless be deemed exempt from that prohibition if they met the following four conditions:

- they contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- they allow consumers a fair share of the resulting benefit;
- they do not impose on the participating undertakings restrictions which are not indispensable to the attainment of these objectives; and
- they do not afford the participating undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market (APC, article 17, paragraph 1).

Block exemptions

The CPC is vested with powers to adopt national rules for block exemption of certain categories of agreements, decisions and concerted practices, which fulfil the criteria for individual exemption (APC, article 18, paragraph 1). The block exemption rules contain a list of restraints which are exempt under certain conditions (grey list), and a blacklist of hard-core restrictions which may never benefit from exemption. In its Decision No. 55/2011, the CPC chose to apply the legal technique of making direct reference to the grey and blacklists of vertical restraints as set out in Regulation (EU) 330/2010 and some other EU Block Exemption Regulations.

Enforcement of statutory rules

Bulgarian antitrust law is part of the administrative law branch. Provisions of administrative law must in principle be construed and applied strictly (ie, a broad interpretation or application by analogy of antitrust law provisions would be contradictory to the nature of those provisions).

In an investigation under article 15 et seq of the APC, the CPC will seek to establish if all the conditions set out in article 15 are fulfilled in respect of the agreement, decision or concerted practice concerned. If so, the CPC will further check if the said arrangement falls outside the scope of the general prohibition (eg, based on the exception for agreements, decisions or concerted practices of minor importance) or exempted either on the grounds of a block exemption regulation or by satisfying the conditions for individual exemption as per article 17, paragraph 1 of the CPC.

The CPC may withdraw the benefits of a block exemption in respect of a particular agreement that, although formally satisfying the conditions for exemption, nevertheless has negative effects outweighing the benefits or efficiencies it would bring. In that case the CPC would not impose a sanction but would set a deadline by which the participating undertakings should bring their arrangement in compliance with the law or terminate it.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier market shares are analysed by the CPC when assessing the legality of vertical restraints. For instance, supplier market shares below 15 per cent serve as the ground for applicability of the de minimis exception unless the agreement under review contains hard-core restrictions such as direct or indirect price fixing, allocation of markets or clients or limitation of production or sales.

Further, supplier market share below 30 per cent would create a presumption of lack of market strength on the supply side, and the block exemption of vertical restraints would apply, subject to fulfilment of the other conditions set out in Decision No. 55/2011 (the block exemption would not, for instance, apply if agreements contained any of the hard-core restrictions listed in article 4 of Regulation (EU) 330/2010).

In addition, if parallel networks of similar vertical restraints exist covering more than 50 per cent of a relevant market, the CPC may by decision withdraw the benefit of the block exemption in respect

of certain market-specific restrictions (Decision No. 55/2011, paragraph 12).

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

The relevance of supplier market shares in antitrust analysis, detailed in question 16, also applies to buyer market shares.

Block exemption and safe harbour

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

Decision No. 55/2011 provides for block exemption of certain categories of agreements, decisions of associations and concerted practices, by way of direct reference to the respective EU Block Exemption Regulations. The block exemption applies if the participating undertakings' market shares in their respective relevant markets are below 30 per cent, if the vertical restraints are not among those blacklisted, and so on. Further, in case of the existence of parallel networks of similar vertical restraints which cover more than 50 per cent of a relevant market, the CPC may withdraw the benefit of the block exemption.

If the conditions for the block exemption set out in Decision No. 55/2011 are met then the block exemption applies automatically. The undertakings concerned must self-assess their compliance with the rules on the block exemption, hence the applicability to their agreements containing vertical restraints (ie, there is no clearance procedure which can be initiated by the undertakings concerned before the competition authority (CPC) in order to check the applicability of the block exemption).

Types of restraint

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

A restriction on the buyer to determine its resale price is generally considered as restrictive of competition. Provisions for suggested or maximum resale prices may be subject to individual or block exemption under certain conditions set out in the law. However, the imposition of minimum or fixed resale prices on the buyer (distributor) would remove the benefit of the block exemption from the whole agreement in which such restriction is contained. In Decision No. 887/26.07.2012, the CPC held that the publication of 'base' prices by a wholesaler of petroleum products was a precondition for coordinated behaviour, which raises the potential for anti-competitive effects.

- 20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

We know of no guidelines or decisions from the CPC exempting resale price maintenance for limited periods related to product or brand promotions. We would expect the CPC to make no exception in this case from the general rules applying to resale price maintenance (ie, minimum and fixed prices would not be subject to exemption as they are perceived as violations per se by the competition authority).

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

In its case law the CPC has consistently demonstrated awareness of the probable anti-competitiveness of the cumulative effect of resale price maintenance and other restrictive arrangements. For instance, the CPC held that determining minimum resale prices combined with horizontal collusion of producers and market foreclosure in a regional market of bread manufacturing and distribution had as its object the distortion of competition (Decision No. 622/22.07.2008). In Decision No. 887/26.07.2012, the CPC specified that an undertaking with a probable dominant position can determine the behaviour of other competitors and therefore weaken price competition by periodically publishing information about 'base' prices and thus determine price changes, since its competitors would follow passively either to take advantage or driven by fear not to be pushed out of the market.

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

The CPC would necessarily assess the possible efficiencies of non-hard-core cases of resale price maintenance (suggested or maximum prices) for the purpose of concluding if the conditions for exemption are met (please see question 15). As regards assessment of hard-core restrictions (eg, imposing minimum resale prices) the CPC usually skips such analysis (please see Decision No. 622/2008).

- 23** How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Hard-core territorial restrictions as per article 4 of Regulation (EU) 330/2010 are also prohibited under Bulgarian antitrust rules with reference to the exceptions set out in the article (ie, prohibition of active sales outside the contract territory of a distributor, a restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier).

In Decision No. 472/24.04.2012, the CPC accepted that including the indicator 'territory of distribution' in agreements between the licensor and the licensee for TV programmes is only for the purpose of determining the fees payable to the licensor. In this case, CPC indicated that specifying an exact territory is not intended to prohibit the distribution of the TV programmes in other territories.

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

Such restrictions are likely to be regarded as harmful to competition and no exemption would be available. By way of exception, a restriction on the buyer to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier would be exempt in the absence of other restrictive arrangements between the parties.

- 25** How is restricting the uses to which a buyer puts the contract products assessed?

Such restrictions would likely be regarded as harmful to competition and eligibility for exemption would be assessed.

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

There is no CPC case law relating to vertical restraints known to us in respect of restricting the buyer's ability to generate internet sales. However, such restrictions are likely to be assessed in the light of the active or passive sales concept. Thus, internet advertising by a distributor not specifically addressed to potential customers in other distributors' territories is likely to be treated as a passive sale.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

There are no guidelines or decisions of the CPC in this respect.

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

Decision No. 55/2011 makes direct reference to the regime of Regulation (EU) 330/2010 and Regulation (EC) 461/2010 as regards assessment of selective distribution agreements. Accordingly, the following clauses in such agreements would be regarded as hard-core restrictions thus triggering the nullity of the entire agreement in which they are contained:

- the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade (excepting the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment);
- the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;
- any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers; and
- the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers that use those parts for the repair and maintenance of a motor vehicle.

There is no guidance or case law known to us as regards how selective distribution networks should be implemented (eg, whether criteria for selection should be published, etc).

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

There is no guidance from the CPC in this respect. In its case law the CPC has indicated that selective distribution systems should be scrutinised as they imply bigger risks for competition than other distribution arrangements. Further, the CPC indicates that it would accept the implementation of a system for selective distribution only in respect of luxury goods such as jewellery, quality watches, perfumery, crystalware and such, or products which require specialised technical knowledge and specialised staff (such as cameras, TV sets, audio systems, etc) (Decision No. 985/11.11. 2008).

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

There are no guidelines from the CPC in this respect.

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

There is no case law from the CPC in this respect.

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

The CPC would take into account the possible restrictive effects of multiple selective distribution systems operating in the same market in order to assess if they are eligible for exemption. The block exemption would not apply if the parallel selective distribution systems cover 30 per cent or more of the relevant market or the market share of any of the participating undertakings exceeds 5 per cent (De Minimis Decision, paragraph 8).

33 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

In Decision No. 1292/06.11.2012, the CPC decided against the operator of a selective distribution system in the car sector for implementing hard-core restrictions, including minimum resale prices; prohibiting dealers from executing sales of competitors' cars; prohibiting dealers from performing cross-supplies of new vehicles and replacement parts within the selective distribution system; prohibiting dealers from performing active sales of new vehicles outside their assigned contract territory; and fixing the prices of replacement parts. The CPC held that such conduct, by not allowing dealers to determine their own market behaviour and price policies, resulted in identical prices for consumers and limited price competition between dealers of the same brand.

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

In Decision No. 1292/06.11.2012, the CPC determined that in a selective distribution system, dealers should have the freedom to perform active sales to all customers on the market. Otherwise, dealers would be restricted from distributing products outside the assigned contract territory, leading to market partitioning. The CPC concluded that such partitioning of the market has a direct effect on intra-brand competition, eliminating effective competition and the dealers' ability to be truly competitive among each other. For this reason, the CPC assumed that such distribution agreements are illegal per se, even when they have not caused a real effect on the market.

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

There is no case law of the CPC known to us in this respect. However, it may be reasonably expected that restricting the buyer's ability to obtain the supplier's products from alternative sources would be regarded as restrictive of competition, except for the restriction of cross-supplies between distributors within a selective distribution system.

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

Imposing a restriction on the buyer to sell non-competing products is likely to be regarded as a supplementary obligation with no connection with the subject or performance of the purchase contract, and thus as a violation per se of antitrust rules. In our understanding, such a restriction could be subject to individual exemption if it would bring efficiencies to the relevant market (ie, improvement of distribution and customer service as regards the contract goods, etc).

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

The obligation imposed by a supplier on a distributor to resell only or predominantly that supplier's products, and not stock and resell competing products ('single branding') is covered by the block exemption as per Decision No. 55/2011, provided that both the supplier's and buyer's market shares do not exceed 30 per cent and the non-compete obligation is limited to five years (bearing in mind the limitations set out in article 5 of Regulation (EU) 330/2010). In any other circumstances the 'single branding' clause would be assessed individually.

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

Such obligations would be regarded as de facto making the buyer concentrate its purchases on one supplier. In competition law, such obligations are commonly designated as 'quantity forcing'. If both the supplier and the buyer lack significant market strength (ie, where their respective market shares are below the 30 per cent threshold) and there are no other hard-core arrangements between them, such clauses should be exempt.

- 39** Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

The 'exclusive supply' obligation would be subject of the block exemption provided that both the supplier's and the buyer's market shares do not exceed 30 per cent. Higher market shares would presumably lead to a risk of market foreclosure and would be examined by the CPC on a case-by-case basis.

Similarly to the rules applicable in the EU, the block exemption benefit would be granted even where the exclusive supply clause is accompanied with other non-hard-core restraints such as a non-compete clause. Accordingly, restrictions on the supplier to sell directly to consumers should also be exempt.

- 40** To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

In a commentary to the APC currently in force, CPC officials have stated that vertical agreements that contain franchise arrangements should always be assessed on a case-by-case basis in order to establish if their anti-competitive effects do not override the competitive benefits they would bring. In other words, franchise agreements may not be block-exempted and should be analysed in light of a possible individual exemption on the basis of the criteria set out in article 17 of the APC.

- 41** Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed.

In both the supplier and the buyer lack significant market strength (ie, where their respective market shares are below the 30 per cent threshold) and no hard-core arrangements exist between them, the said supplier warranties should normally be eligible for exemption. An analysis for possible market foreclosure (see question 32) would also be made.

- 42** Explain whether and in what circumstances a supplier may apply different prices or conditions to similarly placed buyers and explain how, in such circumstances, the application of different prices or conditions is assessed?

In its case law the CPC has indicated that the use of different prices or conditions for similarly placed buyers, when reporting the economies of scale, is normal business practice and should be considered economically justified and usual, having in mind the specifics of the traded products. The CPC accepts that because of the specifics of certain products (such as sound recordings) where retail price does not affect price competition as much as costs associated with advertising, product presentation and product variety, a supplier may apply different prices to similarly placed buyers (Decision No 268/08.04.2008).

- 43** Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

The considerations as per question 41 should also apply where a buyer undertakes to purchase the contract products on terms applied to the buyer's most-favoured supplier. However, a buyer's commitment to not purchase the contract products on more favourable terms from other suppliers may be regarded as a de facto minimum purchase price imposed by the supplier on the buyer, and as such a prohibited violation per se. In Decision No. 833/19.07.2012, The CPC accepted that in the relationships between buyers and suppliers, the clause 'most-favored supplier' makes the buyer unable to freely determine delivery prices and discounts with other suppliers on the same market. The CPC has determined that 'most-favored supplier' clauses restrict buyers, and is prohibited per se.

Notifying agreements

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

There is no longer any formal procedure for notifying agreements containing vertical restraints to the CPC. Historically, a notification regime existed under the former Act on Protection of Competition, repealed in 2008.

Authority guidance

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

There is no procedure for obtaining any kind of clearance. Assessment of a vertical agreement is left to the involved undertakings. If an investigation is launched by the competition authority of

Update and trends

One of the most significant decisions of the CPC was taken in case No. 1352/2011. *CPC v Industrial Komers EOOD*. As described in question 33, the CPC concluded there were obvious hard-core restrictions. The CPC held that the established violations should fall under article 101 of the Treaty on the Functioning of the European Union, and therefore has increased the basic amount of the fine by 25 per cent for each of the violations.

the legality of agreements containing vertical restraints, the burden of proof as to whether those are eligible for exemption lies with the interested parties.

Complaints procedure for private parties

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

An investigation by the CPC may be initiated by a third-party complaint. The CPC's continuing practice is to accept all non-anonymous complaints of alleged violations of antitrust rules.

There is a minimum content of the complaint set out in the law as well as a sample claim form.

Once proceedings are opened, the CPC chairman appoints a supervising CPC member and a team of CPC experts (typically consisting of at least one lawyer and one economist), which lead the investigation and come out with a report.

Based on the report, the CPC may in closed hearings decide to terminate the proceedings for lack of violation, return the case for additional investigation to the expert team or claim violation and give the claimant and the defendants a deadline of no less than 30 days to provide written objections on the CPC's claim. At this stage the parties should submit all the evidence they have in support of their position, as they will not be allowed to do so at a later stage in the proceedings.

The defendants may commit to implement measures for remedying the alleged violation. The CPC may approve the suggested measures and order termination of the proceedings (however, it has no authority to do so in the case of serious violations such as hard-core restrictions).

Upon expiry of the deadline for objections by the parties, the CPC would hold an open hearing of the case. The CPC would then issue a decision whereby it would establish a violation, impose sanctions, establish that there is no violation of the law, order termination of the violation, or dismiss the applicability of a block exemption (national or EU) in the specific case and determine a deadline for

remedying the violation. The CPC may also accept new claims for committed violations, thus restarting the investigation procedure, or order additional investigation.

The procedure as outlined above would typically last between three and six months, although there is no strict deadline for its completion.

Enforcement

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

In 2012 the CPC heard more cases in comparison to previous years, related to vertical restraints, but still it seems that the CPC pays more attention to horizontal agreements as they are generally perceived as more restrictive of competition than vertical restraints.

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

Agreements containing hard-core restrictions (such as price fixing prohibiting a distributor from carrying out passive sales outside their assigned territories) are considered null and void in their entirety. Other kinds of restrictions (eg, non-compete obligations the duration of which is indefinite or exceeds five years, non-manufacturing obligations following the termination of a distribution contract or prohibition on members of a selective distribution system to sell the brands of particular competing suppliers) would be prohibited without rendering invalid the other provisions of the agreement of which they form part.

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

The CPC may impose pecuniary sanctions itself. The fines may amount to up to 10 per cent of the penalised entity's total turnover for the preceding financial year.

The CPC may also order termination of the violation. Further, the CPC may approve measures for remedying the alleged violation that might be suggested by the defendants during the investigation. In a recent notable decision it has ordered termination of price resale maintenance as well as deletion of a restrictive clause from the by-laws of a professional association of undertakings.

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In addition, the CPC may also impose penalties for non-compliance of undertakings and individuals with the procedural rules introduced by the CPC. Thus, for instance the CPC may impose fines for lack of cooperation (failure to provide information or provision of false or incomplete information, destruction of seals affixed by CPC officers during dawn raids, etc). The penalty amount may be up to 1 per cent of the turnover of the penalised undertaking for the preceding financial year, and up to 25,000 leva if imposed on individuals. The CPC is also entitled to impose periodic fines in certain cases of continued violation.

Since the adoption of the new APC in 2008, the CPC imposed several fines exceeding 1 million leva. The competition authority is expected to further fine-tune its methodology in determining the sanctions on the basis of the gravity of the committed violation. The CPC has indicated that it would treat vertical restraints which cover a small geographic area or a limited number of undertakings or consumers as light violations. Horizontal restrictions and in particular cartels would be treated as heavy violations of antitrust law, and penalised more heavily accordingly.

Investigative powers of the authority

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

The CPC may use the following investigative powers:

- request information, material, written, digital and electronic evidence, irrespective of the media on which they have been stored;
- take oral or written statements;
- conduct inspections;
- entrust the conducting of expertise by external experts; and
- request information or assistance from other national competition authorities of EU member states and by the European Commission.

Acting in its capacity as national competition authority on the grounds of article 22 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the EC Treaty, the CPC may request another national competition authority to carry out inspections or other fact-finding measures in its respective jurisdiction. Such requests are, however, limited to enforcing EU antitrust rules. Referrals for investigations related to national antitrust laws would be governed by the general rules on administrative and judicial cooperation between authorities of the states concerned.

Private enforcement

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

In Bulgarian law, there are no special claims for damages stemming from violation of antitrust rules. Any person may bring a civil court lawsuit for direct damages arising from the unlawful behaviour of a third party. The consequential link between the damages and the unlawful behaviour of such a third party should be proven by the claimant in the civil law proceedings.

Other issues

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

No.

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