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**VERTICAL BLOCK
EXEMPTION REGULATION
720/2022
AND
NATIONAL AUTHORITIES
ANTITRUST CASE LAW IN
EUROPE**

a cura di Alberto Venezia

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Presentation

by Antonino La Lumia and Francesca Maria Zanasi

The Milan Bar Association, represented by the President of the Milan Bar Association avv. Antonino La Lumia and the Vice-President and President Delegate of the International Affairs Committee of the Milan Bar Association (in short CRINT) avv. Francesca Maria Zanasi is honoured to present the third book on the commercial relations laws in the European context. The CRINT, implementing its programme for the internationalisation of the legal profession, intended to share with all the legal world materials and know-how collected and analysed by the most experienced Colleagues and professors of the Italian and European legal world, to help lawyers and legal practitioners broaden their knowledge and professionalism in the field of international trade law.

Precisely with this aim, in 2014 was published the first book on the duration and termination of commercial agency contracts, and then in 2018 the second book on distribution and franchising relationships. Today, we present the third and last chapter analysing Regulation 720/2022 on vertical agreements in Italy, Austria, Belgium, France, Germany, United Kingdom and Spain. Thanks to the experience and professionalism of the lawyers who have contributed to the drafting of this third book, CRINT once again places itself at the service of the Colleagues who are the greatest experts in the field of antitrust law, in order to facilitate and encourage professional and legal growth in market law.

The European Union has developed a complex and varied system of regulations to ensure fair competition between companies. To adequately understand this system and the consequence of its implementation, it is utmost essential to know its enforcement in the various EU and non-EU countries. Because it is precisely knowledge of laws and case law of the national Authorities that allows us to outline the legal landscape of competition.

Thanks to this book, a work of sharing and deepening of the different legal realities in which the competition authorities apply national and supranational regulations to promote competition, to prevent cartels and mergers that damage the market and to protect consumers begins.

Through the insights gathered by various experts from each of these Countries, it will be possible to understand the issues of particular relevance to the different Authorities, to understand the regulatory peculiarities of each Country, and to observe on a practical level the actual consequences that regulations and decisions have on the market and consumers.

Special thanks go to Alberto Venezia, Coordinator of the project and member of the International Affairs Committee of the Milan Bar Association, and to all the Colleagues who contributed to the production of this volume, and have placed themselves at the service of the legal world working in the field of antitrust law.

Milan, February 2025

Antonino La Lumia

President of the Milan Bar Association

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Introduction by Alberto Venezia

EU antitrust Regulation of vertical agreements is fundamental in drafting and executing distribution contracts utilized in EU national and international distribution networks.

In this area it is necessary to know and make the best use of the EU Vertical block exemption regulation 720/2022 and its relevant Guidelines.

For these reasons I thought it was necessary to complete the two previously coordinated e-books (both available online free of charge on the website of the Milan Bar Association - International Commission) on the duration and termination of commercial agency contracts (published in 2014) and on distribution and franchising relationships (published in 2018) with a further work to examine, on the one hand, the content of Regulation 720/2022 on vertical agreements and, on the other hand, the national case law of the main European countries and UK on the subject of antitrust regulations applied to so-called vertical agreements.

In this e-book, the first chapter is devoted to an analysis of Regulation 720/2022 on the subject of vertical agreements and the main rulings in Italian case law of both the Italian Competition Authority (AGCM) and ordinary case law on the operation of antitrust principles applied to franchising and distribution contracts and, in specific cases, agency contracts.

This is followed by six chapters dedicated to a precise analysis of antitrust law and the main rulings of national antitrust authorities and case law in the main countries of the European Union (Austria, Belgium, Germany, France and Spain) and outside the UE, of the United Kingdom, without pretension of completeness but with the aim to give an overview of the impact of antitrust law and jurisprudence on the main distribution contracts with a focus on distribution, franchising and, in specific cases, commercial agency contracts, bearing in mind the basic consequences from an economical and juridical point of view.

Special thanks to the colleagues and friends whose indispensable contributions made this e-book possible: Josef Wolff for Austria, Anna Gibello and Victor Rouard for Belgium, Quentin Dunod for France, Mario Dusi and Stefan Esser for Germany, Rocco Franco for United Kingdom and Fernando Sales Bellido and Marcelo Gui Usabiaga for Spain.

This e book, usable for free by all Bar members involved in the project, and not only, simply accessing on the websites of one of the Bar involved and particularly on the Milan Bar Association - International Commission website, is strictly linked to the first and second e book dedicated to termination of commercial agency contract and termination of franchising and distribution contracts and ideally completes the treatise dedicated to distribution national and international contracts in the European Union and UK.

Milan, February 2025

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CHAPTER I

VERTICAL BLOCK EXEMPTION REGULATION 720/2022 ON VERTICAL AGREEMENTS, ITALIAN ANTITRUST AUTHORITY AND CASE LAW

by Alberto Venezia

CHAPTER I – VERTICAL BLOCK EXEMPTION REGULATION 720/2022 ON VERTICAL AGREEMENTS¹, ITALIAN ANTITRUST AUTHORITY AND CASE LAW

1. EU antitrust regulation of vertical agreements. - 2. Agreements of minor importance. - 3. Regulation 720/2022 and the Guidelines on Vertical Restraints. - 3.1. The transitional rules (Article 10). - 3.2. The safety zone and its revision. - 3.2.1 The dual distribution. - 3.2.2. Parity obligations. - 3.2.3. Reformulation of Article 4. - 3.3. Simplification of rules for enterprises and a guide to self-assessment of agreements. - 3.4. Agency contracts. - 4. The competition and market authority - AGCM. - 4.1 Vertical agreements and discipline of commitments (art. 14 *ter* of l. 287/1990): the franchise contract. - 5. Italian case law on vertical agreements: selective distribution.

1. EU antitrust regulation of vertical agreements.

The Community antitrust regulation of vertical agreements², including agency, distribution, franchising, commission, and selective distribution contracts, was contained in two reference

¹ See for insights on the topic, A. Venezia – R. Baldi, *Il contratto di agenzia. La concessione di vendita. Il franchising*, XI^e ed., cap. XVII, p. 809 e ss. (with specific reference to the comment on Regulation 720/2022), 2023. P. Manzini, *Le restrizioni verticali della concorrenza nel nuovo VBER*, in *Dir. Comm. Int.* 2022, p. 555 e ss.; C. Garilli, *La disciplina antitrust delle intese verticali: un primo commento al nuovo regolamento di esenzione per categoria (VBER)*, in *Nuove leggi civili commentate* 2024, 1, p. 91 e ss.; P. Gelato – S. Vergano, *Prime note a margine del Reg. UE 720/2022 e riflessi in materia di distribuzione selettiva*, in *Riv. Dir. ind.* 2022, p. 90 e ss.

² See for insights into the Regulation 2790/1999 my contribution, A. Venezia, *Distribuzione commerciale e disciplina antitrust*, in *Dir. comun. Scambi int.* 2007, p. 75 e ss. where the issue is dealt with in detail, also with reference to the classification of the category of distribution contracts. See also on the subject of vertical agreements, Auricchio, Padellaro, Tomassi, *Gli accordi di distribuzione commerciale nel diritto della concorrenza*, Cedam Padova, 2013; Subiotto - Dautricourt, *The Reform of European Distribution Law*, in *World Competition Law and Economic Review*, Kluwer Law International 2011, volume 34, issue 1, p. 11 e ss.; Simonini, *Accordi verticali limitativi della concorrenza ed indipendenza del distributore*, in *Dir. comun. e degli scambi int.* 2011, p. 123 e ss.

texts adopted by the Commission, namely Block Exemption Regulation No. 2790/1999³ and the Guidelines on Vertical Restraints⁴.

Through the exemption regulations an agreement, otherwise prohibited because it is contrary to the provisions of Article 101(1) of the Treaty, can be considered nevertheless valid, provided it falls within the scope of the Exemption Regulation and meets its requirements.

The adoption of the Vertical Agreements Regulation was preceded by the publication in early 1997 of the Green Paper on Vertical Restrictions in Community Competition Policy, in which the Commission reviewed its competition policy as applied to the main forms of distribution, and more specifically to exclusive distribution, selective distribution, exclusive purchasing agreements, and franchise agreements.

The Commission, from its analysis of the existing framework had pointed out the extreme rigidity and formalism of the previous regulations, the lack of focus on intermediate goods and services, and the absence of linkage between actual market power held by companies and exemption criteria.

The need had also emerged to assess and analyze the effects of vertical agreements on the market with reference to a purely economic analysis, in order to highlight the effects on freedom of competition of vertical agreements and the restraints contained therein.

The role of exemption regulations has then changed from being an indispensable tool for obtaining exemption to guaranteeing the legality of those agreements that comply with its conditions.

In fact, once the Commission has determined, through the adoption of a block exemption regulation, that certain agreements benefit from the Article 101(3) exemption, this choice does

³ *Regolamento (CE) n. 2790/1999 del 22 dicembre 1999 relativo all'applicazione dell'art. 81, paragrafo 3, del Trattato CE a categorie di accordi verticali e pratiche concordate*, in *G.U.C.E.* 1999, L 336/21. See for insights on the topic my contribution, A. Venezia, *La nuova politica comunitaria in materia di restrizioni verticali ed il regolamento n. 2790/1999*, in *I Contratti* 2000, 1042 e ss.; Galli, *I nuovi regolamenti (CE) del 22.12.1999: Block exemption relativa a restrizioni verticali, pratiche concordate e relative Guidelines, e dispensa dalle notifiche preliminari*, in *Giur. piem.* 2000, p. 27 e ss.; A. Frignani, *La subfornitura internazionale. Profili di diritto della concorrenza*, in *Giur. piem.* 2000, p. 195 e ss. F. Bortolotti, *Manuale di diritto della distribuzione*, Padova 2007, vol. II, p. 203 e ss.

⁴ *Guidelines on Vertical Restraints*, in *G.U.C.E.* 2000, C 291/01.

not appear to be further open to review (except through ad hoc mechanisms, e.g., provided for in Regulation 2790/99 itself).

Block Exemption Regulation 2790/99 and the related Guidelines on Vertical Restraints, which formed its core, expired on May 31, 2010, and were replaced respectively by Block Exemption Regulation 330/2010⁵ and the Guidelines on Vertical Restraints of May 19, 2010, which in turn were replaced with effect from June 1, 2022-subject to the transitional rules in Article 10-by Regulation 720/2022 of May 10, 2022 and the Guidelines on Vertical Restraints⁶.

2. Agreements of minor importance

Agreements of minor importance are identified by the so-called “*de minimis*”⁷ Notice, which sets three thresholds, represented respectively by 10 percent, 15 percent, and 5 percent of the market held by the participating companies, below which agreements between companies for the production or distribution of products or the provision of services do not fall under the prohibition of Article 101(1) of the Treaty, because they are deemed not to appreciably affect trade between member States.

The exclusion from the applicability of Article 101(1) is also not lost if quotas are exceeded by no more than 2 percent, during two consecutive fiscal years.

The Commission makes clear, however, that the definition in quantitative terms of the appreciable incidence has a purely indicative value and that, in any case, the Notice does not affect the application of Article 101(1) by national Courts, as well as the applicability of national competition law.

⁵ *Regolamento (UE) n. 330/2010 della Commissione del 20 aprile 2010 relativo all'applicazione dell'art. 101, paragrafo 3, del trattato sul funzionamento dell'Unione europea a categorie di accordi verticali e pratiche concordate*, in *G.U.* 23 aprile 2010, L 102/1.

⁶ Commission' Notice, *Guidelines on Vertical restraints*, in *G.U.* 19 maggio 2010, C 130/1. Commissione Regulation (UE) 2022/720 10th may 2022 *relating to the application of art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, in *G.U.U.E.* 11 maggio 2022, L 134/4; Commission' Notice, *Guidelines on Vertical restraints*, in *G.U.U.E.*, 11 maggio 2022, C 2022, 3006 final (and, in Italian version C 248/1 del 30 giugno 2022), on which I dwell in detail, in paragraph 3 below. *Regulation 720/2022 and the Guidelines on Vertical Restraints*.

⁷ Modified several times and whose latest version was published in 2014: *Comunicazione della Commissione relativa agli accordi di importanza minore che non determinano restrizioni sensibili della concorrenza ai sensi dell'articolo 101, paragrafo 1, del Trattato sul funzionamento dell'Unione europea (comunicazione «de minimis»)*, in *G.U.U.E.* 30 agosto 2014 C 291/1 e ss.

Any prejudice to the interpretation of Article 101 made by the Court of Justice of the European Union is also excluded.

The Commission, while reiterating the absolutely non-binding nature of the Notice, has made it clear that in the cases it provides for, no proceedings will be undertaken by the Commission itself, either ex officio or upon request.

The presence of three thresholds depends on the type of agreement considered.

The first threshold, equal to 10 percent, relates to horizontal agreements (i.e., concluded between actual or potential competitors on one of the relevant markets affected by the agreement), which are usually considered more dangerous from an economic point of view, in relation to possible restrictions of competition contained therein.

The second, at 15 percent, relates to agreements between non-competitors.

If it is difficult to determine whether the agreement is concluded between competitors or between non-competitors, the 10 percent threshold will be applied (item 9.).

The third threshold (5 percent), on the other hand, pertains to the cumulative effect produced by parallel networks of agreements with similar effectiveness in the market. In these cases, for both agreements between competitors and those between non-competitors, the market share threshold is reduced to 5 percent.

However, the exemption is not absolute, as the share held becomes irrelevant if the agreements contain restrictions that are considered severe and more specifically where they have as their object, directly or indirectly:

In agreements between competitors:

- The fixing of prices, where products are sold to third parties;
- The limitation of production or sales;
- The allocation of markets or customers.

Similarly, the Commission will not apply the “safe harbor” created by quotas based on market thresholds to agreements containing restrictions that are defined as hard-core or listed as such in current or future Commission block exemption regulations (restrictions generally considered to be restrictions by object).

In these cases, therefore, Article 101(1) of the Treaty may be applied normally, regardless of the market share held.

Generally speaking, agreements concluded between small and medium-sized companies are viewed favorably for competition purposes. In fact, the Commission specifies that they will “rarely” be of such a nature as to appreciably affect trade between member States.

The Guidelines confirmed that, subject to compliance with the conditions set out in the *de minimis* Notice with respect to hardcore restrictions and cumulative effects, vertical agreements entered into by non-competing companies whose individual share of the relevant market does not exceed 15 percent are generally excluded from the scope of Article 101(1).

On the other hand, where the share held is above the 15 percent threshold, an infringement of Article 101(1) cannot automatically be presumed to exist: such agreements may, in fact, have no effect on trade between member States or otherwise not constitute an appreciable restriction of competition. Such agreements must therefore be assessed in their specific legal and economic context.

Where, on the other hand, hardcore restrictions, as identified in “*de minimis*,” are present, Article 101(1) may be deemed applicable even below the 15 percent threshold, if an appreciable effect on trade between member States and on competition is found.

The general irrelevance of agreements concluded between small and medium-sized enterprises is also confirmed in view of their effects, which are rarely likely to create an impediment to trade between member States or to restrict competition. Also confirmed, at least in general terms, is the exclusion of the Commission's initiation of proceedings even in the event that the conditions of Article 101(1) are met, on the grounds of lack of Community interest, provided, of course, that such undertakings, collectively or individually considered, do not hold a dominant position in a substantial part of the common market. This, however, does not exclude possible interventions by individual national competition authorities in application of their own domestic rules.

3. Regulation 720/2022 and the Guidelines on Vertical Restraints.

Regulation 330/2010 and its Guidelines, effective June 1, 2022-subject to the transitional rules in Article 10-have been replaced in their entirety by Regulation 720/2022 of May 10, 2022 and the Guidelines on Vertical Restraints⁸.

This new Regulation, adopted in continuity with the previous 330/2010, contains significant novelties, focusing on the evolution of distribution with specific reference to the exponential growth of e-commerce and online sales, also in relation to the role played by new players in the markets, such as online platforms.

Regulation 720/2022 (Vertical Block Exemption Regulation - VBER) and the new Guidelines (Vertical Guidelines) are the result of a long and thorough process of review of the EU policy on vertical agreements, carried out also based on the outcome of the public consultations on the draft of the revised texts held from July 9 to September 17, 2021 and on the section of the Guidelines dedicated to the exchange of information in dual distribution between February 4 and 18, 2022.

The changes made by the Commission to the new text are aimed at achieving a twofold objective consisting on the one hand of revising the so-called “ safe harbor ” to eliminate false positive assumptions and reduce false negatives, and on the other hand of providing the companies involved with clearer, simpler and more up-to-date rules to be able to make a self-assessment as to whether their vertical agreements comply with Article 101 of the Treaty, while harmonizing the application of the relevant rules in the European Union.

3.1. The transitional rules (Art. 10).

Before examining the most significant provisions of Regulation 720/2022, it is appropriate to dwell on its transitional rules (Art. 10), which, also in view of the new features introduced, guaranteed one year to make any adjustments to existing agreements as of May 31, 2022.

⁸ Commission Regulation (EU) 2022/720 of May 10, 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, in OJEU, May 11, 2022, L 134/4; Commission Notice, Guidelines on Vertical Restraints, in OJEU, May 11, 2022, C 2022, 3006.

In fact, Article 10 specifies that all agreements already in force as of May 31, 2022, which, while not meeting the conditions for exemption of Regulation 720/2022, comply with the conditions of the previous Regulation 330/2010, will not be subject to the prohibition of Article 101(1) of the Treaty until May 31, 2023.

Thus, for agreements in progress as of May 31, 2022, a kind of ultractivity of Regulation 330/2010 has been guaranteed, thus effectively postponing the entry into force of Regulation 720/2022, which is immediately applicable only to agreements concluded from June 1, 2022 onward, the date of entry into force under Article 11 (expiring on May 31, 2034).

3.2. The safety zone and its revision.

The Commission, in its in-depth examination of Regulation 330/2010, identified four main areas of intervention to achieve the objective of redefining the safety zone, on the one hand excluding the benefit of exemption for two so-called “false positives” namely dual distribution and parity obligations and on the other hand extending it to two areas of “false negatives” and more precisely active sales restrictions and restrictions of online sales.

It should be mentioned preliminarily that the 30% threshold expressed in terms of market share, referring to both supplier and distributor, remained unchanged (Art. 3) compared to Regulation 330/2010, despite a preliminary attempt to introduce a reduced quota of 10% for the hypotheses of information exchange in dual distribution (a hypothesis later excluded from the final text).

False positives are identified in those vertical agreements and restrictions that generally fall within the safe harbor and as such should be exempted from the regulation, but for which nonetheless it cannot be said with sufficient certainty that real efficiencies are realized in execution of the provisions of Art. 101(3). In these cases, it is therefore up to the Commission to tighten the application of the exemption conditions.

Conversely, false negatives represent agreements and restrictions that are normally excluded from the operation of the Regulation, but which in fact meet the conditions of Article 101(3), thus not representing an actual violation of paragraph 1. However, this exclusion results in a significant increase in costs for small and medium-sized enterprises (“SMEs”), and the Commission is therefore committed to trying to reduce these assumptions to the extent possible.

3.2.1. Dual distribution.

Article 2 of the Regulation outlines the scope of application of the exemption and, after dealing with the issues of business associations⁹ and agreements containing provisions relating to the assignment or use of intellectual property rights, reiterates the non-applicability of the exemption in paragraph 1 to vertical agreements concluded between competing undertakings, except where the competing undertakings enter into a non-reciprocal vertical agreement and if at least one of the following alternative conditions is met (hypothesis of so-called double distribution):

(a) where the supplier operates both as a manufacturer, importer, or wholesaler (upstream) and as an importer, wholesaler, or distributor (downstream), while the buyer of the goods operates as an importer, wholesaler, or distributor (downstream) and is not a competing undertaking of the upstream supplier;

(b) where the supplier is a service provider at different levels of the chain of trade, while the buyer provides goods or services at retail and is not a competitor at the level of the chain of trade where it purchases services.

However, the above exceptions do not apply to exchanges of information between supplier and buyer that are not related to the performance of the agreement or necessary to improve the production or distribution of the contracted goods or services or that do not meet any of these conditions.

It is also clarified (Article 2.6) that vertical agreements relating to the provision of online brokering services in which the provider of such services is also a competitor in the relevant market for the sale of the brokered goods and services are also excluded from the exception.

⁹ The exemption applies to vertical agreements concluded between an association of companies and a single member or between it and a single supplier only if all the members of the association are retail distributors of goods and if no member (including affiliated companies) has an annual turnover of more than 50 million euros. However, this is without prejudice to the application of Article 101 to horizontal agreements concluded between members or decisions of the association. The provisions are in line with those of Regulation 330/2010.

The first area of focus, as detailed above, is therefore dual distribution cases in which a supplier not only sells its goods or services through independent distributors, but also directly to final consumers, thus placing itself in direct competition with its independent distributors.

In the examination and review of the old regulation, it was found that, given the increase in the number of double distribution scenarios, the old VBER could exempt vertical agreements in which the horizontal effects were no longer negligible, with specific reference to the exchange of information between suppliers and distributors and in relation to so-called hybrid platforms. On the other hand, the review showed that extending the exemption to the dual distribution of wholesalers and importers was appropriate.

The Guidelines (Vertical Guidelines section 4.4.3: par. 88 et seq.) also provide further clarification in relation to the purpose of dual distribution, specifying by way of example certain types of information exchanges that appear to be included or excluded from the operation of the exemption in the context of dual distribution, as well as guidance on the legal consequences arising from the exchange of information carried out outside the scope of operation of the Exemption Regulation.

The information included and excluded from the scope of operation of the Exemption Regulation is further specified in paragraphs 99 and 100 of the Guidelines, to which I refer.

As mentioned above, Article 2.6 excludes from the exemption vertical agreements relating to the provision of online intermediation services (OIS) by so-called hybrid platforms, i.e., platforms that in addition to providing intermediation services also sell goods and services in direct competition with the purchasing enterprise.

The Guidelines (Vertical Guidelines section 4.4.4: points 104 - 109) contain the guidelines regarding this exclusion, specifying the exact purpose of the definition and the legal consequences of the exclusion of vertical agreements concluded by hybrid platforms. However, the Guidelines point out that the Commission does not intend to prioritize the enforcement of vertical agreements concluded by hybrid platforms to the extent that the agreements do not contain objective restrictions and the platform does not have significant market power.

3.2.2. Parity obligations.

Parity obligations, or “MFN” clauses (Most Favoured Nation clauses) with Regulation 330/2010 benefited from the exemption, but were subject to close scrutiny by the competition authority. These are clauses in distribution contracts that require the seller to offer the counterparty equal, or better, terms than those offered on third-party sales channels, such as on other platforms or on the seller's own direct sales channels, such as on its website.

However, the exclusion was not intended for all parity clauses but only for a certain type. In particular, an obligation, whether direct or indirect, that prevents buyers of online brokerage services from offering, selling or reselling goods or services to end users on more favorable terms through competing online brokerage services (lett. d - “wide retail parity obligation”) is considered as an “excluded restriction ” under Article 5 of the Regulation, in addition to those already provided for in the previous Regulation 330/2010 that have been reconfirmed¹⁰, a direct or indirect obligation that prevents buyers of online intermediation services from offering, selling or reselling goods or services to end users on more favorable terms through competing online intermediation services (letter d – «wide retail parity obligation»). For this type of clause, it will be necessary to apply for an individual exemption under Article 101, while the others (so-called narrow parity) may be deemed to be covered by the block exemption: for example, those by which a platform obliges users of its intermediation services not to offer more favorable terms to end users on its direct sales channels (such as its own website) or those that do not relate to retail sales.

Of interest, again in relation to Article 5, are the provisions of the Guidelines regarding non-compete obligations and in particular, subject to the maximum five-year period previously provided for, the hypothesis of tacit renewal (Sec. 6.2.1: paras. 247-249 and part. 248). Indeed, tacit renewal clauses of non-compete obligations, beyond five years, are to be considered included in the exemption, provided that the distributor has the option to effectively renegotiate

¹⁰ A direct or indirect non-compete obligation of more than five years' duration (sub-paragraph a) including the exemption in paragraph 2, a non-compete obligation after the termination of the relationship (sub-paragraph b - with the exemption for one year limited in essence to franchise agreements and subject to special conditions), and a direct or indirect obligation not to sell brands of certain competitors to members of a selective distribution system.

and/or terminate the vertical agreement containing the non-compete obligation, with reasonable notice and without incurring unreasonable costs, thus being able to switch to another supplier after the expiration of the first five-year period.

Article 6 of the Regulation, however, specifies the Commission's power to withdraw the benefit of the exemption where it finds the production of effects incompatible with the conditions of Article 101(3) in a vertical agreement that nevertheless meets the requirements of the Regulation. For illustrative purposes, the case of a highly concentrated market for online platforms with competition among providers limited by the cumulative effects of parallel networks of agreements, which limit the ability of buyers of online intermediation services to offer, sell, or resell goods or services to end-users on more favorable terms on their direct sales channels. Further criteria for assessing parity clauses are then provided for in the Guidelines (sections 6.2.4 Parity requirements in cross-platform retailing, paragraphs 253-255, and 8.2.5 Parity obligations, paragraphs 356-378).

3.2.3. Reformulation of art. 4.

Article 4, devoted to hardcore restrictions (hardcore restrictions, the presence of which determines the disapplication of the exemption to the entire agreement and not to the only excluded restriction as in Article 5) has been reformulated, with greater flexibility in the definition of distribution models and the identification of hardcore restrictions for each of them (exclusive distribution, selective distribution, and free distribution).

Among the hardcore restrictions, first of all, the disapplication of the exemption in Article 2 is confirmed (Art. 4(a)) to vertical agreements that have as their object the restriction of the buyer's ability to determine its own selling price (RPM “ resale price maintenance ”), without prejudice to the supplier's ability to set a maximum selling price or to recommend a selling price, provided that this does not result in a fixed or minimum price, including as a result of pressure exerted or incentives offered. The Guidelines set out various scenarios in which price-imposition practices can lead to efficiency gains, without prejudice to the need for companies to conduct an analysis to assess whether the requirements for an individual exemption under Article 101(3) are met. Paragraph 189 of the Guidelines goes on to specify that it is considered as an indirect

form of price maintenance (RPM), the supplier's setting of minimum advertised prices since, although in the abstract the distributor's freedom to charge lower prices is provided for, it is in fact disincentivized by limiting the distributor's ability to inform potential customers as to the practicability of further discounts.

In the context of an agreement on an online intermediation service between a supplier of goods and services and a company operating in online platforms the latter, which provides the online intermediation services, cannot be considered in the same way as a buyer and therefore the supplier is free to set its own prices for the sale of goods or services on the platform. Also excluded are hybrid platforms, where the provider of online brokerage services is also a competing enterprise for the sale of the goods or services being brokered.

Subparagraph (b) of Article 4 is devoted to exclusive distribution and, in connection with the provisions of Article 1, has introduced some significant novelties with respect to the previous regime, including the option of granting so-called “shared exclusivity,” i.e., the restriction of active and passive sales relating to a given territory or group of customers assigned no longer to a single distributor, but to several exclusive distributors, up to a maximum of five. Further novelty consists in the ability of the supplier to transfer (“pass on”) from its distributors to the relevant customers the restrictions on active sales in territories or customer groups assigned exclusively to other distributors: this transfer, however, under the Guidelines cannot enjoy the exemption for further steps in the distribution chain.

Article 4(c) devoted to selective distribution strengthens its protection regime, allowing the supplier to prohibit both distributors and their customers from selling to unauthorized distributors located in a territory where the supplier acts through a selective distribution system, regardless of whether these buyers and customers are themselves located within or outside the aforementioned territory.

Also of interest are the provisions of Article 4(e) on online sales, which, without prejudice to the freedom of effective use of the Internet by the buyer or its customers, allows other restrictions on online sales and restrictions on online advertising that are not intended to prevent the use of an entire online advertising channel. With regard to certain indirect measures restrictive of online sales, the changes brought about by Regulation 720/2022 relate, on the one

hand, to the so-called “ dual pricing “, i.e., the possibility of charging the distributor a higher price for products intended for online sales than for those to be sold offline, and on the other hand, to the principle of equivalence (“equivalence principle ”), which imposes criteria for online sales that are not overall equivalent to the criteria imposed for sales in physical stores. The evidence gathered during the review of Regulation 330/2010 and its Guidelines has shown that online sales have developed into a distinctly efficient sales channel, which therefore does not require special protection with reference to sales made through traditional offline sales channels. There is therefore no longer any reason to regard price differentiations or the imposition by suppliers of different criteria depending on the sales channel (online or offline) chosen as fundamental restrictions.

The new Guidelines thus clarify that suppliers may identify different wholesale prices for online and offline sales made by the same distributor to incentivize and/or reward an appropriate level of investment made. While the price difference must be reasonably related to differences in costs and investments related to the different sales channel (online or offline), it is not necessary for the parties to make explicit complex calculations and counts or provide particular evidence in order to prove it. However, the price difference is subject to certain limitations: that is, it must not have as its object the restriction of cross-border sales or limit the buyer's actual use of the Internet. It is also possible to implement a system for verifying which sales are made online and which offline, provided that this does not result in a restriction on sales that can be made online.

Moreover, under a selective distribution system, the criteria imposed by the supplier for online sales need not be overall equivalent to those for sales in physical stores, given the radically different nature of the two distribution systems. Again, however, the criteria set for online sales must not be aimed at limiting buyers' actual use of the Internet or restricting customers from selling the contracted goods and services.

The Guidelines, in execution of the principles expressed in the Court of Justice's ruling in the Coty case (Court of Justice EU December 6, 2017, in Case C-230/16 Coty Germany GmbH v Parfumerie Akzente GmbH), clarified that, as a general rule, restrictions on the use of third-party platforms that operate in a recognizable manner vis-à-vis consumers fall under the block

exemption, given that they restrict only one of the modes of online sales available to the distributor, provided that the actual use of the internet for the sale of the contractual goods and services is not prevented. In the Coty case, in a case brought by a German company that sold luxury cosmetic products in Germany-through a selective distribution network-against one of its authorized distributors to prohibit it from distributing products through the “Amazon. de”, the Court of Justice established the following interpretative principles: ” (1) Article 101(1) TFEU must be interpreted as meaning that a system of selective distribution of luxury products aimed, primarily, at safeguarding the luxury image of those products is in conformity with that provision, provided that the choice of retailers is made in accordance with objective criteria of a qualitative nature, established indiscriminately for all potential retailers and applied in a non-discriminatory manner, and that the criteria defined do not go beyond what is necessary. (2) Article 101(1) TFEU must be interpreted as meaning that it does not preclude a contractual clause, such as that at issue in the main proceedings, which prohibits the authorized distributors of a selective distribution system for luxury goods aimed, primarily, at safeguarding the luxury image of those goods from making use in a recognizable manner of third-party platforms for the sale by means of the internet of the contracted products, where that clause is aimed at safeguarding the luxury image of those products, is established indiscriminately and applied in a non-discriminatory manner, and is proportionate in relation to the objective pursued, circumstances which it is for the referring court to verify. (3) Article 4 of Commission Regulation (EU) No 330/2010 of April 20, 2010 on the implementation of Article 101(3) of the Treaty on the Functioning of the of the European Union to categories of vertical agreements and concerted practices must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the prohibition imposed on members of a selective distribution system for luxury goods, acting as distributors on the market, from making recognizable use, for sales by means of the Internet, of third-party companies does not constitute a restriction on customers within the meaning of Article 4(b) of that regulation, nor a restriction on passive sales to end users within the meaning of Article 4(c) of that regulation ”.

Regarding price comparators (“price comparison tools”), the Guidelines state that an absolute ban on their use constitutes a hardcore restriction, effectively entailing an inhibition on the use

of an entire advertising channel: however, restrictions that do not prevent the use of all comparison services, such as an obligation to meet specific quality standards, are permitted.

Finally, with Article 4 (d), the Regulations set specific discipline dedicated to systems of so-called free distribution, that is, not qualifying either as exclusive distribution or selective distribution. It is specified that if the supplier uses neither an exclusive distribution system nor a selective distribution system, it is allowed to introduce the following 5 types of restrictions:

- 1) the restriction of active sales by the buyer and its direct customers in a territory or to a group of customers reserved for the supplier or assigned exclusively by the supplier to a maximum of 5 exclusive distributors;
- 2) the restriction of active or passive sales by the buyer and its customers to unauthorized distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services;
- 3) the restriction on the buyer's place of establishment;
- 4) the restriction of active or passive sales to end users by a buyer operating at the wholesale level of trade;
- 5) the restriction of the buyer's ability to actively or passively sell components, supplied for the purpose of incorporation, to customers who would use such components to manufacture goods similar to those produced by the supplier.

3.3. Simplification of rules for companies and a guide to self-assessment of agreements.

One of the main goals of the revision of the regulation was to ensure that companies have up-to-date guidance on online restrictions and to ensure a harmonized approach to the aforementioned restrictions in the European Union.

To this end, Regulation 720/2022 and the accompanying Guidelines incorporated key principles for assessing restrictions in online sales drawn from the Court of Justice's case law in the Coty and Pierre Fabre cases (Court of Justice October 13, 2011, in Case C-439/09, Pierre Fabre Dermo-Cosmetiques SAS V Président de l'Autorité de la concurrence EU: C: 2011:649). The Pierre Fabre case stemmed from a dispute over a selective distribution network in which distributors were prohibited from selling cosmetics and personal care products on the Internet

in violation of the provisions of Article L.420-1 of the Code de commerce and Article 81 of the EC Treaty: the Court of Justice affirmed the following principles: “*Article 101, no. 1, TFEU must be interpreted as meaning that a contractual clause which, in the context of a selective distribution system, requires that sales of cosmetics and personal care products be made in a physical space in the mandatory presence of a qualified pharmacist, resulting in a ban on the use of the Internet for such sales constitutes a restriction by object within the meaning of that provision if, following an individual and concrete examination of the tenor and objective of the contractual clause in question as well as the legal and economic context in which it is situated, it appears that, in the light of the characteristics of the products in question, such a clause is not objectively justified. Article 4(c) of Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract containing a clause prohibiting, in effect, the use of the Internet as a method of marketing the contract products. Instead, such a contract may benefit, on an individual basis, from the applicability of the statutory exception of Article 101(3) TFEU, if the conditions set out in that provision are met*”.

Article 4(e) of the Regulation, as mentioned in the previous paragraph, provides that restrictions on online sales are to be considered fundamental (hardcore) when, directly or indirectly, they have as their object the prohibition of buyers and their clientele from using the Internet for the sale of the contracted goods and services, including restrictions that have as their object the prohibition of the use of one or more entire online advertising channels.

Section 6.1.2 (points 202 et seq.) of the Guidelines (Vertical Guidelines) makes interesting clarifications on the subject, specifying, for example, that while the operation of a website is normally a form of passive selling, the translation of the website into a language not commonly used in the distributor's area constitutes a form of active selling (point 213). It is also pointed out (para. 206) that a ban on the use of an entire online advertising channel (such as search engines for advertising services or price comparison services) is a key restriction when the ability to advertise enables the distributor to attract potential customers to the site, which is a

prerequisite for being able to sell online. Correlatively, restrictions on online advertising that do not entirely preclude the use of an online advertising channel are usually exempted, for example where the aforementioned restrictions are related to the content of online advertising and/or set certain quality standards (Section 210). Sections 8.2.3 and 8.2.4 of the Guidelines then contain specific guidance devoted to restrictions on the use of online platforms and price comparison services, respectively.

Specific rules are then provided for the regulation of the so-called platform economy considering its increasingly significant role in the distribution of goods and services. Articles 1(1)(d), 1(1)(e) of the Regulation and Section 4.3 of the Guidelines are expressly dedicated to the topic.

Section 3.2.3 (The Agency and the Online Platform Economy: para. 46) of the Guidelines then clarifies the reasons why traders active in the online platform economy usually do not qualify in terms of genuine commercial agents. Article 2 (6) of the Regulation, as mentioned above, then excludes from the benefit of the exemption agreements concluded with hybrid platforms under the dual distribution exception.

The aforementioned changes are consistent with the Digital Market Act (DMA) on which the Commission, the European Parliament and the member States reached a political agreement on March 24, 2022.

The above is due to the fact that the focus of the DMA is on “digital gatekeepers,” which are firms with market power and as such excluded from the scope of the exemption regulation.

The Guidelines also include the February 2021 working paper devoted to distributors also acting as agents for certain products for the same supplier, providing additional clarification.

The Guidelines then tend to strengthen the operation of national competition authorities in disapplying the regulation to individual cases by providing guidance on the applicable conditions and procedures (sect. 7.1 Withdrawal of the benefit of Regulation (EU) 2022/720).

The Guidelines also make it clear that the achievement of sustainability goals is one of the Union's policy priorities and clarify their meaning. The achievement of the aforementioned goals can then be an element in guaranteeing the efficiency referred to in Article 101(3) of the Treaty.

Finally, the structure of the Guidelines has been simplified from the previous version to provide a clear overview in the assessment of vertical agreements.

3.4. Agency contracts.

Regarding agency relationships, the approach of the previous Regulation 330/2010 is also maintained in Regulation 720/2022, with the exclusion from its scope provided that the agent does not have to bear financial and commercial risks related to the contracts concluded or negotiated by him.

The agency contract was the subject of examination in Section II par 2 of the Guidelines (points 12 to 21) on Regulation 330/2010, which was devoted to agreements normally outside the scope of Article 101(1) of the Treaty. The Guidelines contained a definition of agent that was substantially in line with that of the previous Guidelines, reiterating that the decisive element in considering the agreement to be a genuine agency contract, excluded from the applicability of Article 101, was the financial or commercial risk that the agent may have assumed in connection with the activities for which he was appointed by the principal. The definition in the Guidelines also included the different contract of commission, which is characterized by only the sale or purchase of goods by the commission agent in his own name, but on behalf of the principal.

Paragraph 14 of the Guidelines identified three categories of financial or commercial risk related to an agency agreement for the purpose of applying Article 101(1), namely:

- 1) contract-specific risks: related directly to the contracts concluded and/or negotiated by the agent (such as inventory financing);
- 2) risks resulting from specific investments directed to the relevant market, required to enable the agent to operate and usually not recoverable;
- 3) risks associated with other activities carried out in the same product market, to the extent that the performance of such activities is required by the principal from the agent, but at the agent's own risk.

Where the agent bears none of the three aforementioned types of risks, or merely bears insignificant risks, the agreement will fall outside the scope of Article 101, while in the opposite

case the agent will be regarded as an independent trader, as such free to set its own business strategy in order to recover the investments made.

Point 15 reiterated that the risks generally associated with carrying out activities as an agent, and more specifically the risk that the agent's income is linked to the results achieved, as well as general investments in personnel and premises, necessary for the purposes of carrying out the activity, were to be considered irrelevant.

Paragraph 16 confirmed a number of differentiating factors suitable for determining whether or not we are dealing with a genuine agency contract, specifying that an agreement will be considered commercial agency if ownership of the contract goods bought or sold does not pass to the agent or if the agent does not himself provide the contract services and if the agent: (1) does not contribute to the expenses associated with the supply or purchase of contract goods or services, including transportation costs ; (2) does not maintain at his own cost or risk stocks of the contract goods, and may return unsold goods to the principal, without the payment of a fee, except in the case of fault; (3) does not assume product liability for damages to third parties, except in the case of fault; (4) does not assume liability in the case of non-performance of the contract by customers, except in the case of fault; (5) is not obligated, directly or indirectly, to make investments, including advertising, in sales promotion; (6) does not make investments in equipment, premises, or personnel training, specific to the relevant market, unless the costs are reimbursed by the principal; (7) does not engage in other activities in the same market as the product required by the principal, unless the costs of such activities are reimbursed in full by the principal.

The list made by the Commission was to be considered merely illustrative, and where the agent had borne even one of the costs or risks indicated, the relevant agreement with the principal would not be considered, for the purposes of the applicability of Article 101, as an agency contract.

In any case, the risk assessment had to be carried out on a case-by-case basis in relation to the concrete and actual economic realities, regardless of a merely formal examination.

The Commission also clarified that it did not consider, as a general rule, that Article 101 applies to those obligations of the agent related to the promotion and/or conclusion of contracts on

behalf of the principal, where the principal assumes the economic and financial risks associated with the sale or purchase of the goods or services covered by the contract.

Section 18 identified 3 categories of agent's obligations inherent in the agency contract and as such not subject to the discipline of Article 101 of the Treaty:

- 1) limitations concerning the territory in which the agent may sell the goods or services;
- 2) limitations concerning the customers to whom the agent may sell the goods or services;
- 3) the price and conditions at which the agent must sell or buy the goods or services.

Finally, it was pointed out that agency contracts could contain clauses limiting the principal's ability to appoint other agents for a certain type of transaction, customer or territory (referred to as exclusive agency clauses) and/or prohibiting the agent from acting as an agent or distributor of competing businesses (referred to as “single branding” clauses).

While exclusivity clauses, pertaining to the regulation of intra-brand competition, normally did not result in negative effects on competition, non-compete (or “single branding”) clauses, including those relating to a period after the termination of the contract, could have violated Article 101(1) where they resulted in foreclosure on the relevant market in which the goods or services were sold or purchased.

An examination of the Guidelines shows that the category of agency contracts (to which commission contracts are also assimilated), could be considered to be addressed by the competition protection legislation but in a residual way, also considering that the characteristics deemed necessary to include the agent in the scope of application of the Regulation, to be assessed also in the light of the Community case law on the point, were such as to significantly alter its structure. Indeed, the Commission seemed to have focused, perhaps based on the Community case law developed on the point, more on borderline cases than on the normal practice of operating agency relationships.

The new Guidelines (paras. 29 to 46 and part. 31) slavishly retrace the same risks already highlighted in para. 14 of the previous Guidelines and specified above.

The same three categories of obligations mentioned in Paragraph 18 of the previous Guidelines are reiterated in the new ones (Paragraph 41) and allowed to the principal, who can then determine his own commercial strategy with reference to the territorial limitations imposed on

the agent, even if they refer to groups of potential customers, and to the determination of the prices and conditions at which the agent can sell or buy the goods or services covered by the contract.

I would point out on this point the introduction in the Guidelines of an evaluation criterion that would seem to be more rigid with reference to the assessment of the risk assumed by the agent, on the understanding that in general the agency contract (provided it is genuine) should be considered excluded from the application of antitrust law.

The Guidelines also examine the hypothesis in which the same person simultaneously performs for the same supplier activities as an agent for certain goods and services and as a distributor for others, confirming its admissibility provided, however, that strict conditions are met. In particular (points 36 and 37) it must be possible to effectively delineate the activities and risks covered by the agency agreement, and the agency agreement must in no way affect the distributor's contractual autonomy. The distributor must be effectively free to enter into the agency agreement, which must not be de facto imposed with the threat of terminating the distribution relationship or worsening its conditions. Likewise, the principal must not directly or indirectly impose on the agent an activity as a distributor, unless that activity is fully reimbursed by the principal. In addition, all risks associated with the sale of goods or services under the agency agreement, including specific market-related investments, must be borne by the principal. The Commission also notes that the combination of agency and distribution can create difficulties in distinguishing between the investments and costs that relate to agency and distribution activities, pointing out that the less interchangeable the products sold under the agency agreement are with respect to those of the distributor activity, the less likely such problems are to occur, including with respect to pricing policy.

To identify which market-related investments should be reimbursed when entering into an agency agreement with its own distributor already operating in the market, the supplier/principal should consider the hypothetical situation of an agent who is not yet active in the market to assess which investments are relevant to the type of business entrusted to the agent.

The only investments related to the market that the principal would not have to cover are those referring to the sale of differentiated products that are not sold under the agency contract, but the subject of the distribution contract. In fact, the agent, to operate in the market, would have to bear the costs related to the market, but not those related exclusively to the sale of the differentiated products if he did not also act as a distributor.

Finally, Section 40 enumerates several examples of cost allocation where a distributor also acts as an agent of certain products for the same supplier.

4. The Competition and Market Authority-AGCM.

Italian law No. 287 of October 10, 1990¹¹, which came into force the day after its publication, i.e., October 14, 1990, established the Competition and Market Authority (AGCM¹²), which immediately began to operate within the scope of its competencies and areas of intervention, and more specifically:

- (a) to ensure the protection of competition and the market;
- b) for assessing restrictive agreements and abuses of dominant position and in the control of merger transactions;
- (c) for combating unfair business practices against consumers and microenterprises;
- (d) to protect enterprises from misleading and comparative advertising;
- (e) to ensure that there are no unfair terms in contractual relations between businesses and consumers;
- (f) to crack down on abuses of economic dependence¹³ that are relevant to the protection of competition and the market.

¹¹ Law 10 ottobre 1990, n. 287, *Norme per la tutela della concorrenza e del mercato*, in *G.U. Serie gen.* n. 240 del 13 ottobre 1990.

¹² See on the activity of the AGCM, M. Libertini, *Nel trentesimo anniversario della legge antitrust italiana. Un bilancio dell'attività dell'Autorità nazionale di concorrenza*, in *Riv. Reg. mercati* 2020, p. 240 e ss.; F. Ghezzi, *I numeri dell'antitrust – Considerazioni sull'attività di enforcement dell'Autorità garante della concorrenza in materia di intese e abusi di posizione dominante*, in *Rivista delle Società*, 2022, p. 476 e ss.

¹³ Hypothesis the latter which, as we shall see, allowed the Authority to open investigations on franchise relationships, which were closed without the adoption of measures but with a declaration of commitment by the franchisors to comply with the Authority's indications.

Over the years, the structure and organization of the AGCM have developed significantly with a systematic increase in staffing and an increasingly careful assessment of the behavior of companies in the market. Law 287/1990 has also undergone several amendments¹⁴, which have involved the granting of new powers¹⁵ to the AGCM, an increase in the penalties that can be imposed, as well as the introduction of new procedures. There has also been a broadening of the AGCM's areas of intervention, extended to consumer protection, with particular attention to comparative and misleading advertising, unfair terms, and abuse of economic dependence¹⁶, a prohibition the latter first regulated in Law 192/1998 about industrial subcontracting, but which in an early version was about to be included in the legislation protecting competition.

Prohibition of abuse of economic dependence that Italian jurisprudence considers pacifically applicable also to contractual relations different from industrial subcontracting and, in particular, to contracts between companies in which a client company is in a situation of economic dependence with respect to a supplier company that, by abusing this situation, determines a significant imbalance between rights and obligations, inserting unfavorable covenants resulting from asymmetries in the parties' negotiating power¹⁷.

As we shall see in section 4.1 below, the prohibition of abuse of economic dependence has been used by the AGCM to open proceedings concerning franchise relationships, resulting in franchisors making commitments to modify their standard franchise contracts.

Article 2 of l. 287/1990, in keeping with the principles laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union, establishes the prohibition of agreements

¹⁴ Mentioned among the main ones are the law 5 marzo 2001, n. 57, *Disposizioni in materia di apertura e regolazione dei mercati*, the law 23 dicembre 2005, n. 266, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2006)*, the d.lgs. 19 gennaio 2017, n. 3, *Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea*, the d. lgs. 8 novembre 2021, n. 185, *attuazione della direttiva UE 2019/1 del Parlamento europeo e del Consiglio, dell'11 dicembre 2018, che conferisce alle autorità garanti della concorrenza degli Stati membri poteri di applicazione più efficaci e che assicura il corretto funzionamento del mercato interno*, the law 24 marzo 2022, n. 27, *Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività*, the law 5 agosto 2022, n. 118, *Legge annuale per il mercato e la concorrenza 2021* and the law 30 dicembre 2023, n. 214, *Legge annuale per il mercato e la concorrenza 2022*.

¹⁵ See C. Calini, *I nuovi poteri dell'AGCM a valle della legge annuale per la concorrenza 2021 e della trasposizione della Direttiva omnibus*, in *Giustizia Civile .com* 31.07.2023.

¹⁶ Abuse of economic dependence also assessed with reference to digital platforms.

¹⁷ In this sense Cass. s.u., 25 novembre 2011, n. 24906 (ord.).

between companies that have as their object or effect the prevention, restriction or substantial distortion of competition within the national market or in a relevant part thereof, including through activities consisting:

- in the direct or indirect fixing of purchase or selling prices or other contractual conditions;
- in preventing or restricting production, outlets or market access, investment, technical development and technological progress;
- dividing markets or sources of supply;
- applying different terms and conditions in business dealings for equivalent services, thus leading to unjustified disadvantages in competition;
- making the conclusion of contracts conditional on the acceptance of additional services that have, by nature or custom, no relation to the subject matter of the contracts.

The closing rule then provides a sanction of nullity to all effects for the prohibited agreements. Similar provisions are contained in art. 3 dedicated to the prohibition of abuse of dominant position.

Article 4 allows for the authorization, as an exception to Article 2 and for a limited period of time, of prohibited arrangements or categories of arrangements, under certain conditions, in line with EU regulations.

Articles 5 and 6 are then devoted to the topic of mergers.

Title II of the law (Art. 10 et seq.) is devoted to the establishment and duties of the AGCM, whose powers about restrictive agreements and abuse of dominant position are regulated in Articles 12 to 15k.

The AGCM, to verify the existence of infringements of Articles 2 and 3, proceeds to open investigations on its own initiative, that of the public administration and of anyone with an interest. The AGCM also has the power to define intervention priorities for the purposes of applying Law 287/1990, as well as Articles 101 and 102 of the TFEU: in the relevant proceedings, however, the general principles, including interpretative ones, of European Union law and the Charter of Fundamental Rights of the European Union must be respected. Provision is then made (Art. 13) for companies to communicate the agreements made, with a deadline of 120 days for the preliminary investigation to begin. The conduct of the investigation is regulated

by Article 14, with the option to rule on the adoption of precautionary measures where there is a risk of serious and irreparable damage to competition (Article 14-bis). The discipline of commitments, referred to in the following paragraph 4.1, is regulated by Article 14b, while the newly introduced Article 14c regulates the settlement procedure.

Penalties and warnings, on the other hand, are regulated by Art. 15. Where the AGCM ascertains the existence of an infringement of Articles 2 and 3 of Law 287/1990 or Articles 101 and 102 of the Treaty, it sets a deadline for the companies and business associations involved to eliminate the infringement or, where the infringement has been exhausted, prohibits its recurrence. The Authority may consequently adopt any behavioral or structural remedy necessary for the effective termination of the infringement, in accordance with the principle of proportionality. In addition, the AGCM, after assessing the seriousness and duration of the infringement, orders the application of an administrative fine of up to 10 percent of the turnover achieved by each company or association of companies involved in the last financial year closed prior to the notification of the warning, also setting the terms within which the company must make payment.

Specific provisions are then made for business associations and additional penalties in case of non-compliance with the warning notice, again within the limit of 10 percent and, where a penalty has been applied, in a minimum amount not less than twice the penalty imposed, again subject to the 10 percent limit.

Finally, provision is made (Article 15.2-bis) for the imposition of periodic penalty payments to compel enterprises or associations of enterprises to comply with the warning notice, precautionary measures under Article 14-bis, or to comply with mandatory commitments by decision under Article 14-ter. The amount of the periodic penalty payments may be up to 5 percent of the average daily turnover achieved globally during the previous fiscal year for each day of delay, starting from the date set in the decision.

Measures of the Competition Authority (AGCM) are then subject to the scrutiny of the administrative Courts of first and second instance (TAR Lazio and Council of State), which, as

pointed out in doctrine¹⁸, have resulted in the annulment in whole or in part of the decisions adopted in a fairly significant percentage.

The relevant judicial protection before the administrative Court is regulated by the Code of Administrative Procedure, while actions for nullity and compensation for damages, as well as appeals to obtain emergency measures, are brought before the locally competent Court where the relevant specialized section is established.

Council Regulation No. 1/2003 of December 16, 2002, eliminated the system of prior notification to the Commission of restrictive practices, giving national authorities (including the AGCM) full jurisdiction in the application of Articles 101 and 102 of the Treaty whenever there is a possible injury to trade between member States: a formula interpreted broadly by AGCM, resulting in a more systematic application of Article 101 of the Treaty.

Regarding AGCM's main areas of intervention, the doctrine¹⁹ has pointed out until 2022 the substantial absence of measures with ascertainment related to vertical agreements, contrary to what happened in other member States²⁰.

Recently the AGCM (24/7/2024) has adopted a measure relating to distribution networks and in particular to agency and logistics contracts in the context, however, of a broader concentration operation, with the result that the provisions relating to the changes to be made to agency and storage contracts, moreover the result of a proposal by the companies involved, did not constitute the main object of the investigation, but only an ancillary measure aimed at mitigating the effects on freedom of competition resulting from the market shares held as a result of the intervening concentration with the acquisition of a competitor.

Finally, there have been, as already mentioned, some also recent investigations regarding hypotheses of abuse of dominant position found in the context of franchising relationships,

¹⁸ F. Ghezzi, *I numeri dell'antitrust – Considerazioni sull'attività di enforcement dell'Autorità garante della concorrenza in materia di intese e abusi di posizione dominante*, in *Rivista delle Società*, cit. in note 12.

¹⁹ F. Ghezzi, *op. cit.* in note 12, containing a detailed review of 32 years of AGCM activities from 1990 until 2022

²⁰ See A. Jones, *Expert Report for the European Commission on the Review of the EU Vertical Block Exemption Regulation: cases dealing with online sales, and online advertising, Restrictions at EU and national level*, https://ec.europa.eu/competition-policy/system/files/2021-06/kd0921156enn_VBER_online_sales.pdf.

defined with decisions regarding the assumption of commitments under Article 14b of Law 287/1990.

4.1 Vertical agreements and discipline of commitments (art. 14 ter of l. 287/1990): the franchise contract.

Title III, Chapter II of Law 287/1990, which is dedicated to the powers of the Authority in the area of restrictive agreements of freedom of competition and abuse of dominant position, has undergone a number of amendments over time, which have supplemented the powers of the Authority in order to achieve the goal of a broader decentralization of the application of EU antitrust law, completing the range of tools available to the AGCM.

These include the provision in Article 14b of Law 287/1990²¹, which allows companies, within three months of the notification of the opening of an investigation for the establishment of a violation of Articles 2 or 3 of Law 287/1990 or Articles 101 or 102 of the Treaty, to submit commitments such that the anticompetitive profiles covered by the investigation are eliminated. The AGCM, after consultation with market participants and once it has positively assessed the suitability of these commitments, has the power, within the limits provided by European law, to make them binding on companies. This type of decision, which can be adopted for a fixed period of time, closes the investigation process without any finding of infringement.

The use of this tool, as highlighted by a doctrine analysis on the point²², was most significant in an initial period from 2007 to 2010, with a subsequent decline and recovery in more recent years up to about 50 percent in 2022.

Expression of this recovery are three recent proceedings opened by the AGCM against as many franchisors for alleged abuse of economic dependence which, at the outcome of the notification of the opening of the relevant investigations, were defined with decisions that made it

²¹ Inserted by Article 14, paragraph 1, of Decree Law 223/2006 converted, with amendments, by Law 248 of August 4, 2006 bearing *Conversione in legge, con modificazioni, del decreto legge 4 luglio 2006, n. 223, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale*; and most recently amended by Legislative Decree No. 185 of November 8, 2021, specifying that in the procedure for making a decision with commitments, the measure may be temporary in nature, and market participants must be heard.

²² See F. Ghezzi, *op. cit.*, in note 12.

mandatory for the franchisors to make commitments relating to contractual changes to be made in order to improve the balance of their respective contractual obligations, as well as to the modification of certain ways of conducting relations aimed at protecting franchisees and rebalancing their respective contractual positions²³.

Before briefly examining the three above-mentioned proceedings, it should be pointed out that the attention shown to the issue by the AGCM, as well as the alleged existence of situations of potential abuse of economic dependence, has not been reflected in the jurisprudence of merit and legitimacy, which, on the contrary, on several occasions has found the configuration of a hypothesis of abuse of economic dependence to be insubstantial in the context of franchise relationships, which precisely on the basis of their structure, it was not considered that they could configure the minimum requirements provided for by Art. 9 of Law 192/1998²⁴.

In particular, the Court of Appeals of Milan, in ruling no. 913 of March 16, 2023, in accordance with the contested ruling of the Court of Milan, ruled out the possibility that the extremes of economic dependence could be recognized, confirming the rejection of the franchisee's claims for damages.

Also in the case law of merit, the Tribunal of Lecce (Trib. Lecce June 29, 2022, no. 1997), the Tribunal of Genoa (Trib. Genoa, January 5, 2018, no. 20), the Tribunal of Turin (Trib. Turin May 9, 2017, no. 2414) and, less recently, the Tribunal of Naples (Trib. Naples October 20, 2006, no. 10501) and the Tribunal of Rome (Trib. Rome April 5, 2006, no. 8148): all the aforementioned rulings stressed that in order to be able to configure a situation of economic dependence, there must actually be a total absence of market alternatives, which is difficult to find in the absence of monopoly situations, while the franchise contract remained characterized by the autonomy and independence of the entrepreneurs involved, with the consequent existence of a business risk borne by the franchisee.

The AGCM, on the contrary, did not decide to follow the case law on the merits, opting instead to open investigations related to the examination of business conduct and contractual clauses

²³ See on this point for a first commentary B. Molteni, *Il divieto di abuso di dipendenza economica nei contratti di franchising*, in *Diritto e Giustizia* 4 aprile 2024.

²⁴ See in doctrine A. Venezia – R. Baldi, *Il contratto di agenzia. La concessione di vendita. Il franchising*, *cit.* in nota 1, p. 232 e ss.

imposed by franchisors²⁵ to verify whether hypotheses of abuse of economic dependence could be found.

The opening of the preliminary inquiries, and the potential knock-on consequences of a possible declaration of inadmissibility of clauses and behaviors as well as the risk of having heavy penalties imposed on them within the limits already seen when examining the provisions of Article 15 of l. 287/1990, had as a consequence the use by the companies involved of the faculty contemplated by art. 14 *ter* of Law 287/1990, with the direct assumption of commitments to make the anticompetitive profiles that were the subject of the investigations disappear.

The AGCM thus indirectly achieved the objective of rebalancing the contractual provisions of some franchise relationships, however, using the lever of the potential abuse of economic dependence without, at least according to the prevailing case law, the substantial requirements for its existence.

This in effect demonstrates a certain autonomy of operation on the part of the AGCM, which can also explain, at least in part, the reasons why a substantial proportion of the resolutions adopted by the AGCM are then subject to heavy reform by the administrative judges of first and second instance called upon to assess their legitimacy: not so, however, in the case of the assumption of commitments, given the closure of the proceedings without ascertaining infringements.

The first preliminary investigation (proc. A 543 of November 17, 2020, defined by order no. 3074) concerns the Benetton franchising network, relating to distribution through franchisees of clothing and stems from a complaint by a former franchisee regarding the supply of goods to the point of sale on the basis of contractual clauses and order management mechanisms (including automatic reassortments) that would have resulted in a substantial franchisor's discretion by limiting the franchisee's contractual autonomy. This was followed by the initiation of an investigation and the subsequent assumption of commitments (moreover carried out in two stages, with amendments and additions in January 2023) by Benetton, which the AGCM

²⁵ As is known in fact in franchise networks the contracts used are usually contracts by adhesion whose margin of negotiation is extremely small, also in relation to the fact that many of the clauses provided for must necessarily be uniform also to protect the uniformity and guarantee of the network.

deemed sufficient, sanctioning their obligatory nature, and closing the proceedings without the ascertainment of infringements.

The main commitments submitted by the franchisor for consideration by the AGCM, after hearing from market operators, pertained: i. to the introduction of a clear mechanism for sending and accepting purchase orders for merchandise; ii. to the elimination of the automatic reassortment system; iii. to the introduction of the right for the franchisee to obtain, in the event of termination of the relationship, the repurchase of the furnishings by Benetton, with a pricing mechanism; iv. to the right of termination for the franchisee, with 6 months' notice, once the first year of the duration of the collaboration has elapsed and automatic cancellation of scheduled orders with delivery after the end of the notice period, without any charge; and v. to the elimination of a pre - assigned minimum purchase budget.

In the second preliminary investigation (Proc. A546 of July 27, 2021, finalized with Order No. 30199), the AGCM examined a franchise network operating in fast food, implemented by the well-known McDonald's chain.

The proceedings stemmed from an initiative by former franchisees who contested varied behaviors of the franchisor implemented both before the signing of the contracts and during the cooperation relationship. The investigation carried out revealed various behaviors of the franchisor implemented both in the pre-contractual phase and during and after the termination of the relationships, as well as some contractual clauses included in the franchise contracts and business branch lease contracts potentially capable of integrating the extremes of abusive conduct and compressing the margins of entrepreneurial autonomy of the franchisees.

The franchisor then submitted to the AGCM a series of commitments in December 2021, which were then implemented and supplemented in February 2022 and more specifically: i. the limitation to only the routine maintenance of the assets and premises covered by the business branch lease agreement, with greater protection for franchisees and the application of the provisions on leasing, subject to compliance with the standards and quality levels of the network; ii. the simplification of compulsory training courses for franchisees' employees and the reduction of related costs to be borne by franchisees; iii. the reduction of the rate of gross sales realized by franchisees to be invested in local advertising; iv. the clarification that the

franchisee's activity of operating the store should be prevalent and not exclusive; v. the elimination of the requirement that the franchisee's residence be at a minimum distance from the store; vi. the mitigation of the non-compete obligations on the franchisee: limited to informal catering and eliminated for the period after the termination of the relationship²⁶; vii. the possibility for the franchisee to use alternative suppliers for non-characterizing products, subject to the necessary compliance with the required quality standards; viii. the franchisee's right not to adhere to promotional campaigns and recommended prices without this constituting a preferential evaluation criterion; ix. the strong limitation on the franchisor's right to unilaterally change the rent during the constancy of the relationship; x. the franchisor's commitment to negotiate with the franchisee different conditions in the face of the opening of new stores in the vicinity of the one assigned to the franchisee; xi. the inclusion of an obligation for the franchisor to repurchase equipment and furnishings on predetermined terms and with a pricing mechanism.

The proposed set of commitments, as subsequently amended and supplemented, was deemed suitable by the AGCM to rule out the existence of economic dependence abuse, and the proceedings were closed without a finding of infringement.

The AGCM's third intervention (Proc. A 550 of Dec. 3, 2021, finalized with Order No. 30221) also relates to a franchising network for the retail distribution of clothing, bearing the “Original Marines” trademark.

The investigation was initiated following reports from former franchisees that challenged the franchisor's unilateral determination of the composition of orders, automatic reassortment mechanisms, computerized control of outlets, the imposition of promotions and resale prices, and the prohibition for franchisees to carry out promotional sales without prior written authorization from the franchisor in addition to direct competition in areas adjacent to those of the official outlets with an investee company that would enjoy more favorable supply conditions. This was followed by the initiation of an investigation that in fact confirmed the objections made and the subsequent assumption of commitments integrated by the franchisor

²⁶ Notwithstanding the differing provisions in this regard of the Exemption Regulation on Vertical Agreements, even in its latest version 720/2022.

following the franchisees' comments, and confirmed by the AGCM with closure of the proceedings without a finding of infringement.

The main commitments submitted by the franchisor to the AGCM's scrutiny pertained to: i. the elimination of contractual clauses concerning minimum purchase amounts and products to be compulsorily purchased; ii. the elimination of official price lists to reiterate the impossibility of price-fixing, without prejudice to the franchisor's right to make mere recommendations, in line with the Commission's well-established orientation on the point; iii. the elimination of automatic reassortments; iv. the elimination of the prohibition of competition between franchisees and; v. the freedom for franchisees to independently carry out promotional campaigns, taking into account, moreover, the overall business strategy of the franchisor and the entire network.

The AGCM has thus manifested a clear direction aimed at departing from the well-established assessment of the jurisprudence of merit of the exclusion of franchising from the scope of operation of the prohibition of abuse of economic dependence, thus outlining a kind of autonomous relevance of the principle from the point of view of competition protection policy. There remains, however, as already noted, poor operation of the AGCM in vertical agreements, except in an ancillary way in the context of more general assessments related to merger operations.

5. Italian case law on vertical agreements: selective distribution.

To close the summary overview of the main orientations of Italian jurisprudence about vertical agreements, it is worth mentioning the orientation that, in the context of selective distribution relationships, has recently addressed their legitimacy from the point of view of industrial law²⁷, as well as the supplier's right to proceed with an infringement action against third parties outside the distribution system.

²⁷ See on this point S. Giani, *Distribuzione selettiva tra regolamento di esenzione ed esaurimento del diritto*, cit. in nota 1.; G. Sironi, *Marchi, distribuzione selettiva e marketplace online*, nota a Trib. Milano 3 luglio 2020, in *Riv. Dir. ind.* 2021, p. 404 e ss. e P. Gelato – S. Vergano, *Prime note a margine del Reg. UE 720/2022 e riflessi in materia di distribuzione selettiva*, in *Riv. Dir. ind.* 2022, p. 90 e ss.

Before examining the substantive pronouncements of Italian jurisprudence, it is appropriate to dwell briefly on selective distribution, the definition of which is contained in Article 1(g) of Regulation 720/2022²⁸: “*Selective distribution system means a distribution system in which the supplier undertakes to sell the contracted goods or services, directly or indirectly, only to distributors selected on the basis of specified criteria, and in which these distributors undertake not to sell such goods or services to unauthorized resellers in the territory that the supplier has reserved for such a system*”.

I have already dwelt in section 3.2.3 on some of the provisions of the Regulation dedicated to selective distribution, for which the Commission, as already mentioned, also in the Guidelines has in substance accepted the principles formulated by the Court of Justice in the Coty Case and has strengthened selective distribution with the overcoming of the principle of equivalence in the selective criteria for online and platform sales, the limitation to online advertising and the faculty to provide for a different regime of supply prices depending on the channel chosen, noting the definitive affirmation of online sales, which consequently no longer require special protection.

In fact, it is permitted for the supplier to require that certain requirements be met in online sales and that distributors actually operate one or more physical outlets, also to ensure the provision of effective pre-sales and after-sales assistance to customers²⁹. Among the quality requirements that can be requested to enter a selective distribution network, the issues of sustainability and environmental protection are noted, with the option expressly provided in paragraph 144 of the Guidelines to require distributors to be able to provide refilling, recycling, and delivery services by sustainable means. The Regulations then also address quantitative criteria, as such capable of affecting freedom of competition.

Italian jurisprudence, as mentioned above, has approached the issue of selective distribution networks from the angle of industrial law by assessing their legitimacy and the supplier's ability to take action against third parties with an infringement action under Article 5 of the C.p.i. and

²⁸ Definition also identical to that of the previous EU Regulation No. 330/2010 (Art. 1.1(e)).

²⁹ See for a more detailed examination, para. 208 of the Guidelines.

Article 15 of EU Regulation 1001/2017, which establish specific conditions preventing the operation of the general principle of exhaustion of trademark rights.

Among these specific grounds, Italian jurisprudence includes the existence of a valid system of selective distribution, for the protection of which the principle of exhaustion of trademark rights is therefore allowed to be exceeded. In fact, exhaustion of the exclusive faculties attributed to the owner of an industrial property right normally occurs when the goods protected by that industrial property right are put on the market by the owner or with his consent in the territory of the State or in the territory of a member State. Pursuant to Article 5 of the C.p.i. and Article 15 of the Community Trademark Regulation (Reg. 2017/1001), in such situations the trademark owner cannot prohibit the further circulation of goods in the state or the Union.

The trademark owner, even considering the principle of free movement of goods, cannot prevent parallel imports, nor the circulation in the State of goods put on the market with its consent in another member State, except where there are “legitimate reasons” for the owner to oppose the further marketing of the goods.

The Court of Milan in a ruling dated January 2, 2023³⁰, precisely using the concept of “legitimate reasons” clarified that the trademark owner, may object to the further marketing of its products already placed on the market, where the condition of the products is changed or altered after they are placed on the market³¹.

Selective distribution in the sale of goods was then expressly mentioned, by established case law, as one of the cases that may fall under this exception. It should be said, however, in this regard that the mere existence of a selective distribution network does not in itself constitute a “legitimate reason” that excludes the operation of the principle of trademark exhaustion, it also having to be shown that the marketing of the good is done in such a way as to be detrimental to the functions of the trademark³².

³⁰ Trib. Milano 2 gennaio 2023, n. 8, *cit.* by P. Gelato – S. Vergano, *op. cit.* in note 27.

³¹ See for a broad assessment of “grounds,” not limited to the hypothesis of new product packaging CGUE 4 novembre 1997, C-337/95 Dior, in *Giur. ann. dir. ind.* 1997, 1131; CGUE 23 febbraio 1999, C-63/97, BMW, in *Giur. ann. dir. ind.* 1999, 1505; CGUE 23 aprile 2009, C-59/08 Copad, in *Giur. ann. dir. ind.* 2009, 1377; CGUE 8 luglio 2010, causa C-558/08, Potrtakabin, in *Giur. ann. dir. ind.* 2010, 1209.

³² Trib. Milano 16 marzo 2016 (ord.), in *Foro it.* 2016, I, 3670; Trib. Milano 3 luglio 2019, in *Giur. ann. dir. ind.* 2019, 1, 1058; Trib. Milano 19 ottobre 2018, in *Giur. ann. dir. ind.* 2019, 392; Trib. Milano 18

Therefore, the supplier, in the occurrence of the aforementioned conditions, may take action in the infringement action where the following requirements are met: i. the luxury or prestige character of the products subject to selective distribution; ii. the concrete harm resulting to the luxury image of the products (in this case, these were Chanel products) from the offer for sale by unauthorized third parties.

Even the possible legitimate purchase of the products from an authorized distributor does not legitimize the conduct of the purchaser who provides the resale, not having accepted the selective criteria required for membership in the network, thus allowing the supplier to act with the infringement action.

Further conforming rulings were also issued by the Court of Milan (Trib. Milan June 13, 2022, No. 7193) and the Court of Rome (Trib. Rome December 7, 2022, 24449). The Tribunal of Milan, confirming the possibility for the supplier to bring an action for infringement as an extra-contractual liability against parties outside the selective distribution network, considered the use of the infringement action also against members of the network who, in violation of the contractual provisions, had distributed the contractual products (Rolex) outside their assigned territory and to unauthorized parties. The rationale for this extension of operation would lie in the identity of the relevant prerequisites, as the circulation of the products outside the selective distribution network would result in image damage related to the marketing of the products. The ruling in question, having been issued at the merits stage and not as a precautionary measure, also provided for the liquidation of damages, including non-pecuniary damages calculated on an equitable basis.

dicembre 2018, with note of F. La Rocca, *Il sistema di distribuzione selettiva quale motivo legittimo ostativo all'esaurimento del diritto di marchio?*, in *Riv. Dir. ind.* 2019, p. 40; App. Milano 25 novembre 2019, n. 4682, in *Giur. ann. dir. ind.* 2019, 1, 1426 e Trib. Milano 19 ottobre 2020 (ord.), in *Rass. Dir. farmaceutico* 2021, 2, 271. Trib. Milano 28 febbraio 2022, n. 2635, in *Riv. Dir. farmaceutico* 2022, 3, 553 specified that altering the codes affixed to the packaging of luxury goods (in the case at hand, cosmetics), as well as the manner in which such goods are presented by the retailer, on an e-commerce site for hairdressers, with blurred images and crowded content, alongside products of a different merchandise nature and with lower profile trademarks, are to be considered "legitimate grounds." On the other hand, the fact that the retailer never comes into possession of the products sold and does not have the material possibility of verifying the existence of the alteration does not exclude its liability since it offers for sale and markets such products.

Similar principles were expressed by two orders issued by the Court of Milan in the precautionary and complaint phase, again on the initiative of the company Chanel, against an online platform outside the selective distribution network that offered the relevant products for sale in the absence of authorization (Trib. Milan May 10, 2021, No. 3755³³ and July 1, 2021, No. 2635). The pronouncements reiterated that the existence of a selective distribution network prevents the application of the principle of exhaustion of trademark rights, provided that the marketed product is an article of luxury or prestige that legitimizes the choice of adopting a selective distribution system and that there is actual damage to the luxury or prestige image of the trademark because of the marketing carried out by third parties outside the network, or when they are altered. The pronouncements have also found that the distribution network in question positively complies with the general principles of EU antitrust law.

The Court of Cassation has also ruled on the issue, which, in ruling no. 7378/2023³⁴, confirmed that the existence of a selective distribution network, i.e., a distribution system where the supplier undertakes to sell the contracted goods or services, directly or indirectly, only to distributors selected on the basis of certain criteria, and at the same time the distributors undertake not to sell such goods or services to unauthorized resellers in the territory that the supplier has reserved for such a system, may be included among the legitimate reasons, which are hostile to trademark exhaustion, provided that the product marketed is an article of luxury or prestige that legitimizes the decision to adopt a selective distribution system and that the marketing of the goods outside the system has caused damage to the reputation of the trademark. An examination of these orientations of Italian and EU jurisprudence shows how brand image constitutes an essential component of the trademark deserving protection, subject to the necessary balance with the interest of retailers in the resale of the products and, more generally, respect for the principle of free movement of original products placed in the European market. In this perspective, therefore, the reference to serious prejudice capable of damaging the image

³³ Trib. Milano 10 maggio 2021, in *Giur. ann. dir. ind.* 2021, 1, 851.

³⁴ Cass. March 14, 2023, no. 7378 in *Just. Civ. Mass. 2023*: In the case at hand, the Court upheld the judgment under appeal, according to which the marketing of the plaintiff's products did not constitute trademark infringement, since, in the absence of evidence of the criterion for selecting distributors and the requirements that the distributors had to maintain during the relationship, a selective distribution network could not be discerned.

and reputation of the trademark should be considered, with the consequence that the mere existence of a selective distribution network does not appear sufficient to prevent the operation of the principle of trademark exhaustion.

Italian jurisprudence, in examining individual concrete cases concerning selective distribution networks, has operated by making a preliminary assessment of whether the selective distribution system in question complies with antitrust law, and then verifying the existence of ways of resale arrangements that are not in accordance with the system likely to cause hostile prejudice to the operation of the principle of trademark exhaustion.

Italy, January 2025

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CHAPTER II

ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN AUSTRIA

by Josef Wolff

CHAPTER II – ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN AUSTRIA

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1. Introduction

Every entrepreneur operating in Austria is bound by antitrust rules when carrying out business activities. These arise directly from European competition law (Art 101 and 102 TFEU, Guidelines) and from domestic legislation, in particular the Kartellgesetz - Antitrust Act (KartG).

This abstract outlines the authorities dealing with antitrust rules, gives an overview on the applicable rules and an overview on peculiarities of antitrust law in relation to distribution agreements.

2. Authorities and Tribunals dealing with antitrust rules in Austria

2.1 Federal Competition Authority (*Bundswettbewerbsbehörde* BWB) - Federal Antitrust Prosecutor - *Bundeskartellanwalt*

Compliance with antitrust standards in Austria is monitored by federal authorities and courts.

There are two antitrust authorities in Austria. The Federal Competition Authority (Bundeswettbewerbsbehörde - BWB; <https://www.bwb.gv.at/>) and the Federal Antitrust Prosecutor (Bundeskartellanwalt).

The BWB was founded on 1 July 2002 as a monocratic and independent authority that is not subject to any directives and is responsible for detecting and investigating violations of Austrian antitrust law and European competition law. Its headquarter is in Vienna. In particular, it has the task of investigating and prosecuting violations of antitrust laws or abuse of market power and then submitting the corresponding applications to the Antitrust Court. The BWB may apply for review, declaratory judgements, applications to stop infringements, applications for undertakings and applications for fines).³⁵ The BWB can be represented as a party in any antitrust court proceeding. The BWB and the Federal Antitrust Prosecutor have a monopoly on applications for merger investigations and the imposition of fines.

The Federal Antitrust Prosecutor represents the public interests in antitrust matters before the Austrian antitrust courts. Like the BWB, the Federal Antitrust Prosecutor has party status in all antitrust court proceedings. However, the Federal Antitrust Prosecutor is subordinate to the Ministry of Justice and is therefore an authority bound by instructions. The legislator stipulates a division of tasks: While the BWB is primarily tasked with monitoring the functioning of competition as comprehensively as possible from an economic point of view and intervening where necessary, the Federal Antitrust Prosecutor has a corrective and supplementary role vis-à-vis the BWB by focussing on the just application of the law. The establishment of the Federal Antitrust Prosecutor ensures that the enforcement of antitrust law is not completely exempt from political responsibility and - if necessary - that the public interest can be safeguarded. The Federal Antitrust Prosecutor can apply to the antitrust courts for the examination of mergers (merger control) and participate as an official party in cartel proceedings initiated by the BWB or companies and ensure the transparent and comprehensible assessment of fines.

³⁵ Further tasks of the BWB are Examination of mergers, conducting sector enquiries, investigations (house searches, interrogations, requests for information/notices), assertion of claims for injunctive relief under the Unfair Competition Act before the civil courts

2.2 Kartellgericht (Antitrust Court) – Kartellobergericht (Higher Antitrust Court)

Decisions, penalties and rulings are issued by the Antitrust courts. There are two Antitrust courts for the whole of Austria. The Oberlandesgericht Wien (Court of Appeal of Vienna) acts as the Antitrust court of first instance and the court of facts. The Supreme Court is the higher Antitrust court and purely a court of law. The senates of the Antitrust Court consist of 2 professional judges and 2 lay judges. In the Supreme Antitrust Court, decisions are made either by a simple senate of three judges and two lay judges or by a reinforced senate of seven judges and two lay judges. Proceedings under the Antitrust Act are essentially governed by the provisions of the Non-Contentious Proceedings Act (Außerstreitgesetz (AußStrG)).

The Antitrust Court only decides on application. The BWB and the Federal Antitrust Prosecutor, the Chamber of Commerce, the Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture, some other individual authorities as authorised by law and any entrepreneur or business association with a legal or economic interest in a decision are entitled to file an application.

The Antitrust court is responsible for applying European competition law in individual cases, insofar as such a distortion of competition has an effect in Austria. Fundamental standards on Antitrust proceedings can be found in the Antitrust Act, in particular §§ 29f KartG on fines and their assessment and §§ 36ff on the application principle.

In the event of violations of antitrust law, the antitrust courts³⁶ have the option of ,

- put an end to the infringement and issue the companies with appropriate orders;
- impose fines;
- declare commitments binding³⁷; or
- asses an infringement which has already terminated.

³⁶ The Antitrust Act provides for a court fee of € 34,000.00 for each of these proceedings (Section 50 KartG).

³⁷ This is a form of accelerated termination of proceedings through the submission of undertakings by the company, which the Antitrust Court can declare binding if it is to be expected that these undertakings will prevent future infringements (also under threat of fines in the event of infringements).

2.3 Claim for damages before the ordinary courts

The Antitrust Act also expressly states a separate basis for liability for damages arising from competition law infringements. There is a legal presumption that a cartel between competitors has caused damage (§ 37c KartG). It should be emphasised that the damage always includes loss of profit and that companies are jointly and severally liable for a jointly committed infringement of competition law. The right to claim compensation for damages arising from an infringement of competition law is time-barred after 5 years (§ 37h KartG). Such damages must be claimed before the ordinary courts. At the request of the ordinary court, the Antitrust courts can assist in determining the amount of damages.

2.4 Settlement and leniency programme (“Kronzeugenprogramm”)

Two special features of Antitrust proceedings should be emphasised: the "settlement", which brings many Antitrust proceedings to an early end, and the "leniency programme".

Many proceedings are brought to an “amicable” end by means of a settlement. In Austria, the possibility of ending proceedings by settlement generally exists for all relevant offences under the Austrian Antitrust Act, in particular Sections 1, 5 and Section 17 KartG, as well as those under Articles 101 and 102 TFEU.

A distinction must be made between a settlement and the leniency programme pursuant to Section 11b (2) WettbG, the parallel application of which does not exclude the termination of proceedings by settlement, so that a fine can be reduced on the one hand due to a settlement and additionally for the assumption of a leniency position.

Settlements are not a transaction. Rather, a settlement requires the company to acknowledge the facts established by the BWB. The proceedings are ended by a binding decision of the Antitrust Court. A settlement gives the company and the official parties the opportunity to shorten the evidentiary proceedings before the Antitrust Court. The prerequisite is that the company explicitly accepts the content of the BWB's application for a fine submitted to the Antitrust Court. The acknowledgement must also follow the BWB's legal assessment and accept the proposed fine as appropriate.

In principle, there are no time limits for initiating settlement proceedings. After conducting the investigation procedure, the BWB usually informs the companies of the main elements of the alleged infringement. Settlement discussions are usually initiated by the companies with an informal written request to the BWB after the investigation procedure has been concluded. In general, the BWB has discretionary powers as to whether it enters into settlement discussions or continues them. The company must disclose to the BWB all relevant facts necessary for the assessment of the fine (turnover, mitigating factors worthy of consideration, etc.). Additional factual elements that become known in the further course of the proceedings may be included in the assessment.

If there is a valid acceptance, a settlement discount of up to 15% of the fine to be imposed will be applied.³⁸ The specific amount of the applicable settlement discount depends on various factors, in particular on the actual simplification and shortening of the proceedings. Settlement discussions are regularly terminated by the BWB if the company's behaviour thwarts the purpose of the settlement or obstructs or jeopardises the investigations (including those concerning other companies).

If a settlement is reached before court proceedings are pending, BWB will submit a corresponding application to the Antitrust Court on this basis. On the basis of this and the available evidence, the BWB will then apply to the Antitrust Court for the imposition of a specific fine. Pursuant to § 36 (2) second sentence KartG, the Antitrust Court cannot impose a higher fine than requested by BWB.

The main advantage of a settlement is that it creates legal certainty quickly insofar as the company is informed of the specific, reduced amount of the fine even before it is pending in court. A significant advantage for the companies is the granting of a settlement discount and thus a reduced fine.

Another special feature is the leniency programme (so called “Kronzeugenprogramm”), which has been enshrined in Austrian law since the 2005 amendment to the Competition Act.

³⁸ Pursuant to Section 29 KartG, the Antitrust Court may impose fines of up to 10% of the total turnover achieved in the previous financial year for infringements of Art 101 or Art 102 TFEU or Sections 1, 5, 6 and 17 KartG.

Cartels and other agreements that restrict competition are regarded as serious legal offences under EU and national law and are therefore subject to high fines. Investigations by authorities are difficult. Incentive systems to support the authorities in the fight against cartels exist in the form of "leniency programmes" in all jurisdictions of the European Union and, broadly speaking, grant immunity from fines to the first company that cooperates with a competition authority before the latter becomes aware of the relevant behaviour or has already initiated an independent investigation. In Austria, the leniency programme was introduced in antitrust law in 2006 and 115 applications have been submitted to date (as at 30.04.2022).

The applicability of the leniency programme covers the entire area of Section 1 KartG 2005 and Art 101 TFEU.

The leniency programme has following prerequisites: Pursuant to Section 11b para. 1 no. 1, 2 and 4 WettbG, the Federal Competition Authority may "*refrain from imposing a fine on undertakings or associations of undertakings who 1. have ceased their co-operation in the infringement (...), 2. subsequently co-operate truthfully, fully and expeditiously with the Federal Competition Authority in order to fully clarify the facts of the case, 3. are the first to submit information and evidence that enables it to file a substantiated application (...), or are the first to submit additional information and evidence [...] and 4. have not forced other undertakings or associations of undertakings to participate in the infringement.*"

If these conditions are met, the BWB will refrain from applying for a fine in full (immunity from fines); if these conditions are partially met, the reduction can be between 20% and 50%.³⁹

If a company wishes to make use of this leniency programme, it must submit an application for leniency or an application for a so-called "marker" to BWB. The marker secures the applicant company's ranking in the order of receipt of applications pursuant to Section 11b (1) or (2) WettbG for a certain period of time. Initially, the company only provides the BWB with brief information, which it then completes within a deadline set by the BWB. The allocation of a

³⁹ Cooperation by companies outside the leniency programme can also be taken into account appropriately when determining the amount of the fine to be applied for, taking into account statutory assessment criteria.

marker enables the requesting company to approach BWB as early as possible and subsequently complete its internal investigations.

In many cases, a cartel offence can also have consequences under criminal law for the employees involved (e.g. agreements restricting competition in award procedures (Section 168b StGB) and/or submission fraud (Sections 146ff StGB)). The leniency programme also offers incentives for cooperation in this respect. This is an important aspect to consider. Section 209b of the Code of Criminal Procedure contains complementary provisions to Section 11b WettbG, which allows natural persons to be exempted from punishment due to their cooperation with the prosecution authorities. § Section 209b StPO creates the possibility of "criminal immunity" for employees of a company that have made a significant contribution to the clarification of an antitrust offence vis-à-vis the BWB, the European Commission or the competition authority of another EU member state. § 209b of the Austrian Code of Criminal Procedure (StPO) applies to cases in which antitrust law (Section 1 KartG 2005, Art 101 TFEU) is violated and the criminal offences of agreements restricting competition in award procedures (Section 168b StGB) and/or submission fraud (Sections 146 et seq. StGB) are fulfilled as a result of the same facts.

3. The antitrust laws applicable in Austria

Standards relevant to antitrust law stem directly from directly applicable European competition law (Art 101 and 102 TFEU, guidelines, EU regulations, in particular block exemption regulations) and, on the other hand, from domestic legislation, in particular the Antitrust Act (KartG). These standards are briefly summarised in this chapter.

3.1 European standards

The TFEU standardises restrictions on competition relevant to antitrust law in its section "Rules applicable to undertakings". Art. 101 TFEU consists of three paragraphs, of which the

- the first paragraph prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which

have as their object or effect the prevention, restriction or distortion of competition within the internal market.

- second paragraph stipulates as a legal consequence that the prohibited agreements and decisions are void; and the

- the third paragraph contains a list of conditions for an individual exemption from the prohibition in paragraph 1. This third paragraph contains four conditions for exemption, namely 1. that the agreements must contribute to improving the production or distribution of goods, 2. this with a fair share of the resulting benefit for consumers, 3. The companies may not have any possibility which are not indispensable for the attainment of those objectives and that 4. they may not have any possibility to eliminate competition in respect of a substantial part of the products in question.

Art 102 TFEU deals with the abuse of a dominant market position.

3.1.1 New Block Exemption Regulation

The new Vertical Block Exemption Regulation (VBER) for vertical agreements (Regulation (EU) 2022/720/Vo) came into force on 1 June 2022 and replaced the rules from 2010. Agreements that complied with the old BER had to meet the requirements of the new regulation by 31 May 2023 at the latest. The new regulation contains innovations, particularly for online trading, for which the regulation is of great practical relevance.

In this block exemption regulation, vertical agreements containing vertical restraints are exempted from the application of Art 101 TFEU. Such restrictions can therefore be agreed between companies without violating antitrust norms. The basic prerequisite for any exemption is that neither the supplier's market share nor the buyer's share of demand exceeds 30%.

In line with the 2010 regulation, the new regulation also lists core restrictions in Art 4, so-called "black clauses", which lead to the exemption being cancelled. Accordingly, if, for example, vertical price maintenance, territorial and customer restrictions and restrictions on the sale of spare parts to independent repair and service companies are agreed, there is no exemption from Art 101 TFEU and the agreement may be against antitrust laws. Art 5 also continues to contain so-called "grey clauses", which list restrictions that are not exempted but do not lead to the

exemption of the rest of the contract ceasing to apply (in particular non-compete clauses for more than 5 years).

Compared to the old regulation, the Block Exemption Regulation 2022 extends the exemption to dual distribution at different levels of the retail chain. It therefore also includes cases of combined own and third-party distribution not only by manufacturers, but also by importers and wholesalers. Dual distribution by providers of online intermediary services is excluded from the exemption. Such providers are deemed to be suppliers within the meaning of the Block Exemption Regulation 2022, meaning that agreements between platforms and distributors are exempt. However, this does not apply to so-called hybrid platforms that are both active in the sale of goods or services and offer online intermediation services to competing sellers of these goods or services.

Furthermore, Art. 2 para. 5 of VBER 720/2022 restricts the exemption for the exchange of information in the context of dual distribution. An exchange of information that is not directly related to the implementation of the agreement and is not necessary to improve the production or distribution of the goods or services concerned does not benefit from the exemption. This is intended to exclude the exchange of information relating to the horizontal relationship from the exemption. However, such an exchange of information is not automatically prohibited, but must be examined in accordance with the Commission's guidelines on horizontal co-operation.

3.1.2 Online distribution

According to Art 4 lit e VBER 720/2022, the restriction of the effective use of the internet for the sale of the contract goods and services is now considered a hardcore restriction. Restrictions on online advertising are permitted, provided they are not aimed at preventing the use of an entire online advertising channel, as well as other restrictions on online sales. In this regard, the regulation contains the following clarifications in particular:

A "restriction of an entire online advertising channel" exists if the trader is prevented from using channels such as search engines and price comparison services. However, such restrictions were already not exemptable according to previous decisions (Commission AT.40428 Guess; BGH

KVZ 41/17 Asics). The ban on the use of online marketplaces, on the other hand, is exemptable as before (ECJ C-230/16 Coty).

Dual pricing systems, i.e. the application of different purchase prices for the retailer depending on whether the goods are sold online or offline, are no longer automatically considered a hardcore restriction. If the price difference is in reasonable proportion to the different costs of the distribution channels, it is permissible. However, dual pricing systems aimed at restricting sales in certain areas or to certain customers or reducing the overall volume of internet sales are not permitted;

Quality specifications for online sales, for example for the design of the online shop or with regard to the presentation of the provider's goods, are also permitted. In contrast to the Commission's previous interpretation of the law, the criteria for online sales no longer have to be equivalent to those for offline sales. However, they must not have the purpose of preventing the effective use of the internet by the buyer.

The requirement that retailers must have an offline shop and the specification of a minimum sales volume for offline sales remain permissible.

According to the prevailing opinion, price parity clauses of platform operators were exempted by the Block Exemption Regulation 2010. The BER 2022 now excludes so-called broad price parity clauses from the exemption. This refers to clauses that require customers of the platform operator not to offer goods or services to end consumers via competing platforms at more favourable conditions than via the platform of the beneficiary operator. In contrast, narrow price parity clauses, according to which customers may not offer goods or services more favourably in direct sales than via the platform of the beneficiary operator, are still exemptable.

3.2 Austrian standards

The Austrian Antitrust Act standardises the counterparts to Art 101 TFEU in §§ 1 and 2 (prohibition of cartels and exemptions) and the counterparts to Art 102 TFEU (market dominance and prohibition of abuse) in §§ 4 and 5.⁴⁰

⁴⁰ In addition, Section 7 et seq. of the Antitrust Act contains provisions on notifiable mergers and procedural rules for the examination of such mergers. The remaining provisions of the Antitrust Act

In detail: § 1 of the Antitrust Act largely corresponds to Art 101 TFEU and supplements the European ban on cartels with a ban on so-called “recommendation cartels” (“Empfehlungskartell”). Accordingly, recommendations to comply with certain prices, price limits, calculation guidelines, trade margins or discounts that have as their object or effect the restriction of competition are also deemed to be cartels. This does not apply to recommendations that expressly state that they are not binding – under the condition that no economic or social pressure is exerted to enforce them. In particular, paragraph 2 of § 1 KartG prohibits

- the direct or indirect fixing of purchase or selling prices or other commercial conditions;
- the restriction or control of production, sales, technical development or investment;
- the sharing of markets or sources of supply;
- the application of different conditions for equivalent services to trading partners, thereby placing them at a competitive disadvantage;
- the condition attached to the conclusion of contracts that the contracting parties accept additional services that are not related to the subject matter of the contract, either in terms of substance or according to commercial practice.

Such agreements or decisions are null and void.

§ 2 KartG largely corresponds to Art 101 (3) TFEU with specific exceptions (petty cartels, fixed book prices, members of co-operatives and agricultural producers).

The market dominance of a company must be examined in accordance with § 4 KartG. This distinguishes between individual market dominance and collective market dominance. In particular, market dominance is legally presumed if a single company has a share of at least 30% of the relevant market as a supplier or buyer.

3.2.1 Price fixing in Austria

§ 1(2)(1) of Austrian antitrust law contains an express prohibition of fixing the resale price - analogous to Art 101(1) TFEU. Since 2011, the BWB has increasingly investigated vertical

relate to the enforcement of infringements, penalties, proceedings before the Antitrust courts and the organisation of the Antitrust courts.

price fixing, particularly in the food retail sector, and published non-binding "positions" on vertical price fixing in 2014.⁴¹

Price fixing was one of the subjects of the KOG's Press Wholesale decision in 2009. The KOG initially found that price fixing fulfils the requirements of Art 101 TFEU, irrespective of the determination of its effect on the market.⁴² The specific case concerned the price mark-up of German magazines (including "Alles für die Frau", "Neue Post", "Bravo", etc.) for distribution in Austria. However, the courts ultimately ruled in favour of fixed prices: in the specific case, this was justified in accordance with Art 101 para. 3 TFEU because the free return of unsold copies would otherwise not be feasible. Without fixed prices, retailers with low sales figures could not have been supplied at all. The price fixing was therefore necessary for the diversity of titles and over-availability of the magazines - in general for the diversity of media.

A second important decision concerns price fixing in the food retail sector. The food retailer SPAR was ultimately sentenced to a (record) fine of 30 million euros, as SPAR buyers had regularly and comprehensively agreed prices with the employees of dairy product suppliers over a period of 10 years and regularly demanded "margin neutrality". Accordingly, SPAR's margin was to remain the same even in the event of a purchase price increase. This presupposed that SPAR could also increase its sales prices. SPAR therefore required suppliers to set their sales prices as target prices and not to sell more favourably to competitors. The suppliers had to provide SPAR with price lists and receipts from competitors as proof. The KOG stated that it was important whether the bundle of coordinated vertical agreements resulted in an agreement between the parties involved. It was sufficient that the vertical contractual relationship could not be entered into without agreeing to horizontal coordination.

If the supplier and retailer discuss sales prices to consumers, this should - at most - take the form of "non-binding price recommendations" (and in any case should not contain any horizontal coordination elements). In this context, the Supreme Court (OGH) sets a high standard for a non-binding nature. The exertion of pressure or positive incentives may already

⁴¹https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB-Leitfaden%20-%20Standpunkt%20zu%20vertikalen%20Preisbindungen.pdf

⁴² OGH as KOG 16 Ok 6/09 and 16 K 10/09

preclude the assumption of a non-binding nature.⁴³ An explicit declaration of intent that clearly indicates the non-binding nature of a price recommendation only exists if it does not only indicate by way of a conclusion, but in a way that excludes any doubt from the outset, that it is neither a legal obligation nor a commercial obligation, but only a voluntary authorisation that does not restrict the recipient's freedom of choice in any way. According to supreme court rulings, for example, the recommendation to adhere to prices "as far as possible" does not fulfil the criterion of non-binding nature.⁴⁴ Although the unilateral provision of non-binding price recommendations is permissible in principle, if these are not only communicated to customers, but compliance with them is also monitored and enforced through targeted contact, the "non-binding nature" of a non-binding price recommendation is called into question. The targeted and repeated "processing" of retailers with the aim of achieving the most uniform compliance with a recommended price therefore leaves the scope of non-binding. There must not be the slightest doubt about the non-binding nature of a price recommendation.⁴⁵

3.2.2 Recommendation cartels

If, in the absence of an agreement or concerted behaviour (see above), there is no conduct in breach of antitrust law pursuant to Art 101 (1) TFEU or § 1 (1) KartG and there are no intergovernmental effects for the applicability of Art 101 TFEU, it must be examined whether there is unilateral conduct in breach of antitrust law pursuant to § (4) KartG. Pursuant to § 1 (4) KartG, recommendations to comply with certain prices, price limits, calculation guidelines, trade margins or discounts, which have as their object or effect the restriction of competition (recommendation cartels), are equivalent to a cartel. This is a speciality in Austria. Pursuant to § 1 (4) KartG, only those recommendations are exempt from this which expressly state that

⁴³ It must be checked on a case-by-case basis whether it is actually a non-binding recommendation. If the supplier uses the term "UVP (unverbindliche Preisempfehlung = non-binding sales price)" or describes a price as "recommended without obligation", but there are other factors that prove that there is no non-binding nature (incentives, sanctions, insistence), the non-binding nature is not guaranteed. The mere handing over of a list of recommendations from a supplier to a retailer does not constitute an act in breach of antitrust law.

Translated with DeepL.com (free version)

⁴⁴ OGH 12 Os 320/62 of 20.02.1963

⁴⁵ Cfr. OGH as KOG 16 Ok 1/13 of 05.03.2013; OGH as KOG 16 Ok 3/14 of 06.05.2014

they are not binding and that neither economic nor social pressure is exerted or intended to be exerted to enforce them. However, a mere attempt to exert pressure is sufficient for the existence of a cartel offence. There is no price fixing, on the other hand, if there is only an explanation of the marketing strategy (in particular with regard to pricing): The supplier may explain reasons for non-binding price recommendations and, in principle, explain what strategy it is pursuing with regard to the positioning and marketing of its products. A joint marketing strategy may also be developed, provided that this does not include an agreement or coordination regarding sales prices. Suppliers may explain their marketing strategy, but the explanation of the marketing strategy may not serve as a "means" of coordinating the trade, for example by disclosing to the trading companies, as part of the explanation of the marketing strategy, when which promotions are planned, where and with which sales prices.

Promotional prices do not necessarily have to violate the price fixing ban either: It is permissible under antitrust law for the retailer to inform the supplier of the planned sales prices, for example because this is necessary for quantity planning (usually carried out by the producer in some sectors). The initiative for a promotion can also come from a supplier who, for example, proposes a promotion to the retailer as a marketing strategy. However, the promotional sales price must be determined by the retailer and may not be coordinated or agreed. As a rule, there is no violation of the ban on cartels if a supplier obliges the retailer not to exceed a certain maximum price for the sale of a product, provided that this does not de facto become a fixed or minimum sale price, e.g. as a result of the granting of incentives or the exertion of pressure. A supplier has the right to make any financial promotional support dependent on a certain maximum price not being exceeded during the promotional period set by the retailer. In this context, however, care must be taken to ensure that the maximum limit is not set so low that it becomes a minimum limit or fixed price target from an economic point of view.

In a publication from 2014, the BWB provides an exemplary list of the types of behaviour encountered in practice with regard to fixed prices. According to this, inadmissible behaviour would be, for example

- the written or verbal agreement or fixing (e.g. in annual agreements) of sales prices by means of fixed prices or minimum prices;

- agreeing bonuses, discounts or other benefits or incentives for adhering to certain sales prices or sales price recommendations;
- the agreement of penalties or other disadvantages in the event of non-compliance with certain sales prices or sales price recommendations;

Unilateral measures such as a delivery stop for non-compliance with a certain sales price or sales price recommendation can be an indication that a fixed price was agreed.

3.2.3 Territorial restriction

Similar to Art 101 TFEU, § 1 para. 2 no. 3 KartG also contains an express prohibition of the division of markets or sources of supply. This includes in particular radius clauses, i.e. agreements according to which, for example, no business may be conducted within a certain radius. The KOG has dealt with radius clauses in a number of decisions, e.g. the agreement between the operator of a shopping centre and its tenants, according to which the latter were prohibited from operating a similar business within a radius of 50 kilometres.⁴⁶

4. Antitrust law and distribution agreements in Austria

There is no systematically organised regulation of distribution law in Austria. Distribution law is defined as the *"law governing the organisation of sales channels for goods and services through the involvement of sales bodies"*.⁴⁷ This distribution may take place by means of own, dependent bodies (direct distribution) or via economically independent entrepreneurs (indirect distribution). In Austria, there are only separate laws for brokers ("Makler") and commercial agents ("Handelsvertreter"), namely the Brokers Act (MaklerG) and the Commercial Agents Act (HVertrG). Other distribution agreements do not have their own law and are based on the general contract law principles of the Austrian Civil Code (ABGB). The commission contract is regulated in §§ 383ff of the Austrian Commercial Code (UGB).

In order to apply antitrust law to distribution agreements, it must first be checked whether **two companies** are involved at all. If only one company is involved, neither Art 101 TFEU nor the

⁴⁶ OGH as KOG in 16 Ok 6/15s of 08.10.2015.

⁴⁷ Martinek/Semler/Habermeier/Flohr, Vertriebsrecht § 3 Rz 3, 6

Block Exemption Regulation apply. Then there must be a **vertical agreement**. According to the definition in Art 1 (1a) of the Block Exemption Regulation 2022, this is an *"agreement or concerted practice between two or three undertakings each operating at a different level of the production or distribution chain for the purposes of the agreement or concerted practice and relating to the conditions under which the undertakings concerned may purchase, sell or resell goods or services."* A distribution agreement typically falls under this definition. Finally, it must be examined whether there is an appreciable **restriction of competition** at all. In Austria, there is a statutory appreciability criterion in the form of § 2 para. 2 no. 1 KartG, which excludes the applicability of the Antitrust Act to domestic cases of so-called petty cartels.

In the following, special features of Antitrust law will be described for the various types of distribution:

4.1 Commercial agents and commercial agent privilege (*Handelsvertreter und Handelsvertreterprivileg*)

According to the legal definition in Section 1 HVertG (Handelsvertretergesetz, Law on agencies), a commercial agent is anyone who *"is permanently entrusted by another person with the brokerage or conclusion of transactions, with the exception of immovable property, in the latter's name and for his account and carries out this activity independently and on a commercial basis."*

The commercial agent is therefore never himself a party to a transaction. His independence is characterised by the commission risk. He is not responsible for sales or fulfilment of the distribution contract.

A commercial agent arranges sales contracts between the end customer and the importer or - if he is authorised to do so - concludes such sales contracts on behalf of the importer. He receives a commission for this. This replaces the contribution margin of an authorised dealer. Compared to an authorised dealer, a commercial agent does not have to pre-finance the purchase price and does not bear the risk that the purchased goods can no longer be sold.

In principle, commercial agency agreements are vertical agreements within the meaning of both the (old) Regulation 330/2010 and the new Vertical Block Exemption Regulation 720/2022, although the so-called "commercial agent privilege" must be observed: From an economic point of view, a genuine commercial agent is not an independent market participant, but merely an extension of his principal (principal), similar to an employee. Union antitrust law does not apply to a commercial agency agreement if the commercial agent is a commercial agent within the meaning of the Vertical Restraints Directive (2022/C 248/01), i.e. if he bears no or hardly any financial or commercial risk; in particular if he does not become the owner of the goods, if there is no cost sharing in the purchase of the goods, if goods are not stored at the expense and risk of the commercial agent and if no liability has been assumed for the fulfilment of the distribution agreement.⁴⁸ In general, the list of these risks is not exhaustive, the risk assessment must be made on a case-by-case basis and the economic reality is decisive, not the legal structure of the contract.

If an agreement fulfils these criteria, then it is a commercial agency agreement within the meaning of Art 101 TFEU. The provisions relating to the contracts to be negotiated and concluded on behalf of the principal then do not fall within the scope of Art 101 TFEU. The principal can therefore restrict the commercial agent with regard to distribution goods and services (restrictions on territory, customers and specifications on prices and conditions). These restrictions do not fall under Art 101 TFEU because the risk of sales remains with the principal anyway. Such provisions do not need to be examined for individual or block exemption. The ban on cartels does not apply to genuine commercial agency agreements because the genuine commercial agent and its principal form a single company from an antitrust law perspective. Restrictions on competition are therefore permissible. In this respect, the legal situation is the same as for an employment contract.

The non-genuine commercial agent, on the other hand, bears a risk that is already too high to regard him - like an employee - as merely an extension of his principal. In economic terms, the non-genuine commercial agent is therefore an independent market participant, similar to an authorised dealer. A non-genuine commercial agent always exists if he bears financial or

⁴⁸ See the case law of the ECJ C-279/06 (CEPSA) and C-217/05 (CEEES).

commercial risk. The contract with a non-genuine commercial agent is therefore subject to the ban on cartels. In particular, it must not contain any intended restrictions of competition. For example, prohibitions on passive sales or non-exempt territorial or customer group restrictions are therefore prohibited (see Article 4 VBER 720/2022).

The new Vertical Guidelines go into more detail on how the principal can financially compensate for certain risks assumed by the commercial agent and assume them in this way. As a result, a non-genuine commercial agent can become a genuine commercial agent despite the risks originally assumed. A principal may use various methods to cover the relevant risks as long as these methods ensure that the commercial agent does not bear significant risks.⁴⁹ For example, the principal may assume the exact costs incurred, cover the costs through a lump sum or pay the agent a fixed percentage of the revenue generated from the sale of the goods or services under the agency agreement.⁵⁰

Example: A commercial agency agreement in the motor vehicle sector is indeed subject to the ban on cartels if the commercial agent is obliged to purchase demonstration vehicles, make a certain amount of advertising expenditure, invest heavily in the location and its employees and keep a certain number of vehicles in stock. It is then not permissible under antitrust law, for example, to prohibit the commercial agent from sharing his commission with the end customer (and thus, as a result, to reduce the end consumer price to be paid by the end customer).

The commercial agent privilege also applies in Austria. The Supreme Antitrust Court dealt with the applicability of the privilege for the first time in the Lufthansa decision⁵¹ and in detail in the Pressegrasso decision⁵². In this decision, the Supreme Antitrust Court came to the conclusion, among other things, that sales intermediaries also assumed an economic risk due to the logistics costs they assumed and therefore did not qualify as commercial agents within the meaning of the guidelines. As a result, antitrust regulations were applicable to the agreement for them as

⁴⁹ Examples of significant risks include transport costs borne by the commercial agent, financial risk in payment transactions, the obligation to store contract goods at one's own expense or risk, to keep demonstration vehicles, to invest in premises or training or to run advertising campaigns oneself. The classic agency risk of earning too little due to a lack of success, on the other hand, is not relevant.

⁵⁰ See point 3.2 of the Guidelines on Vertical Restraints (2022/C 248/01)

⁵¹ OGH as KOG 16 Ok 8/05 Vertriebssystem Lufthansa

⁵² OGH as KOG 16 Ok 6/09 und 16 Ok 10/09, Ris RS0124925

"non-genuine commercial agents". In the petrol station lease decision⁵³, the Supreme Court assumed a genuine commercial agency agreement, as the risks assumed by the commercial agent were low. The applicability of Antitrust law was thus denied.

Any importer wishing to set up an agency system with commercial agents must first decide whether or not to avoid antitrust law. If the importer prefers to avoid antitrust law, the commercial agents can hardly take on any risks, as described above. In return, restrictions on competition by the commercial agent are then permitted, which would otherwise violate antitrust law. In the other case, numerous risks may be contractually transferred to the commercial agents. However, restrictions on competition are then no longer permitted without further ado.

However, the provisions of antitrust law do apply to agreements concerning the relationship between commercial agents and principals. The "exclusive representation clauses" or "compulsory trade mark clauses" found there, for example, concern the market for commercial agency services. In this market, the commercial agent acts as an independent contractor. Art 101 TFEU already applies here:

However, if a contract between principal and commercial agent cannot be categorised as a commercial agency agreement (precisely because the commercial agent assumes too much risk or concerns the relationship between commercial agent and principal), then the contract must be assessed as a regular vertical distribution agreement on the basis of Art 101 (1) TFEU. The agreement then also falls within the scope of VBER 720/2022 and can benefit from the Block Exemption Regulation.

4.1.1 Commercial agents and price maintenance

Within the framework of a genuine commercial agency relationship, a trading company sells the goods without any commercial risk on behalf of the supplier. In this case, the manufacturer is authorised to design the sales price entirely according to its own ideas. A commercial agency relationship that is only established on paper and is intended to circumvent prohibitions under

⁵³ OGH as KOG 16 ObA 59/09f

antitrust law, but in which a supplier-dealer relationship actually exists in which the typical authorised dealer risks are assumed by the "commercial agent" (e.g. assumption of transport costs, sales risk, product liability, participation in marketing costs, warranty obligations, etc.), is referred to as a so-called "non-genuine" commercial agency relationship. In this case, the coordination of prices between the supplier and the dealer is not permitted.

The contract with a non-genuine commercial agent is to be treated like an agreement with an independent sales partner. In contrast to other independent agents, the principal must leave it to the agent to reduce the end customer price by reducing his own commission. The principal's net income remains unaffected. Any restriction on commission sharing is considered a hardcore restriction within the meaning of Art 4 lit a Regulation 2022.

Apart from this, however, the principal is not in breach of Art. 4 VBER 720/2022 if it sets the price to be applied by the commercial agent in contract negotiations on behalf of the principal. The principal may therefore not prevent the commercial agent from sharing his commission with the customers in order to obtain a lower end customer price.

4.2 Selective distribution

The Block Exemption Regulation 2022 contains a definition of selective distribution. According to this definition, selective distribution systems are *"distribution systems in which the supplier undertakes to sell the contract goods or services directly or indirectly only to distributors selected on the basis of specified characteristics and in which these distributors undertake not to sell the goods or services concerned to distributors who are not authorised to distribute within the territory specified by the supplier for the operation of that system."* In other words, the supplier organises a network of authorised dealers (authorised buyers) who must meet certain quality criteria to be included in the dealer network or who are selected at the discretion of the manufacturer (or importer).

The regulations for selective distribution systems were revised in the VBER 720/2022, but their content was not significantly changed.

The restrictions on the territory or customer groups (active or passive sales) in a selective distribution system are still core restrictions. However, restrictions on selective distributors are exempted, whereby (i) active sales into an exclusive territory are prohibited, (ii) active and passive sales to unauthorised distributors in selective distribution territories are prohibited and (iii) the place of establishment of the distributor is restricted (see Art. 4 c VBER 720/2022). The Block Exemption Regulation also does not prevent a supplier from undertaking not to enter into direct competition with its selective distributors (in particular through online sales or flag ship stores). A contractual ban on direct sales is therefore valid. Such dual distribution is therefore expressly authorised.

It has also been clarified that active sales by members of a selective distribution system may be restricted to an exclusive sales territory or an exclusively allocated customer group. At the same time, there are new organisational possibilities: Investments by specialist dealers can be protected against free riders by prohibiting resale to unauthorised dealers. At the same time, exclusive dealers and other dealers located outside the selective distribution area can be prohibited from actively or passively selling to unauthorised dealers within the area in which the selective distribution system is operated.

Furthermore, the quality requirements for offline and online retail have been relaxed under the new VBER 720/2022. Under the new VBER 720/2022 and its guidelines, manufacturers or suppliers operating a selective distribution system can now set different quality requirements for online and brick-and-mortar retail, such as the presentation of goods or customer advice. However, the manufacturer must ensure that the quality requirements for online retail are not so high that it is effectively impossible for the retailer to e-commerce the contract products.

4.3 Broker (“*Makler*”)

A broker is a person who, on the basis of an agreement under private law, arranges transactions with a third party for a client without being permanently authorised to do so. This is the legal definition in § 1 MaklerG. As a rule, the brokerage agreement relates to property or companies. Antitrust agreements are also possible and prohibited for brokers, e.g. price agreements or the division of territories. In the insurance industry, agreements between competitors, for example

on insurance products, commissions, premiums or the allocation of territories or customers, are therefore generally prohibited.

The above-mentioned rules of antitrust law therefore fully apply to brokers.

4.4 Commission agent (“Kommissionär”)

According to Section 383 (1) UGB, a commission agent is someone who undertakes to buy or sell goods or securities for the account of a third party (the principal) in their own name. In contrast to a commercial agent, the commission agent acts in his own name vis-à-vis the third party, whereby the contract is concluded directly between the third party and the commission agent. There is no ongoing business relationship in a commission contract and the commission agent does not owe success, only endeavour.

As the commission agent undertakes risk, antitrust law fully applies to this relation.

4.5 Authorised distributor (“Vertragshändler”)

There is no definition of the term. According to case law, an authorised distributor is permanently entrusted with concluding legal transactions on contractual products in his own name and for his own account.⁵⁴ He is therefore permanently integrated into the sales organisation of the entrepreneur. This sales organisation is particularly prevalent in the motor vehicle trade.

Restrictions on distributors who are not exclusive or selective distributors are regulated separately for the first time in Art 4 lit d VBER 720/2022. In particular, it is clarified that such customers may also be prohibited from active sales in exclusive distribution areas or to exclusively reserved customers and active and passive sales to unauthorised dealers in selective distribution areas.

4.6 Franchise

Franchise is neither defined in Austrian law nor uniformly in the literature. Case law defines a franchise as a continuing obligation under which the franchisor grants the franchisee the right

⁵⁴ Cfr. z.B: OGH in 4 Ob 141/06y

to sell certain goods or services for a fee using the franchisor's name, brand, equipment, etc. and commercial and technical experience and in accordance with the organisational and advertising system developed by the franchisor, whereby the franchisor provides assistance and exercises control.⁵⁵

A definition of franchising can only be found in the Vertical Guidelines (margin nr 165). Franchising generally falls within the scope of the Block Exemption Regulation 2022 because it clearly refers to the conditions under which parties may purchase, sell or resell certain goods or services. Articles 4 and 5 of the Block Exemption Regulation 2022 also do not provide for any special treatment of franchising. The type of distribution form is irrelevant for questions of price maintenance or non-compete obligations during the term. For other restrictions, it must be examined whether the franchise agreement is selective or non-selective or whether it is to be categorised as exclusive or non-exclusive. With regard to the Block Exemption Regulation, the franchise agreement must also only be categorised with regard to these characteristics.

Since the franchise agreement usually contains provisions on the transfer of intellectual property rights, Art 2 (3) Block Exemption Regulation 2022 is decisive for the applicability of the Block Exemption Regulation to franchise agreements. The Vertical DCs provide for a number of obligations in relation to intellectual property rights that are generally considered necessary to protect the franchisor's rights. These restrictions do not fall under Art 101 (1) TFEU. These include, for example, the obligation of the franchisee not to become directly or indirectly active in a similar line of business or to pass on the know-how provided by the franchisor to third parties.

The agreement or coordination of sales prices is also not permitted in the relationship between the franchise partners. With regard to franchising and its fundamental compatibility with antitrust law, please refer to the Commission Notice on the Guidelines on Vertical Restraints (2010/C 130/01), para. 189 et seq.

⁵⁵ Taken from OGH 4 Ob 321/87 with abbreviations

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CHAPTER III

ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN BELGIUM

by Anna Gibello and Victor Rouard

CHAPTER III – ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN BELGIUM

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1. Introduction

The distribution sector accounts for 12% of the economy and employment in Belgium⁵⁶. This economic weight reflects not only its importance in terms of employment and investment, but also its major role in consumer satisfaction and, more broadly, the well-being of Belgian society.

The economic and operational health of this sector is therefore a constant concern of the Belgian legislator who, since the Second World War, has tried to protect distributors from market changes which could have a negative impact on them. The most representative example in Belgium is the law of 27 July 1961 on the unilateral termination of exclusive sales concessions of indefinite duration ("1961 Law"), which offers distributors operating in Belgium significant financial protection in the event of termination of their contract. Since 2014, the 1961 Law has been transposed into Book X of the Belgian Code of Economic Law ("CEL").

The development of the internal market, globalisation and technical progress have brought the issue of protecting distributors to the level of European Union law, particularly competition law, always with the ultimate objective of ensuring that goods reach the consumer under optimum conditions. The European legislator has therefore, in turn, been led to evaluate the effectiveness of distribution contracts. This assessment shows that the conditions imposed on distributors by producers under so-called "vertical" agreements⁵⁷ can be beneficial, since they generally make it possible to improve the efficiency of the distribution or production chain in which they operate (in particular by reducing operating costs and optimising sales and investments)⁵⁸. However, in other cases, the restraints imposed on distributors by producers may have an anti-competitive purpose or effects that outweigh these benefits, in particular where one of the undertakings part to the vertical agreements has a significant market share,

⁵⁶ <https://www.ccecrb.fgov.be/p/fr/1095/1-emploi-dans-le-secteur-de-la-distribution-juin-2023/11>.

⁵⁷ Vertical agreements are agreements between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

⁵⁸ See Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, recital 6.

where an undertaking abuses its dominant position, or where the conditions of the agreements lead to serious restrictions of competition⁵⁹.

In order to distinguish beneficial vertical agreements from those whose effects distort competition (in particular, exclusion of other suppliers and buyers, restriction of consumer choice, price increases), the European legislator has developed a complex legal framework, which the Belgian authorities are also responsible for enforcing.

The aim of this contribution is to set out the legal framework in question in more detail, then to examine its application in Belgium and its interaction with Belgian law. We will then analyse a number of decisions illustrating its implementation by the Belgian judicial and administrative authorities.

2. EU antitrust rules on vertical agreements

The basis of the *Antitrust Regulation of Vertical Agreements* is Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), the application of which is specified by the following texts:

- The Commission Notice of 30 August 2014 (2014/C 291/01) on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("*De Minimis* Notice");
- Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("*Vertical Block Exemption Regulation*" or "*VBER*");
- The Commission Communication of 30 June 2022 (2022/C 248/01) Guidelines on vertical restraints («Guidelines »).

Alongside Article 101 TFEU, which targets cartels and restrictive agreements, Article 102 TFEU prohibits any abuse of a dominant position. This article therefore targets, not agreements between undertakings, but unilateral practices by undertakings consisting of an abuse of a

⁵⁹ *Ibid*, recital 15.

dominant position on a specific market, which, in the distribution sector, should not be neglected.

2.1 Agreements and concerted practices likely to have anti-competitive effects

2.1.1 Article 101 TFEU: general principles

Article 101 TFEU reflects the balance sought by European law between two types of agreement. On the one hand, those that must be prohibited because of their potential anti-competitive effects on the internal market (Article 101(1) TFEU). On the other hand, those whose anti-competitive effects are offset by benefits for production, distribution and innovation, and which should therefore not be subject to this prohibition (Article 101(3) TFEU):

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

2.1.2 *De Minimis* Notice: presumptions of exemption

Article 101(1) TFEU prohibits all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the single market.

Agreements that are not capable of appreciably affecting trade between Member States (absence of effects on trade) or that do not appreciably restrict competition (agreements of minor importance) do not fall within the scope of Article 101(1) TFEU.

More specifically, the *De Minimis* Notice sets out three indicative thresholds below which an agreement or practice, although likely to affect the internal market, must not be considered to have the effect of restricting competition⁶⁰ :

- in the case of an agreement between competing companies, if their combined market share does not exceed 10% on the market or markets concerned;
- in the case of an agreement between non-competitors, if the market share held by each party does not exceed 15% on the market or markets concerned;
- where competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors, the threshold is 5%, whether or not the agreements are between competitors.

⁶⁰ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (de minimis notice) (2014/C 291/01), 8 - 10.

If the above thresholds are exceeded, the agreements are not considered to be prohibited by Article 101 (1) TFEU, since it is still possible that they do not affect the internal market or have the effect of restricting competition.

For example, a vertical agreement in which one of the parties has a 15% market share does not necessarily fall within the scope of the prohibition, but it must be assessed more precisely, depending on the economic and legal context in which it operates.

At the same time, it should be noted that the so-called "Safe Harbor" thresholds do not apply to agreements which have the object of preventing, restricting or distorting competition (such as, for example, agreements between competitors which fix prices for the sale of products to third parties, limit production or sales, or allocate markets or customers) or which contain hardcore restrictions⁶¹.

2.1.3 The Exemption Regulation and the Guidelines

2.1.3.1. General principle

On 1 June 2022, the new VBER came into force, supplemented by revised Guidelines designed to reflect the European Commission's position on the main restrictions of competition encountered in the context of vertical agreements. The VBER and the Guidelines are intended to apply for a period of 12 years, until May 2034.

As we have seen, the *De Minimis* Notice specifies the thresholds below which certain agreements should not be considered to fall within the scope of the prohibition in Article 101(1) TFEU.

The Vertical Block Exemption Regulation sets out the conditions under which a vertical agreement prohibited by Article 101(1) TFEU (for example, because it does not benefit from the presumptions of the *De Minimis* Notice) may nevertheless be authorised under the exemption provided for in paragraph 3 of the same Article, because its potential anti-

⁶¹ *Ibid*, 13.

competitive effects are presumed to be offset by efficiencies in production, distribution or innovation.

To this end, the Vertical Block Exemption Regulation has maintained the general rule used by Regulation (EU) 330/2010 of 20 April 2010, which it replaced on 1^{er} June 2022: where the market share held by each undertaking part to the vertical agreement does not exceed 30% and the agreement does not contain serious restrictions of competition, it will be presumed to meet the conditions for exemption set out in Article 101(3) TFEU.

At the same time, the revised rules provide undertakings with simpler, clearer and up-to-date rules and guidance to help them assess the compatibility of their supply and distribution arrangements with EU competition rules in a business environment reshaped by the growth of e-commerce and online sales.

The following is a very brief overview of the main changes introduced by the new EU regulations, which focus on adjusting the safety zone to ensure that it is neither too extensive nor too narrow.

2.1.3.2 Double distribution

Considering the market developments, particularly in e-commerce, the Vertical Block Exemption Regulation lays down new, more restrictive rules on dual distribution and online sales that were not provided for in the previous Vertical Exemption Regulation.

While the VBER specifies that vertical agreements between competing undertakings cannot benefit from the exemption, it adds that the exemption extends to dual distribution, where a supplier sells its products or services both to distributors and directly to end customers, thereby competing with its own distributors⁶².

⁶² Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, Recital 12, Art. 2.4.

There are two reservations. First, the exemption does not apply to exchanges of information which are not directly related to the implementation of the vertical agreement or which are not necessary to improve the distribution or production of the goods or services concerned, examples of which are given in the Guidelines⁶³. Secondly, it does not cover vertical agreements relating to the provision of online intermediation services where the provider of such services is also a competitor on the market in question for the sale of the goods or services which are the subject of the intermediation⁶⁴.

2.1.3.3 Parity clauses

Parity clauses require an undertaking to offer its co-contractor terms that may not be less favourable than the terms it offers on any other sales channel ("wide" clause) or on its own direct sales channel ("narrow" clause).

Both "narrow" and "wide" clauses previously benefited from the block exemption (subject to each party having a market share of less than 30%). "Wide" clauses no longer benefit from the block exemption and must therefore be assessed on a case-by-case basis under Article 101(3) TFEU in order to be exempted.⁶⁵

2.1.3.4 Exclusive distribution

With regard to exclusive distribution, the Vertical Block Exemption Regulation maintains the restriction on passive sales as a hardcore restriction⁶⁶: a supplier may not prohibit its distributor from making sales in response to unsolicited requests from individual customers, for example via its own website.

⁶³ *Ibid*, recital 13, art. 2.5; Communication from the Commission - Guidelines on Vertical Restraints (2022/C 248/01), 4.4.3 (98) and (103).

⁶⁴ *Ibid*, recital 14, art. 2.6

⁶⁵ Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, art. 5.1(d), Communication from the Commission - Guidelines on Vertical Restraints (2022/C 248/01), 6.2.4.

⁶⁶ Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, art. 4(b).

With regard to restrictions on active sales, two notable innovations have been introduced: firstly, the concept of shared exclusivity (or co-exclusivity), which allows a supplier to designate a maximum of five distributors per exclusive territory or customer group⁶⁷ and, secondly, the possibility for the supplier to oblige its distributors to pass on restrictions on active sales in territories or customer groups exclusively allocated to other distributors to their customers⁶⁸.

2.1.3.5 Selective distribution

In a selective distribution system, the supplier undertakes to sell the contract goods or services, directly or indirectly, only to distributors selected on the basis of defined criteria. These distributors themselves undertake not to sell these goods or services to non-approved distributors in the territory reserved by the supplier for the operation of this system.

The VBER strengthens the protection of these systems by allowing suppliers to restrict active sales, including targeted online advertising, by authorised distributors in other territories or to groups of customers allocated on an exclusive basis to other distributors or reserved for suppliers. They may also require authorised distributors to impose such restrictions on their direct customers. The Vertical Block Exemption Regulation also allows suppliers to restrict their authorised distributors and their customers from making active or passive sales to unauthorised distributors in any territory where the supplier operates a selective distribution system.⁶⁹

2.1.3.6 Agency

An agency contract is a contract by which a legal or natural person is given the power to negotiate and/or conclude contracts on behalf of another person called the principal, either in

⁶⁷ *Ibid*, art. 4 (b) i).

⁶⁸ *Ibid*, art. 4 (b) ii).

⁶⁹ *Ibid*, art. 4 (c) i) and ii), Commission - Guidelines on Vertical Restraints (2022/C 248/01), 6.1.2.3.1 (229) and (230).

his own name or in the name of the principal with a view to the purchase of goods or services by the principal, or the sale of goods or services provided by the principal⁷⁰.

In principle, agency agreements do not fall within the scope of Article 101(1) TFEU insofar as the agent does not assume the risks specific to each contract concluded with customers, nor those linked to investments specific to the market, nor those linked to other activities carried out on the same product market⁷¹. In this case, the agent is not considered to be an independent trader and is therefore exempt from the general prohibition.

The Guidelines specify how to assess the concept of "risks", and list (non-exhaustively) the conditions to be taken into account for the contract not to fall within the scope of Article 101 TFEU: no acquisition by the agent of the services bought or sold pursuant to the agency contract, no contribution to the costs linked to the supply or purchase of the contractual goods and services, no assumption of the costs of financing stocks or the cost linked to their loss, etc.⁷²

2.1.3.7 Online intermediation services (OIS)

The Vertical Block Exemption Regulation also introduces clarifications made necessary by the arrival - or at least the proliferation - of online intermediation services, which were difficult to categorise in terms of the concepts relating to vertical agreements in the traditional economy.

These services are defined as information society services which enable undertakings to offer goods or services to other undertakings or to final consumers, in order to facilitate the initiation of direct transactions between undertakings or between an undertaking and a final consumer, irrespective of whether and where the transactions are ultimately concluded⁷³.

The Guidelines take as examples e-commerce marketplaces, app shops, price comparison tools and social media services used by businesses⁷⁴.

⁷⁰ Commission - Guidelines on Vertical Restraints (2022/C 248/01), 3.2.1 (29).

⁷¹ *Ibid*, 3.2.1 (30).

⁷² *Ibid*, 3.2.1 (31).

⁷³ Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, recital 10.

⁷⁴ Commission - Guidelines on Vertical Restraints (2022/C 248/01), 4.3 (64).

The Guidelines state that, because of their special characteristics, online intermediation services cannot be considered as agents⁷⁵. However, they must be considered as suppliers within the meaning of the Vertical Block Exception Regulation, with the result that they can benefit from the block exemption⁷⁶. Nevertheless, due to their specific nature, certain restrictions relating to online intermediation services are excluded from the benefit of this exemption.

2.2 Abuse of a dominant position

Abuse of a dominant position is prohibited by Article 102 TFEU :

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) 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.

A company's dominant position on the market is not prohibited: only the abuse of that position is prohibited by Article 102 TFEU.

From the point of view of distribution, this article is of particular importance with regard to the protection of the distributors of undertakings holding a dominant position, as they may not be discriminated by the latter without objective grounds.

⁷⁵ *Ibid*, (63).

⁷⁶ Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, art. 1 (d).

As with Article 101 TFEU, the scope of Article 102 TFEU is set out in guidelines drawn up by the Commission⁷⁷, to which we refer the reader for further details.

3. Belgian competition law

3.1. Articles IV.1 and IV.2 of the Belgian Code of Economic Law ("CEL")

Articles IV.1 and IV.2 CEL are respectively borrowed from the European rules prohibiting anti-competitive agreements and abuses of dominant position, since they constitute the "national" versions, with only certain adjustments and additions differing from the wording of their European cousins:

Art. IV.1. 1. Shall be prohibited, without the need for a prior decision to that effect, all 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 to an appreciable extent in the Belgian market concerned or in a substantial part of it, and in particular those which consist of:

1° directly or indirectly fixing purchase or selling prices or any other trading conditions;

2° limiting or controlling production, markets, technical development or investment;

3° sharing markets or sources of supply;

4° applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

5° making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

§ 2 Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

⁷⁷ Communication from the Commission, Guidance on the Commission's priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02); Communication from the Commission, Amendments to the Communication from the Commission, Guidance on the Commission's priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2023/C 116/01).

§ 3 However, the provisions of paragraph 1 shall not apply:

1° to any agreement or category of agreements between undertakings,

2° to any decision or category of decisions by associations of undertakings, and

3° to any concerted practice or category of concerted practices, which contribute to improving the production or distribution of goods, to promoting technical or economic progress, or which enable small and mediumsized enterprises to strengthen their competitive position in the relevant market or in the international market, while allowing users a fair share of the resulting benefit, but without however:

a) imposing restrictions on the undertakings concerned that are not indispensable to the attainment of these objectives;

b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

§ 4 Natural persons in the course of the activities of an undertaking or association of undertakings are prohibited from negotiating, agreeing, deciding or concerting with one or more competitors in respect of:

1° the fixing of the sales prices of products to third parties;

2° the limitation of the production or sale of products;

3° the allocation of markets or customers.

The infringement of the prohibition referred to in this paragraph 4 may be established only if the agreement, decision or concerted practice is part of an infringement of the prohibition referred to in this paragraph 4 committed by the undertaking or association of undertakings in the course of activities in which the natural person was involved and established by the Competition College or by the Competition Prosecutor in the same case of infringement.

By way of derogation, in the event that the undertaking or association of undertakings no longer exists and has no legal successor, the investigation may be conducted and the decision taken in respect of the natural person only.

Art. IV.2 Any abuse by one or more undertakings of a dominant position on the Belgian market concerned or in a substantial part of it shall be prohibited, no prior decision to that effect being required.

These abusive practices may, in particular, consist in:

- 1° directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- 2° limiting production, markets or technical development to the detriment of consumers;
- 3° applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 4° making the conclusion of contracts subject to the 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.

Given that they are not intended to affect the European internal market but to limit their effects on the Belgian internal market, these provisions logically do not make their application conditional on trade between Member States being affected or on competition within the internal market being restricted, but on competition on the Belgian market being distorted.

Secondly, Articles IV.1 and IV.2 CEL incorporate the clarification in Article 1 of Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003") that the practices they seek to prohibit are prohibited without the need for a prior decision.

With regard specifically to Article IV.1 CEL, on restrictive agreements, an additional justification is added in relation to Article 101(3) TFEU, in favour of practices which "*enable small and medium-sized enterprises to strengthen their competitive position on the relevant market or on the international market*", the treatment of which is therefore identical to practices

which "*contribute to promoting technical or economic progress*". It should be noted that the conditions required to fall within the scope of this justification do not appear, to date, to have been met in case law.

Finally, Article IV.1, §4 CEL contains a specific injunction against natural persons, prohibiting them, "*in the course of the activities of an undertaking or association of undertakings, from negotiating, agreeing, deciding or colluding with one or more competitors as regards the fixing of prices for the sale of products to third parties, the limitation of the production or sale of products, and the allocation of markets or customers*". This offence is subject to possible individual fines (see *infra* 3.3.2.4.).

3.2 Interaction of Articles IV.1 and IV.2 CEL with Articles 101 and 102 TFEU

3.2.1 Principles

Articles 101 and 102 TFEU no longer fall within the exclusive competence of the European Commission and are directly applicable in the national legal orders of the Member States by the national competition authorities and courts. It follows that some situations may be covered both by these articles and by Articles IV.1 and IV.2 CEL where they have a significant effect on trade between Member States and on the Belgian market.

It should be emphasised that the Belgian Competition Authority and the Belgian courts adopt a qualitative assessment of the concept of "effect on trade between Member States", which conditions the applicability of European Union law, despite the European Commission's attempts to objectify the concept by opting for a quantitative approach through a "*quantification of appreciability*"⁷⁸.

The trend in Belgian case law is to use the qualitative criteria derived from the *Manfredi* case law of the Court of Justice of the European Union to determine an impact on trade between Member States, namely⁷⁹ :

⁷⁸ G. GÉRARD, "l'application du droit de la concurrence par les autorités belges: un alignement parfait entre le droit belge et l'Union européenne?" in *Le droit de l'Union européenne et le juge belge* (ed. N. Cariat and J. Nowak), Bruylant, Brussels, 2015, p. 292; Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 81 of the Treaty (2004/C 101/07), 2.4.2.

⁷⁹ *Ibid*, pp. 292-293. See also N. NEYRINCK, *Manuel de droit belge de la concurrence. Les pratiques restrictives de concurrence*, Larcier, Brussels, 2021, p. 99.

- the presence among cartel participants of operators established and/or active in other Member States ;
- the geographical scope of the practice ;
- the risk of partitioning the single market on a national basis.

If the effect on trade between Member States is confirmed, the relationship between Belgian competition law and Articles 101 and 102 TFEU is then governed by Articles 3.1 and 3.2 of Regulation 1/2003. These articles set out the contours and limits of this overlapping legislation, indicating :

- on the one hand, that when applying national law to agreements, the results must be identical to those resulting from the application of European law, i.e. an agreement that is not found to be anti-competitive under Article 101 TFEU could not be prohibited under Article VI.1 CEL; and,
- secondly, that when applying national law to unilateral practices, solutions that are at least as strict as those derived from European law must be applied, which means that Member States may adopt stricter rules that would punish an abuse that is not deemed anti-competitive under Article 102 TFEU.

The situation can be summarised as follows:

Situation not likely to have an appreciable effect on trade between Member States (effects limited to the Belgian market)	Article VI.1 CEL	Independent application of Article VI.1 CEL
	Article VI.2 CEL	Independent application of Article VI.2 CEL
Situation likely to have an appreciable effect on trade between Member States, including the Belgian market	Article VI.1 CRC and article 101 TFEU	Results in line with those provided for under Article 101 TFEU (primacy of European law)
	Article VI.2 CRC and article 102 TFEU	Results at least as strict as those provided for under Article 102 TFEU

3.2.2 Belgian law on abuse of economic dependence

The Belgian State has made use of the latitude allowed by Article 3 of Regulation 1/2003 with regard to unilateral practices by inserting an Article IV.2/1 CEL, designed to punish abuses of economic dependence:

Art. IV.2/1. . It is prohibited for one or more undertakings to abuse a position of economic dependence in which one or more undertakings are engaged, where competition may be affected on the Belgian market concerned or a substantial part thereof.

The following may be considered an abusive practice:

- 1° the refusal of a sale, a purchase or other trading conditions;
- 2° the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions;
- 3° the limitation of production, markets or technical development to the detriment of consumers;
- 4° the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 5° the making of the conclusion of contracts subject to the 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.

The prohibition of abuse of a position of economic dependence is intended to prevent abuse by one or more undertakings that exercise dominance over one or more other undertakings, but do not necessarily hold a dominant position in the market as a whole or in a substantial part of it. This concept is therefore intended to alleviate the frequent difficulty of proving an abuse of a "dominant position" ⁸⁰.

This prohibition requires three cumulative conditions: a situation of economic dependence, abuse and harm to competition⁸¹.

⁸⁰ Pres. Trib. entr. Brussels (NI.) no. AR/20/03061, 11 February 2021, available on jura.kluwer.be.

⁸¹ Brussels (9^{ème} ch.), no. 2022/AR/1134, 8 June 2023, available on jura.kluwer.be.

Some argue that an abuse of economic dependence is conceivable in situations where no contract has yet been concluded and where a contract is refused. According to others, economic dependence refers to a situation where there is a relationship between the undertaking and its customers or suppliers, or a relationship between commercial partners. The latter interpretation, which implies the need for a pre-existing contractual relationship, should be preferred.⁸²

3.2.3 Interaction between Belgian unfair commercial practices law and competition law (Belgian and/or European): the reflex effect of competition law on market practices law

Market practices law is likely to lead to the prohibition of practices that are not prohibited by competition law. These rules, referred to in Book VI of the CEL, have a different objective from that of protecting economic order, namely to penalise acts contrary to fair market practices by which an undertaking damages or may damage the professional interests of one or more other undertakings⁸³.

Rules relating to unfair practices are expressly authorised by Article 3(3) of Regulation 1/2003, which states that "*they* [paragraphs 1 and 2 of Article 3 of Regulation 1/2003 - see table above under 3.2.1.] *do not prohibit the application of provisions of national law which have as their principal objective an objective different from that pursued by Articles 81 [101] and 82 [102] of the Treaty [TFEU]*".

Thus, as confirmed by the recitals of the Vertical Block Exemption Regulation, Member States may implement on their territory national legislative provisions prohibiting or penalising acts related to unfair commercial practices, whether unilateral or contractual⁸⁴.

However, this possibility leaves open the question of whether the law of unfair commercial practices can be used to close the loopholes in competition law. The Belgian Court of Cassation was called upon to respond to this question, and on that occasion enshrined the reflex effect of competition law on the market practices law: "*the practice of an undertaking which restricts competition but is permitted under both European competition law and Belgian competition*

⁸² *Ibid.*

⁸³ N. NEYRINCK, *Manuel de droit belge de la concurrence. Les pratiques restrictives de concurrence*, Larcier, Brussels, 2021, p. 13.

⁸⁴ *Ibid.*

law cannot be prohibited by virtue of the obligation to observe fair practices in commercial matters, where the breach of fair practices, as alleged, consists essentially solely in a restriction of competition between distributors⁸⁵ ".

To summarize what Professor Gérard said to clarify this reflex effect, a practice that is deemed to comply with competition law cannot be prohibited on the basis of fair market practices, as long as what the perpetrator is accused of is essentially a restriction on the proper functioning of the free market ⁸⁶.

3.3 The Belgian Competition Authority

3.3.1 An independent administrative authority

The Belgian Competition Authority ("BCA") is an autonomous public service with legal personality (art. IV.16, § 1 CEL). It is an independent administrative authority with investigative and decision-making powers. The BCA is made up of :

- Chairman and his department (art. IV.17 CEL),
- Competition Committee, responsible for ruling on cases submitted to the CBA (art. IV.20 CEL),
- Management Committee (art. IV.21 CEL),
- Auditor's Office, acting under the direction of an Auditor General, mainly responsible for investigative procedures (art. IV.39 CRC).

The CBA is competent to apply Articles IV.1, IV.2 and IV.2/1, as well as Articles 101 and 102 TFEU (art. IV.16, §2/1 CRC).

The decisions of the Competition Committee are decisions of an administrative body and not of an administrative court. The Competition Committee carries out its duties in terms of public economic law, does not settle disputes between parties to a lawsuit, but rules in the general economic interest. It does not have jurisdiction to rule on disputes concerning the civil rights of the parties, which fall within the exclusive jurisdiction of the ordinary courts and tribunals. The

⁸⁵ Cass., 7 January 2000, R.C.J.B., 2001, p. 249 and note by J. Stuyck, available on jura.kluwer.be .

⁸⁶⁸⁶ G. GÉRARD, "L'application du droit de la concurrence par les autorités belges : un alignement parfait entre le droit belge et l'Union européenne ? *in Le droit de l'Union européenne et le juge belge* (ed. N. Cariat and J. Nowak), Bruylant, Brussels, 2015, p. 304.

CBA therefore intervenes exclusively in objective disputes concerning legality and not in disputes between parties.

3.3.2 Proceedings before the CBA

3.3.1.1. Initiation of proceedings

Article IV.39 CEL specifies that proceedings concerning cartels and abuses of dominant positions are brought before the Auditor General either by means of complaints lodged by a natural or legal person demonstrating a legitimate interest, or at the request of a minister, or on the initiative of the Auditor General acting *ex officio*.

The Auditor General alone decides whether or not to open the investigation.

3.3.1.2. Investigation of the case

The Auditor's Office is responsible for investigating proceedings (art. IV.40 CRC).

In general, the auditors are competent to seek any useful information and to make any necessary findings with a view to the application of Belgian competition rules. They may collect all information, all provisions, all written or oral evidence and may obtain all documents or information they consider necessary for the performance of their duties, of which they may take copies. Requests for information must remain proportionate and must not lead the parties being prosecuted to admit the existence of an infringement of competition law.

With the prior authorisation of an examining magistrate of the Dutch/French-speaking Court of First Instance in Brussels, the auditors may also investigate the premises, means of transport and other places of undertakings, as well as the homes of undertakings' directors and other persons where they have reason to believe they will find information of which they may take a copy (art. IV.40/2 CRC) ⁸⁷.

Article IV.41 of the CEL defines the procedure regarding the confidentiality of documents and data contained in the file compiled by the auditors with regard to each of the parties concerned by the statement of objections and the proposed decision.

⁸⁷ For more information on the ABC's search procedures: https://www.abc-bma.be/sites/default/files/content/download/files/20131217_guidelines_perquisitions.pdf.

Article IV.42, §1 CEL stipulates that the auditor must compile an investigation file containing all the documents and data collected during the investigation. The file is accompanied by an inventory indicating the confidentiality status of each document, except for those that have been the subject of a negotiated disclosure agreement in accordance with Article IV.41, §6 CEL.

At the end of the investigation, the Auditor may, after consulting the Auditor Counsel, decide to close the case without further action if he considers that (art. IV. 44, §1 CRC):

- the complaint initiating the proceedings is inadmissible, unfounded or time-barred;
- the commitments offered by the party concerned, which it makes binding, are likely to meet its competition law concerns;
- the case should not be considered a priority or does not justify an investigation in view of the (material!) resources of the ABC.

Any appeal against a decision to take no further action must be lodged, on pain of nullity, within one month of the notification of the decision (art. IV.44, §2 CEL). It will be brought before the Competition Committee (art. IV.44, §3 CEL).

On the other hand, if after the investigation the Auditor decides to continue the procedure, he will inform the parties concerned of the complaints against them (art. IV.46, § 1 CEL). The parties concerned will then be given access to the non-confidential versions of the documents and to the data in the investigation file and will have a period of at least two months (which may be extended on reasoned request) to (i) respond to the objections and file their documents or (ii) offer commitments.

The Auditor, in turn, will have a period of two months, after the expiry of the deadline for responses from the parties concerned, to decide whether to :

- close the case in whole or in part, taking into account the commitments offered by the party being prosecuted or the defences put forward by the latter (art. IV.46, §2 CEL),
- re-characterise the facts and raise new objections (art. IV.46, § 3 CEL) or
- submit to the President of the CBA a proposal for a decision on the complaints against the parties being prosecuted (art. IV.46, § 4 CEL).

3.3.1.3. Decisions of the Competition College

If the Auditor decides to submit a reasoned proposal for a decision to the Chairman of the CBA, the latter will forward it to the Competition College, which will make the final decision (art. IV. 49 and art. IV.50 CEL) ⁸⁸.

Apart from certain specific cases, the Competition Committee may (art. IV.52, § 1):

- declare that, on the basis of the information available to the Committee, there are no grounds for action and close the case with no further action;
- find that there is a practice restricting competition and order its cease; this decision may be accompanied by fines and/or periodic penalty payments;
- declare the commitments offered by the undertakings concerned binding and declare that there are no longer grounds for action by the BCA. In this case, the Committee does not rule on the existence of an infringement and the commitments do not imply any prejudicial recognition on the part of the undertaking concerned.

Article IV.71 CEL also provides that the Competition Committee is empowered to take interim measures to suspend restrictive competition practices under investigation if there is an urgent need to avoid a situation likely to cause serious, imminent and difficult-to-repair damage to the applicant undertakings or if the practices in question are harmful to the general economic interest. Articles IV.72 and 73 CEL define the terms and conditions of such a request and the ensuing procedure.

The Competition Committee may impose fines and periodic penalty payments (art. IV.70 - IV.74 CEL).

For breaches of articles IV.1 § 1 and/or IV.2 CEL, and/or articles 101 and/or 102 TFEU, undertakings and associations of undertakings may be fined up to 10% of their worldwide turnover.

For breaches of article IV.2/1 of the CEL, the fine may not exceed 2% of the worldwide turnover of the undertaking or association of undertakings concerned.

The Competition Committee can also impose periodic penalty payments of up to 5% of their average daily worldwide turnover if its decisions are not complied with.

Individuals may be fined between 100 and 10,000 euros for breaches of article IV.1, §4 CRC.

⁸⁸ Written procedure and hearing in which the complainant may also participate.

In addition, when undertakings fail to cooperate during the investigation of a case or a sector enquiry, they are liable to a fine of up to 1% of their worldwide turnover, and periodic penalty payments may also be imposed by the Competition Committee as part of an interim measures procedure.

3.3.1.4. Appeals to the Market Cour

The Brussels Court of Appeal has been given specific powers in competition matters and a specific section has been created: the Market Court (art. 101, § 1, 4 Belgian Judicial Code).

Pursuant to Article 90 CEL, may be annulled before the Market Court the decisions of the Competition Committee and the Auditor' Office, the decisions to allow or refuse mergers, and the requests for interim measures.

The Market Court rules in summary proceedings and makes rulings in law and in fact. It has full jurisdiction and is therefore able to substitute its decision for that of the ABC, although in practice it tends to limit itself to exercising its power of annulment ⁸⁹.

Appeals may be lodged by all parties to the case and by parties who can show an interest and who have been heard by the Competition Committee. The Minister may also lodge an appeal without having to justify his interest. Under penalty of inadmissibility, appeals must be lodged within thirty days of the notification of the contested decision, by filing a request with the Brussels Court of Appeal clerk's office.

In principle, an appeal does not suspend the contested decisions. However, under certain conditions, the Market Court may decide to partially or totally suspend them.

3.3.3 Relations between the CBA and the ordinary Belgian courts

Very many Belgian competition law cases are decided by the ordinary courts, as there are many advantages of judicial litigation over administrative litigation: speed of the procedure and the

⁸⁹ N. NEYRINCK, *Manuel de droit belge de la concurrence. Les pratiques restrictives de concurrence*, Larcier, Bruxelles, 2021, p. 563 ; D. GRISAY et A. ANSAY, *Droits européen et belge de la concurrence. Principes essentiels du droit européen de la concurrence. Autorité belge de la concurrence : organes et procédure*, Larcier, Bruxelles, 2022, p. 282.

possibility of combining an action for the cease of anti-competitive practices with a claim for compensation for the damages suffered.

The absence of any risk of contradiction between the decisions handed down by the CBA (purely objective litigation concerning legality and the protection of economic competition) and the decisions of the judicial courts (subjective litigation concerning the rights of the parties) means that a party who considers itself to have been harmed by an anti-competitive practice may refer the matter both to the CBA and to the judicial courts, as the decisions of the former do not have the force of *res judicata* over the decisions of the latter, nor can they render the latter incompetent, and vice versa⁹⁰.

3.4 Case law review

Below, we look at some recent decisions handed down by the CBA and the Belgian courts.

Although these decisions have referred to the Vertical Block Exemption Regulation regularly since it came into force, at the time of writing they do not seem to have had the opportunity to apply the new provisions.

The decisions presented below are not without interest, however, as they illustrate and clarify the concepts mentioned in the previous sections.

3.4.1 CBA decision of 13 December 2023, "Le Creuset" case: Restriction "by object" (resale price fixing policy), effect on trade between Member States⁹¹

The ABC fined Le Creuset Benelux S.A. ("Le Creuset"), a company specialising in the manufacture and distribution of top-of-the-range kitchen and wine utensils and accessories, for having implemented a minimum pricing policy. This policy limited the ability of distributors to set their own prices for sale to consumers, resulting in uniform prices between different distributors.

Over a period of six and a half years, Le Creuset implemented a series of practices whereby the resale prices recommended to its distributors were in fact imposed. The company rigorously

⁹⁰ N. NEYRINCK, *Manuel de droit belge de la concurrence. Les pratiques restrictives de concurrence*, Larcier, Brussels, 2021, p. 575 et seq.

⁹¹ Decision no. ABC-2023-IO-47-AUD of 13 December 2023, Case MEDE-I/O-17/0010.

monitored the application of this pricing policy, intervening in the event of non-compliance and, if necessary, using pressure or sanctions to ensure its effectiveness. In addition, Le Creuset supervised the promotional activities of its distributors and provided them with information on their competitors' prices, in particular any adjustments made or planned.

This policy of minimum prices covered the whole of Belgium, thus affecting sales throughout the country. In addition, the practice of fixed prices was likely to have an impact on trade between Member States of the European Union, by increasing imports from other States and reducing exports of 'Le Creuset' brand products from Belgium. The CBA considered that the absence of this practice would have resulted in a different pattern of trade at European level.

As a result, the CBA ruled that this minimum pricing policy restricted the independence of Le Creuset network distributors in setting their resale prices in Belgium. This restriction on pricing freedom, in particular the limitation on price cuts, hindered intra-brand competition, thereby damaging competition on the Belgian market (and indirectly on the European market).

As a result, this practice constitutes a restriction of competition by object, prohibited by Article 101(1) TFEU and Article IV.1, § 1 CEL.

The fine imposed on Le Creuset Benelux amounts to €490,112.

3.4.2 President of the Brussels Commercial Court (NI.) n° AR/20/03061, 11 February 2021: Abuse of dominant position, abuse of economic dependence and anti-competitive vertical restraints⁹²

This decision comes from a dispute between Legio and X²O ("Legio/X²O") and the Geberit group ("Geberit"). Geberit dominates several market segments in Belgium as regards the distribution of sanitary products.

Geberit applies a three-stage distribution concept, supplying its products only to wholesalers specialising in sanitary or technical products, who then resell these products to retailers and installers. The latter install and/or deliver the products to end customers. These wholesalers must meet certain criteria. They must purchase a full range of 'Geberit' products, have adequate

⁹² Pres. Trib. Entr. Bruxelles (NI) n° AR/20/03061, 11 February 2021, *Annuaire Pratiques du marché*, 2021, book 1, p. 1214.

storage and logistics capacity, employ technically qualified staff and focus on installers (who are the main customer group) as well as retailers.

In practice, Geberit makes a distinction between, on the one hand, its Belgian wholesalers, who deal mainly with installers and resellers, and, on the other hand, Belgian retailers, who are resellers dealing mainly with end customers. These retailers are not supplied directly by Geberit, but may purchase products from the above-mentioned wholesalers.

Legio/X²O is one of the largest distributors of ‘*Geberit*’ products on the Belgian market. Until 2019, Legio/X²O sourced its ‘*Geberit*’ products from a wholesaler, but considered that this situation was unbearable, as this wholesaler was not only smaller than Legio/X²O, but also its direct competitor, as it sold directly to consumers and private individuals.

At Legio/X²O's request, Geberit agreed to sell directly to Legio/X²O under certain conditions, but subsequently discontinued its practice, forcing Legio/X²O to replenish supplies from its historical wholesaler, which, according to Legio/X²O, resulted in a 17% price increase.

Legio/X²O denounced this interruption, alleging an abuse of a dominant position by Geberit, an abuse of economic dependence and an anti-competitive vertical restraint.

- Abuse of a dominant position

Legio/X²O argued that Geberit's refusal to direct sell constituted an abuse of a dominant position, prohibited by Article IV.2 CEL and Article 102 TFEU.

However, the Brussels Commercial Court (the "Court") found that Geberit had adequately demonstrated that this refusal did not constitute discrimination against Legio/X²O. In addition, it was pointed out that Legio/X²O had been regularly supplied by the wholesaler for years, until 2019, without difficulty, and that direct sales by Geberit had only lasted a few months in 2020. The Court also held that the obligation on Legio/X²O to revert to sourcing via a wholesaler did not constitute an abuse of a dominant position, particularly as all Legio/X²O's other competitors were subject to the same condition. The allegations that the wholesaler, in concert with Geberit, had applied higher prices specifically to Legio/X²O were not supported by the evidence presented.

Finally, the Court concluded that Geberit had valid reasons for not selling directly to Legio/X²O as Legio/X²O still had access to Geberit products via the wholesaler, and it had not been proven

that this access was restricted by unfair prices or that Legio/X²O could not compete with other retailers.

Consequently, the Court rejected the claim for abuse of a dominant position and considered it unfounded.

- Abuse of economic dependence

The Court pointed out that the introduction of the concept of abuse of economic dependence was intended to fill a legal vacuum, in response to the frequent difficulty of proving an abuse of a dominant position.

However, in this case, as Geberit's dominant position had already been ruled out, there was no need to resort to the more flexible concept of economic dependence. Moreover, the evidence submitted by Legio/X²O in support of the allegation of abuse of economic dependence was identical to that relied on to prove abuse of a dominant position, which the Court had already found insufficiently established or inconclusive.

- Anti-competitive vertical restraints

Legio/X²O also accused Geberit of having set up an unlawful selective distribution system by intervening in the pricing of its distributors, in breach of Article IV.1 CEL.

The Court found that Legio/X²O had not proved the existence of such a system. Although Geberit did sell to wholesalers, it had not been shown that the wholesalers undertook to restrict the undertakings to which they resold the products. Furthermore, there is no concrete evidence that Geberit influenced the prices charged by wholesalers, including those charged to Legio/X²O.

The Court therefore dismissed the claim under Article IV.1 CEL.

3.4.3 Brussels Appeal Court (8th) n° 2019/AR/890, 11 September 2023: vertical restraints, block exemptions and burden of proof of market share⁹³

The Belgian undertaking Cinem SA ("Cinem") imports and distributes '*Liebherr*' refrigerators, freezers and wine cellars and Univer SA ("Univer") is part of its selective distributor network.

⁹³ Bruxelles, n° 2019/AR/890, 11 September 2023, *Competition*, 2023, book 4, p. 380.

On 19 March 2017, Cinem and Univer formalised their partnership to this effect by signing a wholesale and selective distribution concession agreement, notably allowing Cinem to unilaterally modify its purchase prices, as well as its discount rates, without prior notification or a transitional period.

A discount had been granted to Univer until 31 December 2018. After this date, Cinem reserved the right to apply a new discount, without any obligation to maintain a minimum rate for the whole of 2018. From 1 January 2018, Cinem reduced the discount on purchases from 40% to 35%.

Univer considered that this reduction was less favourable than those granted to other Cinem purchasers, and complained of discriminatory treatment, invoking Articles 101(1) and 102 TFEU, as well as Articles IV.1 and IV.2 CEL.

The Brussels Court of Appeal (the "Court") pointed out that only undertakings in a dominant position are required not to discriminate against their purchasers. On the other hand, an undertaking that dominates the market cannot apply unequal conditions to similar services, thereby causing competitive harm. The Court then referred to the block exemptions set out in the Vertical Block Exemption Regulation. These exemptions cover both exclusive and selective distribution, provided that neither party holds more than 30% of the relevant market and that the agreement does not contain "hardcore" blacklisted restrictions.

The Court found that Univer had not adduced sufficient evidence to show that Cinem held a dominant position which would prevent it from benefiting from the block exemption.

Market share must be calculated in accordance with Article 8 of the Vertical Block Exemption Regulation, which distinguishes between market share by value and by volume, with priority given to value data. In the absence of such data, estimates based on other reliable information may be used. In the Court's view, Univer did not produce any calculation of market share by value or explain why such a calculation could not be made. No reliable information on the market, in particular with regard to sales and purchases of wine cellars in Belgium was presented. Consequently, the Court concluded that Univer did not sufficiently establish the delimitation of the market or proved that Cinem had a market share of more than 30%.

In addition, the Court held that Univer did not demonstrate that Cinem held a dominant position that would oblige it to comply with Article 102 TFEU or Article IV.2 CEL concerning the prohibition of discrimination.

According to the Court, there had also been no infringement of the VEBER ‘hardcore’ restrictions, in particular as regards price fixing, since Liebherr only sets recommended prices for end customers, and Univer remains free to set its own resale prices.

Finally, the Court rejected Univer's request to appoint an expert, considering that the burden of proof remains primarily on Univer itself, whereas Univer had not provided any preliminary data justifying such an appointment.

3.4.4 Case Newpharma and Pharmsimple against Caudalie, *sanctions imposed by the ABC*⁹⁴

- *CBA decision of 6 May 2021*

The CBA's decision follows non-competitive practices by the Caudalie group ("Caudalie") which, between 2014 and 2018, consisted of imposing minimum prices and restrictions on active and passive sales on its distributors, in breach of Article IV.1 ECC and Article 101 TFEU. More specifically, Caudalie required its distributors to apply only a maximum discount on its products, ensuring that this rule was respected both in its shops than online. Caudalie also prevented the use of the usual marketing techniques relating to the display of discounts, rendering them ineffective since consumers were thus unaware of them.

Caudalie was also careful to limit active and passive sales by selective online distributors established in a Member State other than that of the end users in order to limit price competition and ensure compliance with a minimum resale price per country to consumers.

These practices were considered as restrictions by object by the CBA.

To avoid being fined, Caudalie offered a number of commitments to the Competition Committee aimed at remedying its shortcomings.

In its decision of 6 May 2021, these commitments were taken into consideration by the ABC, which nevertheless considered them insufficient in view of the seriousness of the infringement.

⁹⁴ Decision no. ABC-2023-PK-01 of 18 January 2023, Case n° CONC-PK-17/0038 and CON-PK-18/0001.

In addition to having accepted them and made them binding, the ABC also penalised Caudalie by imposing a fine, albeit reduced to 859,310.00 euros as a result of these commitments.

- *Decision of the Market Court of 1^{er} December 2021 following Caudalie's appeal of the ABC's decision of 6 May 2021.*

After suspending the ABC's decision of 6 May 2021, the Market Court considered that the ABC had diverted Caudalie's commitments from their intended purpose, which was to establish, following their acceptance, that there was no longer any reason to act against it and, consequently, no reason to establish the infringement and sanction it accordingly.

The Market Court rejected the CBA's argument that Caudalie's commitments were "modalities" of its decision, allowing a fine to be imposed in addition to these commitments since the CBA had "accepted" them and made them "binding". In other words, the ABC could not both accept Caudalie's commitments and decide to impose a fine.

By requiring Caudalie to comply with its commitments and at the same time by establishing an infringement and imposing a fine, the Market Court considered that the CBA had misapplied Article IV.52§1^{er} CEL and therefore annulled the decision of 6 May 2021.

- *Subsequent CBA decision of 20 January 2023*

As the infringement was not contested on appeal, the ABC adopted a new decision on 20 January 2023 in which it confirmed the characterised nature of the restrictions of competition put in place by Caudalie and imposed a fine of 859,310.00 euros on Caudalie.

Belgium, January 2025

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CHAPTER IV

ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN FRANCE

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CHAPTER IV – ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN FRANCE

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I. Competition Authority and French Courts Competent in Competition Law

1. Competition Authority (*«Autorité de la Concurrence»*).

1. a) Overview

The Law on the Modernization of the Economy dated August 4, 2008, significantly altered procedural rules in competition law by assigning the powers, previously held by the “Conseil de la Concurrence” (Competition Council), to a single independent administrative authority, the “Autorité de la Concurrence” (Competition Authority). This authority now has the power to sanction anticompetitive practices and control merger operations, replacing the role previously held by the Minister of Economy.

This independent authority has also been granted the power to issue recommendations aimed at improving the competitive functioning of markets.

The law of August 6, 2015, and the ordinance of May 26, 2021 transposing Directive (EU) 2019/1 of the European Parliament and Council of December 11, 2018, have further expanded the competence of the Competition Authority.

The Competition Authority's contentious powers are derived from Article L. 410-1 of the Commercial Code, which grants it the authority to deal with anticompetitive practices occurring

within economic activities related to production, distribution, or services, irrespective of whether the entities involved are public or private.

The Competition Authority's territorial jurisdiction covers the economic activities of individuals or entities located within the national territory, as well as those outside of it, provided their activities have an anticompetitive impact on French territory.

1. b) Powers

With regard to anticompetitive practices, from the investigation phase—which may include significant visits and seizures—through to the decision stage, the Competition Authority examines cases in accordance with specific procedural rules provided by the Commercial Code and enriched by case law.

Given the importance of the financial penalties that may be imposed, the Authority must comply with the rules of the ECHR in general and the fundamental principles of a fair trial in particular. Appeals (for annulment or modification) against decisions of the Competition Authority are brought before the Paris Court of Appeal. A cassation appeal can be filed against the decision of the Court of Appeal (Article L. 464-8 of the Commercial Code).

In addition to its main prerogatives, the Competition Authority also has an advisory function that represents an increasing part of its activity, in various cases, particularly on certain regulatory texts, specific competition issues, and anticompetitive practices.

It can be referred to by the Minister of Economy, companies, or any entity concerned with the interests they manage (parliamentary committees, local authorities, trade unions, etc.). It can also initiate investigations on its own regarding the practices mentioned in Articles L. 420-1, L. 420-2, and L. 420-5 of the Commercial Code.

The Authority may also, on its own initiative, "give an opinion on any question concerning competition," and make recommendations to the government to improve the competitive functioning of markets (Article L. 462-4 of the Commercial Code).

It has a large range of measures to address all situations arising during and after the procedure (interim measures, acceptance of commitments, leniency, injunctions, financial penalties).

Under Article L. 464-1 of the Commercial Code, the Competition Authority can order the cessation of anticompetitive practices.

If an injunction is not complied with, it can compel the company to comply by imposing a fine of up to 5% of the average daily turnover per day of delay.

The Competition Authority can impose a financial penalty not exceeding 3 million euros if the offender is not a company, and 10% of the highest global turnover if the offender is a company. Financial penalties must be proportionate to the severity of the offenses, the extent of the harm caused to the economy, the situation of the company concerned, and any recurrence of prohibited practices. They are determined individually and with justification for each company (Article L. 464-2, I, al.3 of the Commercial Code).

The Competition Authority can impose precautionary measures requested by companies or deemed necessary by the Authority, provided that the practices in question are likely to cause serious and immediate harm to the general economy, the sector concerned, consumer interests, or the complainant company.

In case of non-compliance with the precautionary measures imposed, it can impose fines of up to 5% of the average daily turnover per day of delay and/or a financial penalty.

Furthermore, leniency is a legal tool used to detect cartels, in exchange for total or partial exemption from financial penalties for companies that disclose their existence.

The infringements eligible for the leniency program are “the most serious” anticompetitive agreements.

Fine immunity can be granted when the Competition Authority has no information about the alleged cartel or when it already has information about the alleged cartel.

In the first case (the Authority has no information) the company must be the first to provide evidence of the existence of a cartel, allowing the Authority to conduct thorough investigations.

In the second case (the Authority has some information), company must be the first to provide sufficient evidence for the Authority to establish the existence of an anticompetitive cartel infringement.

In other cases, companies can benefit from a fine reduction of between 25% and 50% for the second company, 15% to 40% for the third, and up to 25% for subsequent companies, if the

evidence provided adds significant value compared to the evidence already available to the Authority.

The company must promptly cease its participation in the alleged cartel and provide genuine, total, permanent, and prompt cooperation to the Competition Authority.

Furthermore, Article L. 464-2, I of the Commercial Code provides that the Competition Authority can "accept commitments proposed by companies or organizations to address its competition concerns likely to constitute prohibited practices mentioned in Articles L. 420-1, L. 420-2, and L. 420-5."

This usually applies to situations raising competition concerns that can be quickly resolved through commitments. It does not apply in cases where the harm to public economic order necessitates the imposition of financial penalties.

In the event of non-compliance with the commitments made, the Authority can impose fines of up to 5% of the average daily turnover per day of delay, which may be combined with a fine.

Finally, under the settlement procedure introduced in 2015, the company must waive the right to challenge the grievances notified to it.

The amount of the fine reduction attached to the implementation of the settlement procedure is not predefined.

The settlement procedure was used, for example, in a decision related to practices in the distribution sector of consumer products in Overseas territories (ADLC, Dec. 16-D-15, 06/07/2016).

The Authority does not rule out combining reductions with the leniency procedure, provided that the procedural benefits of a combined procedure appear sufficient.

Additionally, the Authority may accept a settlement from one of the prosecuted companies that does not wish to contest the grievances, while having to demonstrate participation in the anticompetitive practices alleged against the company contesting the grievances (Paris Court of Appeal, 26/10/2017). This hybrid settlement procedure was upheld by the Court of Cassation (Cass. Com., 24/06/2020).

The Paris Court of Appeal confirmed the confidential nature of the settlement procedure (Paris Court of Appeal, 06/07/2017 on appeal from ADLC Dec. 17-D-06, 21/03/2017).

Although the settlement procedure sometimes allows companies to significantly reduce the amount of fines, these can still be relatively high.

Under Article L. 463-3 of the Commercial Code, a simplified procedure can also be implemented, if necessary, in conjunction with the settlement procedure.

The contentious matters of the Competition Authority concerning the policing of anticompetitive practices defined in Articles L. 420-1, L. 420-2, L. 420-5, and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), are economic in nature.

The purpose of referring matters to the Competition Authority is only to sanction anticompetitive practices that disrupt free competition, not to compensate for the harm resulting from these practices, which falls under the jurisdiction of civil and commercial courts.

2) Civil and Commercial Courts specialized in competition law.

2. a) Jurisdiction.

In France, disputes relating to the application of competition rules (Articles L. 420-1 to L. 420-5 of the Commercial Code – Articles 101 and 102 of the TFEU) are entrusted to a limited number of courts.

The courts competent to hear such cases include the judicial and commercial courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris, and Rennes. Appeals from these specialized courts are handled by the Paris Court of Appeal.

Judicial courts have jurisdiction over cases involving individuals who are neither merchants nor craftsmen, while commercial courts handle cases involving merchants or craftsmen.

Article L. 462-3 of the Commercial Code allows courts to seek an opinion from the Competition Authority on anti-competitive practices defined in Articles L. 420-1 and L. 420-2 of the Commercial Code and Articles 101 and 102 of the TFEU.

In this context, the Authority may transmit certain documents collected or prepared during proceedings held before it (Article L. 462-3 of the Commercial Code).

Like national competition authorities, national courts must cooperate with other national competition authorities and the European Commission and apply EU law.

2. b) Main claims brought before these Courts

A victim of anti-competitive practices seeking compensation for the damage suffered must bring the matter before judicial courts to obtain compensation or the annulment of the contract. In particular, agreements, contracts, or contractual clauses related to a cartel, abuse of a dominant position, or economic dependency that have the purpose or effect of restricting competition in a given market are null and void (Article L. 420-3 of the Commercial Code).

The nullity of an agreement that is the source of anti-competitive practices can be requested by anyone with an interest in stopping such practices.

Actions for compensation are subject to a five-year statute of limitations. Article L. 462-7 of the Commercial Code provides that the initiation of proceedings before the Competition Authority, the European Commission, or a national competition authority of another Member State of the European Union interrupts the statute of limitations for civil actions until the decision becomes final.

A claim for compensation for damages caused by anti-competitive practices brought before civil and commercial courts is based on Article 1240 of the Civil Code, which requires the existence of a fault, damage, and a causal link.

The person claiming to be a victim of anti-competitive practices must establish a direct link between the damage and the proven faults of the companies involved in such practices (Paris Court of Appeal, 23/06/2004).

French Case law has found that the causal link between an abuse of a dominant position and potential damage, yet to be determined, can be established, even if the dominant company had made commitments during the procedure before the Competition Authority and no sanction was imposed (Paris First Degree Court, 22/02/2018 and Paris Court of Appeal, 12/09/2018).

The Court of Justice has ruled that a commitment decision by the European Commission does not prevent national courts from finding a breach of competition rules, as "such a decision does not certify the compliance of the practice under scrutiny with Article 101 TFEU."

Moreover, Directive 2014/104/EU of November 26, 2014, facilitates proof of anti-competitive practices and encourages victims to bring actions by increasing the effectiveness of compensation.

The probative facilitation introduced by the directive was illustrated in a judgment by the Paris Court of Appeal, which recalled that under Article 17-2 of the directive, it is presumed that infringements committed within the framework of a cartel cause harm (Paris Court of Appeal, 20/04/2022).

The fault lies in the violation of national provisions (Articles L. 420-1 and L. 420-2 of the Commercial Code) and/or European provisions (Articles 101 and 102 TFEU).

A final decision by a national competition authority establishing the existence of an infringement allows for the irrebuttable presumption of the defendant's fault in actions brought before national civil courts. National courts may also order the defendant or a third party to provide relevant evidence if the claimant presents sufficiently plausible allegations.

Civil courts are authorized to seek the assistance of the national competition authority in quantifying the amount of damages.

The effectiveness of compensation is further enhanced by the joint and several liability imposed on companies that participated in the violation of competition rules, requiring them to compensate for the harm caused. This includes compensating consumers and businesses for the consequences of price increases.

II. Overview of French Competition Law Regarding Vertical Agreements.

1. Vertical Restrictions.

1. a) Articles L. 420-1 and following of the Commercial Code.

In French law, the prohibition of agreements (either vertical or horizontal) is governed by Article L. 420-1 of the Commercial Code: *"Agreements, even though the direct or indirect intermediary of a group company established outside France, that have as their object or may have as their effect the prevention, restriction, or distortion of competition in a market, are prohibited, especially when they tend to:*

1° Limit access to the market or the free exercise of competition by other companies;

2° Hinder the setting of prices by the free play of the market by artificially favoring their rise or fall;

3° Limit or control production, outlets, investments, or technical progress;

4° Share markets or sources of supply."

In general, the Competition Authority adopts a flexible approach, considering the dual nature of distribution agreements, which reduce competition between network members (intra-brand competition) but generally increase competition between networks (inter-brand competition). They are therefore assessed in the context in which they are implemented, considering the rule of reason.

The rule of reason approach permits the validation of distribution systems that, despite including clauses potentially restrictive to competition, establish objective selection criteria and do not prevent new competitors from entering the market.

Article L 420-4 of the Commercial Code allows for legal exemptions (I-1°) as well as individual exemptions if various conditions related to economic progress are met (I-2°). It also covers (II) the case of categories of agreements, particularly when their purpose is to improve the management of small or medium-sized enterprises, that may be recognized as meeting the conditions of article L 420-1 by decree issued after consultation of the Competition Authority, however rarely used in practice.

In accordance with the provisions of Articles L 464-6-1 and L 464-6-2 of the Commercial Code, the Competition Authority, who can normally decide that there is no need to pursue a procedure regarding practices covered by Article L. 420-1 of the Commercial Code if the combined market shares of the companies involved do not exceed 15%, is bound to do so in case of hardcore restrictions of competition such as price fixing, limiting production or sales, market or customer allocation, restrictions of passive sales etc.

In cases affecting trade between Member States, French authorities simultaneously apply Articles L. 420-1 of the Commercial Code and 101, paragraph 1, TFEU. Competition authorities generally conclude that there is an impact on trade between Member States.

The Competition Authority has complete authority to enforce EU Regulation 2022/720 when an agreement is within its scope since, under Article 29 of EU Regulation 1/2003, national competition authorities are empowered to revoke the benefits of a vertical block exemption regulation within their jurisdiction.

Even when a restriction's effects are limited to the national territory—making the EU regulation inapplicable in principle—the Competition Authority still views European rules as a guiding framework for analysis under the rule of reason.

In the following paragraphs, the main rules and decisions regarding exclusive distribution, selective distribution, franchising and commercial agency will be briefly presented.

1. b) Exclusive Distribution

The prohibition of agreements applies to distribution contracts concluded between the supplier and the members of its distribution network, which are likely to affect competition by their terms or by the conditions under which they are exercised.

Exclusive distribution systems are not intrinsically contrary to competition law. They are so if the supplier limits the commercial freedom of distributors by imposing a resale price to the public, restricting their sources of supply, or prohibiting passive sales.

The rule of reason applies to exclusive distribution, although more moderately than in selective distribution.

-The network promoter is free to decide on its organization, development and implementation strategy, provided it does not practice discrimination within each category of distributors.

Therefore, the network promoter is free to set the selection criteria. The supplier can independently evaluate the professional and technical qualifications of applicants for exclusive concessions. However, this freedom of selection must not lead to any anticompetitive practices. When it reinforces competition between network members and non-network distributors, the supplier can take measures to protect its network by granting aid to distributors significantly affected by the development of parallel imports (Paris Court of Appeal, 21/09/2004).

-Practices that impose a price are sanctioned even if the distributors are not located in the same sales area. Thus, a concession contract is contrary to Article L. 420-1 of the Commercial Code when contractual clauses make the prices recommended by the supplier mandatory (Paris Court of Appeal, 04/04/2006).

However, the manufacturer can influence retail prices to some extent by providing distributors with non-binding indicative price lists. If these recommended prices act as maximum limits set

by the supplier without imposing obligations on distributors, they do not harm competition because distributors retain the commercial freedom to lower prices.

If no clause imposes a minimum resale price, it is necessary to verify whether the contractual clauses, their economic and legal context, and the behavior of the parties reveal the existence of an imposed or minimum resale price.

The same behaviors observed in the prices charged by distributors must result from an agreement and not just from their identical reaction to the prices recommended by their supplier. In the absence of a contractual provision, the competition authority examines whether public pricing or maximum discount rates are specified and controlled by the supplier, and whether they are effectively and consistently implemented by the distributors.

Although this statistical method is not systematic, the Competition Authority may consider that a rate of compliance with indicative public prices of at least 80% presumes effective application of the prices. Below, the verification must be completed with other element such as the dispersion of observed prices (CC Dec. 07-D-50, 20/12/2007).

-French competition authorities consistently view the prohibition of passive sales within an exclusive distribution network as anticompetitive.

Like European authorities, the Competition Authority, with support from the Paris Court of Appeal, treats this restriction as equivalent to granting absolute territorial protection. It cannot be prohibited ton an exclusive distributor to respond to unsolicited request from customers even located outside the granted territory.

The combination of an exclusive supply obligation, which prevents cross-supply between exclusive distributors, with an export ban, which creates an artificial sharing of national markets, has been considered anticompetitive (CC Dec. - 93-D-50, 23/11/1993).

By contrast, if it is established that the pressures of the manufacturer only concern active sales outside the area and not passive sales, it is considered that he does not commit an anticompetitive practice.

Also, according to the Paris Court of Appeal, it is possible for a distributor to commit not to solicit or sell outside of the European Union or the EFTA and to forward to the supplier any requests originating from these areas (Paris Court of Appeal n°15/21296, 13/09/2018).

-The non-compete obligation combined with exclusive distribution increases the risk of weakening intra-brand competition and market segmentation. According to the Vertical Block Exemption Regulation, a contractual non-compete clause is exempted only if its duration is not indefinite or does not exceed five years.

1. c) Selective Distribution

Selective distribution combines broad product distribution with a guarantee of distribution quality and brand image.

According to the Court of Cassation, a selective distribution contract is one by which "the supplier undertakes to supply in a determined sector one or more merchants chosen based on objective qualitative criteria, without discrimination and without unjustified quantitative limitation, and by which the distributor is authorized to sell other competing products."

Even though selective distribution can lead in some cases to a restriction of competition, it usually has a minor anticompetitive effect than the exclusive distribution.

It may have been weakened by the law favoring internet sales, particularly in the context of marketplaces, but most recent jurisprudence, considering also the latest exemption Regulation, now tends to align with European jurisprudence.

Prohibiting authorized distributors from marketing perfumes on third-party platforms has been considered appropriate for preserving the luxury image of these products, as long as it does not go beyond what is necessary to achieve this goal and does not involve an absolute ban on online sales (CJUE 06/12/2017 – Aff. 230/16 – Coty Germany).

The Competition Authority has aligned with European jurisprudence and considers for example that a manufacturer cannot de facto prohibit the online sale of horticultural equipment, while recognizing its right to oppose the marketing of the same products on third-party platforms (ADLC, Dec. 18-D-23 – 24/102018).

With EU Regulation 2022/720, whose article 4, e) prohibits restrictions that aim to prevent the effective use of the internet by the buyer or their customers to sell the contractual goods or services (but the guidelines exclude online marketplaces from the text's scope), the situation has been further clarified.

In 2023, the Competition Authority once again had the opportunity to sanction the absolute ban on online sales in the context of selective distribution (ADLC, Dec. 23-D-12 – 11/12/2023; ADLC, 23-D-13 19/12/2023).

-The prohibition of cross-supplies between authorized distributors is also illicit (CC. Dec. 95-D-14 – 07/02/1995) and it is a hardcore restriction within the meaning of Article 4, point c), ii) of Regulation 2022/720.

The supplier cannot prohibit passive sales either. The clause segmenting national markets is contrary to Article L. 420-1 of the Commercial Code and also constitutes a hardcore restriction within the meaning of Article 4 of Regulation 2022/720.

-In a selective distribution network, price imposition practices are anticompetitive within the meaning of Article L. 420-1 of the Commercial Code as they hinder the setting of prices by the free play of the market by artificially favoring their rise or fall.

This applies, for example, when access to a selective distribution network is conditioned on tacit acceptance of prices determined by the supplier, minimum resale price or minimum margin (CC– Dec. 93-D-50 23/11/1993; CC, Dec. 02-D-36 14/06/2002).

Such practices manifest not only through pressures, threats of retaliation, and actual retaliations by the supplier but also through prices merely "mentioned" (dissemination of price lists showing an indicative public price, letters mentioning a specific multiplier coefficient or maximum discount rate, advice given to distributors regarding price positioning...).

The prohibition of imposed minimum prices is justified by the fact that the reduction of intra-brand competition thus caused usually leads to an increase in the final consumer price. Thus, as for exclusive distribution, setting a maximum price is legal as it benefits the final consumer. As long as the resale price actually proposed to the clientele remains freely set by the distributors, the supplier has the possibility to disseminate an indicative price list or even a price range (CC. Dec. 05-D-07 -24/02/2005).

Disseminating indicative prices within a selective distribution network does not constitute a price imposition practice, provided that distributors are not subjected to pressures for their effective application, or there are significant differences between the recommended prices and the prices actually practiced, and that the supplier does not conduct any control.

-Selection of candidate must also be based on objective, qualitative, or quantitative criteria. Qualitative selection must be justified by the type of product and must be proportionate to the goal of promoting the quality and image of the brand.

Thus, while a dedicated and suitable space for the product's image may be required, the requirement for a minimum space for the sale area may be excessive depending on the type of product being sold (for example, cosmetic products: CC Dec. 96-D-57 du 01/10/1996).

If the candidate does not meet the qualitative criteria applied to all members of the network, their refusal of approval cannot be considered anti-competitive. Only discriminatory measures are prohibited by Articles 101 and L 420-1 of the Commercial Code.

Quantitative selection, because it directly limits the number of resellers, may fall under Article L. 420-1 of the Commercial Code.

Before the Vertical Block Exemption Regulation came into effect, French control authorities had already subjected quantitative selection to rule of reason analysis, provided it was economically justified (inability to supply numerous points of sale, increase in distribution costs, limitation of local economic opportunities, etc.).

Even when it directly limits the number of distributors, quantitative selection was legal as long as it was economically justified. This is the case when too many distributors would make distribution costs excessive and risk increasing the cost price.

However, French jurisprudence remained reluctant to admit quantitative criteria, particularly those concerning local sales potential, which were considered too general and were deemed subjective and discriminatory.

The use of the Vertical Block Exemption Regulation when the supplier's market share is below 30% as a guide for analysis has now logically led the French judge to more favorably accept quantitative criteria, in line with the jurisprudence of the Court of Justice which validated quantitative criteria "whose precise content can be verified" without the need for objective justification as long as they are applied uniformly to all candidates (CJUE, 14 /06/2012, aff. C-158-11).

French jurisprudence now holds that the network leader is not required to justify the quantitative criterion, either geographically or economically, when it is set and has been met (Paris Court of Appeal 15/13603 - 20/02/2019).

1. d) Franchising

For a franchise contract to be legal, it must meet certain conditions, particularly regarding the proportionality of restrictions imposed on franchisees relative to the pursued objective.

Restrictive clauses must be necessary to protect the franchisor's know-how and brand image and required to achieve these objectives (ADLC, Dec. 24-D-02 06/02/2024).

If the parties hold less than 30% of the market shares, the agreement may benefit from a favorable assessment under the rule of reason when it contains no prohibited clauses.

The Paris Court of Appeal held that, in the case of a network holding less than 30% market share, practices involving the franchisor granting long payment terms and loans to enable franchisees to outcompete members of a rival network were licit (Paris Court of Appeal, 14/15714, 25/10/2017).

Agreements that harm price setting by the free play of competition are contrary to article L 420-1 of the Commercial Code. Setting identical or minimum resale prices, which franchise network members located in the same sales area are forced to apply, constitutes a prohibited practice.

Setting a very low maximum price combined with the obligation not to deviate far from it, pre-registering prices in cash registers, advertising campaigns encouraging adherence to announced prices are indirect ways of price-fixing sanctioned by French courts and authorities (Paris Court of Appeal, 13/12/1995).

-Territorial exclusivity is legal if it aims to protect the network against internal and external competition and if it does not unduly hinder the commercial freedom of franchisees.

When the parties to the agreement have a limited market share, or when the franchisor's network does not create a significant barrier to normal market competition, territorial exclusivity does not negatively impact competition (Court of Appeal of Paris, 11/03/1988 and 16/12/1992).

-Clauses imposing restrictions such as passive sales or an absolute prohibition of online sales, are considered disproportionate and contrary to competition rules. Franchisees must be allowed to sell online, outside their territory.

The Competition Authority recently ruled that restricting online sales to the franchisor, while granting franchisees only limited authorization within their territorial zones, artificially divides the online distribution channel, creating segmentation both among franchisees and between franchisees and the franchisor (ADLC, Dec. 24-D-02 06/02/2024).

-Non-compete clauses shall remain proportionate to their pursued objective: protecting the network's know-how, identity and image, which is not the case if the franchisor's know-how is of low technicality or not accessible after the contract.

To be valid, the non-compete clause must also be limited in time and space (Cass. com. 16/02/2022 - 20-12.885).

French jurisprudence also validates non-reaffiliation clauses prohibiting the former franchisee from joining, directly or indirectly, a franchise network or similar distribution network after the end of the contract if it is proportionate to the pursued objective (Paris Court of Appeal, 09/16817 06/03/2013).

The French legislator has also introduced new validity conditions for post-contractual clauses in certain franchise agreements (Articles L. 341-1 and L. 341-2 of the Commercial Code).

Any clause that restricts the freedom to conduct commercial activities after the termination of the contract is deemed null and void unless it meets several cumulative conditions.

It must apply to goods and services competing with those sold during the contract, be limited to the premises and locations used during the contract, be essential to the protection of substantial know-how, and be of a maximum duration of one year.

-A right of preference in favor of the franchisor may reduce inter brand competition but it is validated by the French jurisprudence if it aims at securing the franchisor's investment.

-Exclusive supply is acceptable if it ensures the quality and uniformity of the distributed products.

The Court of Cassation considers that if it allows to preserve the network's image and identity, an exclusive supply clause necessary to ensure uniform quality and taste of products does not

constitute a restriction of competition under Articles 101, paragraph 1, TFEU and L. 420-1 of the Commercial Code, even if concluded for an indefinite duration (Cass. Com. 20/12/2017, 16-20.501).

For frequently renewed items, the franchisor can define and impose specifications to ensure the minimal standardization necessary to preserve the franchise network's identity. For other products available on the market (such as furniture, display cases, showcases, price tags, signs, paper bags...) the network's image is sufficiently preserved by a precise definition of the required objective qualities and exclusive supply is therefore not justified.

With the new vertical block exemption regulation, if market share of the supplier and distributor does not exceed 30%, it is no longer necessary to verify whether the supply obligation is necessary for preserving the identity of the network: Exclusive supply obligations of a 5-year duration and quasi-exclusive obligations of up to 80% for an indefinite period, are considered valid.

1. e) Commercial Agency

Regarding commercial agent contracts, French authorities and courts have had few opportunities to rule on the existence of anti-competitive practices referred to in Articles L 420-1 to L 420-7 of the Commercial Code.

The approach of European courts would be adopted by French authorities in a domestic situation when applying these provisions, as indicated by the Competition Authority (CC, Dec. 09-D-23 30/06/2009) concerning practices implemented in the ready-to-wear clothing and accessories distribution sector, and before that in a decision (CC, Dec. 06-D-18, 28/06/2006) concerning practices implemented in the cinema advertising sector.

2. Other Prohibited Anti - Competitive or Restrictive Practices

Legal provisions prohibiting behaviors other than agreements (and abuse of dominant position) are numerous and diverse.

Practices classified as anticompetitive by law require, for their characterization, an impact on competition in the relevant market. Practices classified as restrictive of competition, on the other hand, are characterized independently of such impact.

2. a) Abuse of Economic Dependence

The second paragraph of Article L 420-2 of the Commercial Code states:

"Is also [that is, regardless of the prohibition of abuse of dominant position provided by the first paragraph] prohibited, as soon as it is likely to affect the functioning or structure of competition, the abusive exploitation by a company or group of companies of the state of economic dependence in which a client or supplier company finds itself. These abuses may include refusal to sell, tied sales, discriminatory practices mentioned in Articles L 442-1 to L 442-3 of the Commercial Code, or range agreements."

Court decisions have recognized an abuse of economic dependence for example in cases of a general store operators economically dependent on a major retail company, of which they were both franchisees and tenant-managers (“locataires-gérants”), and against whom this company had acted abusively in several ways (requiring them to entrust her administrative and accounting management of their store, resulting in a fee increase to more than five times the previous rate; computerized order management preventing them from knowing purchase prices in advance; delegation of power to pay invoices, etc.).

Moreover, the fact that the franchise contract was linked to the tenant-management (“location-gérance”) contract, and both were of indefinite duration, had the effect of leaving the franchisees at the mercy of the franchisor.

This idea is corroborated by the Competition Authority in the Apple case (resulting in a record fine over a billion euros, however significantly reduced in 2022 by the Paris Court of Appeal) which found that Apple had abusively exploited the dependence of its resellers by implementing a set of rules and behaviors that, taken together, constituted an abuse by excessively and abnormally restricting the commercial freedom of the resellers.

This included supply difficulties, discriminatory treatment, unstable remuneration conditions for their activities (discounts and credit), and discretionary implementation of certain rules.

However, dependence, even if proven, does not presume abusive exploitation. A supplier who terminates direct commercial relations with a distributor without fault cannot be accused of abuse solely because of the distributor's inability to obtain supplies from the brand's wholesalers under the same conditions previously granted by the supplier.

2. b) Prohibition of Internal Dumping

Article L 420-5 of the Commercial Code states that "*offers or sales price practices to consumers that are abusively low compared to production, transformation, and marketing costs are prohibited if such offers or practices aim to or may have the effect of eliminating a company or one of its products from a market or preventing access to a market.*"

This targets a form of dumping different from selling below purchase price (discussed below) and that involves selling or offering to sell to consumers below cost price as defined by the text; it also requires an impact on market competition. This provision has remained largely without significant impact.

2 c) Other prohibited restrictive competition practices

Title IV of Book IV of the Commercial Code contains provisions of various origins, natures, and purposes. These provisions aim, in a certain way, to maintain competition.

Frequently modified, the current provisions of Title IV of Book IV of the Commercial Code (Articles L. 441-1 to L.444-1 A) govern "transparency, restrictive competition practices, and other prohibited practices" about general terms and conditions of sale, negotiation and formalization of the contractual relationship, invoicing and payment terms, unfair practices between businesses, as well as other specific provisions for agricultural and food products.

Although their goal is not exclusively of a competitive nature, it is worth noting the obligations regarding the communication of general terms of sale, the negotiation of prices and contractual terms provided by Articles L. 441-1 to L. 441-8 of the Commercial Code, as well as those related to the transparency of relationships between professionals, including Article L. 441-9 of the Commercial Code, which imposes numerous invoicing obligations on the supplier.

Regarding restrictive practices (Articles L. 442-1 to L. 442-8 of the Commercial Code), it includes : obtaining an unjustified advantage from an economic partner; creating a significant contractual disparity ; imposing logistical penalties; discriminatory practices; bad faith commercial negotiations preventing contract conclusion ; sudden termination of an established commercial relationship ; participating in the violation of the prohibition on out-of-network resale by an authorized distributor ; unilateral refusal or return of goods or deduction of the invoice amount ; imposing penalties disproportionate to the non-fulfillment of contractual obligations.

In general, even though they no longer explicitly refer to a dependence relationship, Articles L. 442-1 and following prohibit and civilly sanction abuses of dependence in the broad sense. They mainly aim to prohibit certain abuses of purchasing power, such as obtaining benefits without consideration, abusive delisting, abusive listing...

Additionally, Article L. 442-3 declares null and void clauses or contracts providing for any person engaged in production, distribution, or service activities the possibility of retroactively benefiting from discounts, rebates, or commercial cooperation agreements, benefiting from the most favored partner clause, and prohibiting the assignment of a contractual claim to third parties.

Regarding significant disparities (Article L. 442-1, I, 2°), these can, according to jurisprudence, result from the stipulation of an automatic termination clause and a payment deadline clause, the immutability of general purchasing conditions, or distortions between payment deadlines and discount conditions, or the stipulation of penalty clauses benefiting only one party.

Several decisions, rendered in cases initiated by the Minister of Economy, found significant disparities against major distribution groups noting that the centralization of commercial negotiations at the group level and their contractual strength made it practically impossible for suppliers or franchisees to truly negotiate framework contracts and led them to accept certain abusive clauses.

It has been ruled that refusing to supply a range of products to an exclusive distributor without objective reason is abusive, as all network members in the same situation must be treated equally to face competition under the same conditions.

Similarly, a clause allowing the grantor to sanction a malfunction over which the concessionaires have no control and are not necessarily responsible for, without allowing them to control the implementation conditions, appears unbalanced.

Also, Article L. 442-5 prohibits and sanctions "*the act of any merchant reselling or announcing the resale of a product at a price lower than its actual purchase price.*" The law targets what is commonly called "selling at a loss," and this provision has had to be modified several times due to circumventions by distributors.

To conclude, Article L. 442-6 of the Commercial Code prohibits "*the act of any person imposing, directly or indirectly, a minimum resale price for a product or good, the price of a service, or a commercial margin*". It necessitates a clear distinction between imposed and recommended prices and it aims to prevent a producer from restricting price competition among its distributors.

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CHAPTER V

ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN GERMANY

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CHAPTER V – ANTITRUST NATIONAL AUTHORITY AND CASE LAW ON VERTICAL AGREEMENTS IN GERMANY

1. Introduction, competences, civil law classification. - 2. Commercial agency agreement. – 3. Exclusive distribution agreement. - 4. Selective distribution. - 5. Franchising.

1. Introduction, competences, civil law classification

In the Federal Republic of Germany, there are in many administrative contexts two levels of government: the Federal Republic and the 16 federal states, which are granted extensive legislative powers under the German Constitution.

Accordingly, there are also “double” cartel authorities, namely the Federal Cartel Office, as a federal authority, and a total of 16 State Cartel Offices, each of which is assigned to a state ministry (so-called supreme state authorities, in German language “Oberste Landesbehörden”).

In addition to European law, in particular the Treaty on the Functioning of the European Union (TFEU), the common central law for antitrust matters in Germany is the Act against Restraints of Competition (in German language “Gesetz gegen Wettbewerbsbeschränkungen - **GWB**”). Pursuant to Section 48 GWB, the Federal Cartel Office is competent for antitrust matters, if the effect of the anti-competitive behaviour in question extends beyond the territory of a federal state and the responsibility of a state-antitrust authority is not explicitly mandated by law. Matters relating to the applicability of Articles 101 and 102 TFEU are generally assigned to the Federal Cartel Office (in German language “**Bundeskartellamt**”) (Section 50 (1) GWB).

In principle, the German courts can be involved in two different types of proceedings with issues relating to Art. 101 and 102 TFEU, namely indirectly in civil law disputes and as appellate courts in proceedings relating to antitrust activities. Regarding civil law disputes, the provision in Section 33 GWB is of particular importance, according to which the party who violates the GWB or Art. 101 or 102 TFEU (the so-called “infringer”) is obliged to remedy the impairment (damages) and, if there is a risk of repetition, is also obliged to cease and desist. An outstanding example in this context is a judgement by the 1st Cartel Senate of the Regional Court of Appeal (in German language “Oberlandesgericht” or “**OLG**”) of Frankfurt am Main,

which upheld claims by authorised dealers of a car manufacturer to refrain from terminating existing contracts all over the country, because the manufacturer was exerting undue pressure on the authorised dealers, to impose new contractual conditions⁹⁵.

The provisions of Articles 101 and 102 TFEU and the GWB also constitute so-called prohibition laws within the meaning of Section 134 of the German Civil Code (in German language “**BGB**”) with the consequence that agreements contradicting the antitrust regulations are null and void. This is therefore an important gateway for public law antitrust regulations into the civil law and therefore also into the distribution law.

Jurisdiction in antitrust matters is also specifically regulated: Section 73 (3) sentence 1 GWB stipulates that an appeal against an order issued by the antitrust authority must be filed with the Regional Court of Appeal, competent for the local antitrust authority. This rule leads to a strong concentration of case law on antitrust issues on a few OLG and on the Federal Court of Justice (in German language “Bundesgerichtshof” or “**BGH**”).

In North Rhine-Westphalia, for example, which is by far the most populous federal state, the OLG of Düsseldorf (the capital city of the state North Rhine-Westphalia) is competent for appeal proceedings against rulings by the Federal Cartel Office (in German language “**Landeskartellamt**”). Civil law disputes on antitrust issues are also generally assigned to a few Tribunals (in German language “Landgericht” or “**LG**”) and a few OLG - including the Düsseldorf Regional Court of Appeal - due to special regulations.

This particular structure of antitrust case law is one reason why, aside from the BGH only a few OLG, in particular the Düsseldorf Regional Court of Appeal, are known for their extensive antitrust case law.

The following comments highlight the antitrust case law of the German OLG and the BGH, as well as decisions of the Bundeskartellamt on vertical distribution agreements, in particular on commercial agency agreements, exclusive distribution agreements, selective distribution agreements and franchising. The Vertical Exemption Regulation (**Vertikal-GVO**) and the EU Regulation 2022/720 are taken into consideration.

⁹⁵ OLG Frankfurt am Main, judgement of 13.06.2023 – 11 U 14/23

2. Commercial agency agreement

From the German point of view distribution by a commercial agent is exactly the opposite of independent distribution, because with this type of distribution the supplier retains the greatest possible control over the products and services it offers. The supplier can impose requirements on its commercial agents, which would be clearly inadmissible towards all other customers. This is referred to as a commercial agent privilege⁹⁶. The Vertical Block Exemption Regulation (in German language **Vertikal-GVO**) now clarifies that this privilege only applies to genuine commercial agents, i.e. only to those who assume merely insignificant financial or commercial risks with regard to the contracts they conclude or negotiate on behalf of the principal⁹⁷⁻⁹⁸. It does not apply to sales partners who assume risks with regard to financing or make market-specific investments themselves. If a supplier makes requirements to such “commercial agents”, it may possibly commit an antitrust offence. In Germany selling agreements are mixed up, especially in the form of an agent as well as distribution contract.

For this in the past, Court and Authority decisions already paid considerable attention to the specific sales constellation in which a commercial agent works at the same time for the manufacturer and also as an independent dealer. The new version of the Vertikal-GVO now also covers commercial agents’ contracts in such a double condition, if the activities, risks and products within the commercial agency relationship can be objectively distinguished from the activity as non-commercial agent.

Yet in March 2017, the Düsseldorf OLG ruled that online marketplaces, price comparison tools, hotel and other booking portals on the internet were subject to the law on commercial agents⁹⁹, with the result that they could invoke the commercial agent privilege and impose price specifications to the respective sales partners. However, under the new Vertical Block Exemption Regulation, also in Germany, the commercial agent privilege no longer applies between providers and online platforms. The European legislator gave the time for the recent case law of the BGH on so-called best price clauses, when online platforms require their sales

⁹⁶ Thiede/Zaworski: Neue Regeln im Vertriebskartellrecht, NZG 2022, 1617, 1619

⁹⁷ Tribunal Dortmund, judgement of 28.06.2017 – 8 O 21/16

⁹⁸ Hopt, Handelsgesetzbuch, 41. Aufl. 2022, § 86 Rn. 38

⁹⁹ OLG Düsseldorf, 1. Kartellsenat, judgement of 4.12.2017 – VI-U (Kart) 5/17 - Expedia

partners not to offer more favourable prices than the online platform, even when selling their own products. Indeed, the German Supreme Federal Court recently (2021) rejected the application of the commercial agent privilege to such online platforms¹⁰⁰. The European Court of Justice (in German language “EUGH”) confirmed this case law in a very recent judgement¹⁰¹.

An earlier judgement of the Düsseldorf OLG, dated 2013, addressed possible antitrust implications in the sale of a commercial agency. This Regional Court of Appeal ruled that the principal is not obliged to continue supplying the commercial agent (on the basis of the antitrust prohibition of obstruction and discrimination), if the commercial agency is sold to a competitor of the principal¹⁰². According to the judges of that OLG, there is no unfair obstruction or discrimination in the sense of antitrust law, because the principal is not obliged to promote a competitor to its own detriment. The associated economic threat to the commercial agent or the transferee does not play a decisive role in this context.

3. Exclusive distribution agreement

With regard to the exclusive distribution agreement, there is currently no case law of particular interest, so that the following statements should represent the German antitrust law view on this distribution agreement in the light of the current Vertical Block Exemption Regulation.

An exclusive distribution agreement or exclusive distribution system refers to the exclusive allocation of certain territories or customer groups to individual independent dealers. Typically, the manufacturer builds up a network of sales partners who are each given one exclusive region, but are not allowed to actively approach customers in other regions¹⁰³. According to Art. 4 let. b Vertical Block Exemption Regulation, such exclusive distribution systems are generally discharged. However, consistency must be ensured when drafting the contract: the manufacturer can only prohibit active sales in those territories that it has reserved for itself or allocated exclusively to other dealers. Areas for which such allocations do not exist, may not

¹⁰⁰ BGH, judgement of 18.05.2021 – KVR 54/20

¹⁰¹ EuGH, judgement of 19.09.2024 – C-264/23

¹⁰² OLG Düsseldorf, judgement of 23.10.2013 – VI-U (Kart) 36/13

¹⁰³ Kohn/Eppelmann, Blick aus der Praxis auf die neue Vertikal-GVO; GRUR-Prax 2022, 458, 459

be part of the agreement. Otherwise, the clause would be invalid as a cartel offence. Additionally, only the restriction on active sales is exempt. This refers to the active approach of customers, for example through targeted advertising, or the offer in an online shop, in a language which is commonly used in the home region of another dealer. For example, a retailer assigned to Germany is prohibited from offering products for sale on a website in any language other than German. However, passive sales may not be prohibited. This refers to the case where a customer becomes aware of the retailer, without being specifically addressed and places an order, for example when they come across the retailer's online shop and place an order there, even though the shop is not tailored to their region. For example, a customer from Hungary orders the product on a German-language website with a .de domain. The restriction of passive sale to end consumers constitutes a cartel offence.

4. Selective distribution

According to the German understanding, a selective distribution system enables the manufacturer to prevent the distribution of non-branded products, by selling contract goods or services only to dealers who have been selected on the basis of defined characteristics and obliging these dealers not to sell the goods and services in question to dealers who are not authorised to distribute them¹⁰⁴.

Selective distribution is typically associated with products that have a strong brand identity, which is particularly evident in German economy with its renowned car manufacturers. Germany's BGH, has repeatedly faced antitrust issues related to the distribution of Porsche-branded vehicles.

In 2021, the BGH ruled that an absolute and unlimited supply ban imposed on authorised dealers relating to the customer group of companies, involved in customizing, modifying through component replacement, and enhancing the performance (so called “**tuning**”) of series vehicles of a particular brand, constituted a restriction of competition, that was considered infringing antitrust rules¹⁰⁵. The car manufacturer prohibited its authorised dealers from selling

¹⁰⁴ Thiede/Zaworski: Neue Regeln im Vertriebskartellrecht, NZG 2022, 1617, 1619

¹⁰⁵ BGH, judgement of 6.7.2021 – KZR 35/20 – Porsche Tuning II

new cars, spare parts and accessories to tuning companies and at the same time ensured their exclusion from sales through further restrictions on use and sale. Porsche was then sued by an association of companies that manufacture and sell tuning parts. The Tribunal of Stuttgart initially dismissed the action for injunctive relief pursuant to Section 33 GWB. The Stuttgart OLG substantially upheld the claim. The German Supreme Court confirmed the judgement of the Stuttgart Regional Court of Appeal and rejected a revision.

In the ruling, the BGH stated that the disputed clause in the distribution agreement restricts competition by generally excluding Porsche authorised dealers (the so-called Porsche Centres) from selling new Porsche vehicles for the purpose of presenting tuning products. Additionally, Porsche itself offers its own tuning programmes for its production vehicles, in competition with independent tuning companies, so that Porsche is also denying its own competitors the necessary supply of new vehicles. It is a legitimate sales objective to want to prevent the resale of **new** vehicles by tuning companies. However, this could also be done by obliging the requesting tuning companies to hold the new vehicles for an appropriate period of time.

In connection with selective distribution structures, the so-called price search engines on the Internet have also been subject of higher court (OLG) rulings. In 2017, the Regional Court of Appeal of Düsseldorf ruled that a general ban preventing authorized dealers in a selective distribution system from selling contractually bound goods on price comparison portals violates Art. 101 (1) TFEU¹⁰⁶. It constitutes a restriction of competition by object, because the prohibition is part of the set of rules governing the operations of the selective distribution system. However, this was not a necessary qualitative distribution restriction, but a customer restriction, aimed at restricting both intra-brand price competition among authorised dealers and inter-brand price competition across brands. According to the case law of the Düsseldorf OLG, also within the selective distribution by authorized dealers, broad best price clauses—whereby providers of online intermediary services prevent users from offering their goods or services more favourably through other channels—are not permitted. However, narrow best

¹⁰⁶ OLG Düsseldorf, judgement of 5.4.2017 – VI-Kart 13/15 (V)

price clauses that prohibit users of intermediary services from selling goods or services more favourably via their own channel, for example their own website, are (still) permitted¹⁰⁷.

In the context of selective distribution agreements, as already mentioned, goods and services with a particularly strong brand image were frequently the subject of legal disputes, because the manufacturers and suppliers were particularly concerned to ensure the standards that they considered necessary in the area of distribution, to protect their brand reputation.

In 2016, the Regional Court of Appeal of Frankfurt am Main referred a question to the European Court of Justice, asking whether a general prohibition on members of a selective distribution system, operating at the retail level, from using third-party platforms for online sales, recognizable to the public, could be compatible with Article 101(1) TFEU. The referral questioned whether such a ban could be justified regardless of whether the manufacturer's legitimate quality requirements were met in the specific case.

The background to this enquiry was a case in which a luxury cosmetics manufacturer took legal action against one of its authorised retailers, to cease and desist the distribution through the internet platform *amazon.de*. In the contractual agreements concluded between the parties, there was a supplementary agreement on internet sales stating that the retailer was not permitted to use a different name or involve a third-party company.

As indicated by the question posed, the Frankfurt OLG expressed concerns regarding the admissibility of such a clause under antitrust law, because it broadly prohibited the involvement of third-party companies, without allowing authorized retailers the opportunity to urge that these third parties involved must also comply with the manufacturer's quality standards.

The EUGH has basically confirmed the contractual clause in question¹⁰⁸: Article 101(1) TFEU should be interpreted as not precluding a contractual clause, which prohibits authorised distributors of a selective distribution system for luxury goods, which is essentially aimed at ensuring the luxury image of those goods, from engaging third-party platforms for the sale of the contractual goods online, in a manner which is recognisable to the outside world, if that clause is intended to preserve the luxury image of the goods, is uniformly defined and is applied

¹⁰⁷ OLG Düsseldorf judgement of 4.6.2019 – VI-Kart 2/16 (V)

¹⁰⁸ EuGH, judgement of 6.12.2017 – C-230/16

without discrimination. According to the Court of Justice of the European Union, the online sale of luxury goods - via platforms that are not part of the selective distribution system, when the supplier does not have the possibility to verify the conditions under which his goods are sold - poses a risk of degrading the presentation of these products on the internet, which could undermine their luxury image and, consequently, their essence. To support its view that also the obligation to enforce the provider's quality standards against the third-party company is insufficient to protect the provider's interests, the Court refers to the fact that there is no contractual relationship between the provider and the third-party platforms that would allow the provider to enforce compliance with the quality requirements. Therefore, the prohibition outlined in the clause is fundamentally compatible with the regulation in Article 101(1) TFEU.

5. Franchising

In the author's opinion, the primary focus of German case law on franchise agreements has been, and continues to be, the commitment to purchase prices. Franchisors often seek to dictate the sales prices of goods to franchisees, even though the franchisees typically bear the economic risk of their business activities independently.

Already in 1999, the German Supreme Court ruled that the prohibition of price in the relationship between franchisor and franchisee applies in any case if the franchisee bears the economic risk of his own company. Even in the “simple” case of a manufacturer’s price recommendation, known as the recommended retail price (in German language “UVP”), it must be assessed whether this constitutes an attempt to circumvent the prohibition on price maintenance. In this context, the entire content of the agreements made between the parties involved must be taken into account¹⁰⁹.

In fact, in Germany the so-called “resale second hand price maintenance” is a “typical” vertical cartel offence. The manufacturer may dictate its resale prices to the retailer only in certain exceptional cases. A temporary price maintenance may, for example, be a necessary promotional measure for the market launch of a product. It may also be necessary to set a minimum price, in order to protect the brand image from so-called bait-and-switch offers. This

¹⁰⁹ BGH, judgement of 2.2.1999 – KZR 11-97

refers to a retailer selling certain goods below wholesale price in order to attract customers to his shop and encourage them to make additional purchases. In such a case, the image of a product could suffer so much, that setting a minimum price is justified. Of course, the exceptional cases mentioned are extremely rare and the concrete risk of a cartel offence is ever-present¹¹⁰.

At this point, however, it should be noted that the current legal situation in Germany allows a so-called “*dual pricing system*”, whereby the manufacturer supplies the retailer at different conditions, depending on whether the retailer intends the goods for online or offline distribution. This does not change the fundamental antitrust approach of prohibiting price fixing. This does not only mean that the corresponding clauses are invalid, but also that other contractual agreements, which indirectly affect the pricing of the franchisee, have been the focus of court rulings in Germany in this context.

In 2018, the Tribunal of Munich I ruled that advertising measures by the franchisor, which effectively forced franchisees to offer their goods at the advertised prices, constituted restrictive practices under § 1 GWB¹¹¹. The resulting claim for damages by the franchisee was calculated based on the profit that could have been achieved from the sale of the advertised products without the pricing constraint. In its ruling, the Tribunal also stated that the franchisor inadequately pointed out in the commercial advertisements (which were objected to by the franchisee) that not all branches participated in the advertised price promotions. For that reason, the franchisor violated its obligations under the franchise agreement and caused a prohibited restriction of competition under §§ 1, 33 GWB.

However, the mentioned ruling of Munich was overturned by appeal by the Munich OLG¹¹². In motivating its decision, the Regional Court of Appeal stated that the franchisor's advertising with low prices was admitted, because it was a so-called maximum price fixing, which was permitted under the contractual agreements. The judges of the OLG confirmed in principle that the commercials (which were objected to by the franchisees) did not contain a clear indication that not all branches were participating in the advertising campaign. However, the “obligation”

¹¹⁰ Kohm/Eppelmann: Blick aus der Praxis auf die neue Vertikal-GVO, GRUR-Prax 2022, 458, 459, 460

¹¹¹ LG München I – Partial judgement of – 37 O 10335/15

¹¹² OLG München – Judgement of 7.11.2019 – 29 U 4165/18 Kart

of all franchisees to offer the advertised prices associated with the commercials was permissible because this only involved a commitment with regard to the highest price to be charged. The franchisees were still free to offer lower prices, meaning no prohibited restriction of competition had occurred.

Another interesting topic in the context of franchising are the so-called “*supply clauses*”. These are provisions in franchise agreements that require franchisees to purchase goods exclusively from the franchisor.

In its decision of 8 May 2006, the Bundeskartellamt determined, among other things, that a franchisor (in this specific case Praktiker Baumärkte GmbH) had unfairly hindered certain franchisees by imposing a 100 per cent purchasing obligation on these franchisees with regard to the system-typical product line and - at the same time - failing to pass on to the respective franchisees the purchasing advantages obtained for franchisees from Praktiker Baumärkte GmbH, which had accrued for deliveries for franchisees at Praktiker Baumärkte GmbH¹¹³. The Federal Cartel Office assessed that the obligation to purchase, at least for the main goods (“system-typical”), is not objectionable in itself; rather, it is a typical element of a franchise agreement. However, the franchisor must pass on the economic advantages that it receives in purchasing, to the respective franchisees, otherwise it would discriminate against individual franchisees and unfairly hinder competition. The German Supreme Court did not follow the view of the Federal Cartel Office. It ruled that franchisees are not unfairly hindered by the fact that the franchisor, who acts as a wholesaler to them, is not obliged under the terms of the franchising contract to pass on discounts, bonuses, rebates and similar purchasing advantages to the individual franchisees¹¹⁴. This decision is practically relevant in two ways: on the one hand, there is no obligation to pass on economic advantages in purchasing from the franchisor to the franchisees. In addition, the BGH has clarified that even the different treatment of franchisees is allowed, so that there is neither an unreasonable obstruction nor discrimination.

¹¹³ Bundeskartellamt, decision of 08.05.2006 – B 9-149/04

¹¹⁴ BGH, decision of 11.11.2008 – KVR 17/08

The mentioned are some of the best-known cases of application of the regulations under discussion. In Germany, the jurisprudence is often so well established that it does not change for several years, thus giving (for better or worse?!) a certainty of application that is not found in all jurisdictions.

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CHAPTER VI

COMPETITION AUTHORITY AND COMPETITION LAW RELATING TO VERTICAL AGREEMENTS IN THE UNITED KINGDOM

by Rocco Franco

CHAPTER VI – COMPETITION AUTHORITY AND COMPETITION LAW RELATING TO VERTICAL AGREEMENTS IN THE UNITED KINGDOM

1. Introduction. – 2. Competition and Markets Authority. - 3. Exemptions. – 4. Sanctions. - 5. Procedure and Enforcement. - 6. The divergence of UK competition law from EU competition law. - 7. Agency agreements. - 8. Distribution agreements. - 9. Single branding. - 10. Exclusive distribution agreements. - 11. Selective distribution agreements. - 12. Franchise agreements. - 13. Vertical agreements in the online platform economy. – 14. Conclusion.

1. Introduction

A vertical agreement is entered between two or more businesses operating at different production or distribution chain market levels (including supplying raw materials, manufacturing, wholesaling, and retailing), such as an agency, a distribution or a franchise agreement.

Although vertical agreements may interfere with competition between retailers selling the same brand, they may also stimulate competition, providing more comprehensive benefits to end-consumers.

However, where an agreement is one of several similar agreements having a cumulative effect on the market (a so-called “network effect”), vertical agreements can cause competition problems.

UK competition law provides a specific definition for assessing vertical agreements. Sect. 3(2) of The Competition Act 1988 (Vertical Agreements Block Exemption Order) 2022 (SI 2022/516) (“**VABEO**”) defines vertical agreements as follows:

“agreements or concerted practices entered into between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice concerned, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell, or resell certain goods or services”.

The VABEO entered into force in the United Kingdom at the same time as the Vertical Block Exemption Regulation 720/2022 (replacing Commission Regulation 330/2010) and its accompanying Guidelines on Vertical Restraints (2022 Guidelines) adopted by the European Commission on 1 June 2022. The Competition & Markets Authority’s Guidance describing the application of VABEO (“**CMA’s VABEO Guidance**”) was published on 12 July 2022.

The main EU competition rules (Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)) continue to apply post-Brexit only to agreements or conduct of UK companies that have an effect within the EU. Otherwise, since 1 January 2021, EU competition law is no longer in force in the UK as a result of:

- (a) the Competition (Amendment etc.) (EU Exit) Regulations 2019 revoking Articles 101 and 102 of the TFEU and the EU Merger Regulation (and related EU regulations and European Commission decisions) and making amendments to the Competition Act and Enterprise Act (and other primary and secondary legislation) to reflect this revocation; and
- (b) the Competition Act 1998 was amended to remove provisions empowering the CMA and sector regulators to investigate and enforce EU competition law and remove provisions for reciprocal investigation cooperation: a new section, Sect. 60A of the Competition Act 1998¹¹⁵ provides that competition regulators and UK courts will continue to be obligated to

¹¹⁵ **60A Certain principles, etc to be considered or applied from IP completion day**

(1) This section applies when one of the following persons determines a question arising under this Part in relation to competition within the United Kingdom—

- (a) a court or tribunal;
- (b) the CMA;
- (c) a person acting on behalf of the CMA in connection with a matter arising under this Part.

(2) The person must act (so far as is compatible with the provisions of this Part) with a view to securing that there is no inconsistency between—

- (a) the principles that it applies, and the decision that it reaches, in determining the question, and
- (b) the principles laid down by the Treaty on the Functioning of the European Union and the European Court before IP completion day, and any relevant decision made by that Court before IP completion day, so far as applicable immediately before IP completion day in determining any corresponding question arising in EU law, subject to subsections (4) to (7).

(3) The person must, in addition, have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn.

(4) Subsection (2) does not require the person to secure that there is no inconsistency with a principle or decision referred to in subsection (2)(b) so far as the principle or decision is excluded from the law of England and Wales, Scotland and Northern Ireland on or after IP completion day.

ensure no inconsistency with pre-Brexit EU competition case law unless appropriate in specific circumstances. In addition, existing EU block exemption regulations have been copied into UK law as retained exemptions. Unlike other provisions of retained EU law, it is not only the Supreme Court and Court of Appeal that can depart from the pre-2021 case law of the EU Courts regarding Articles 101 and 102 TFEU, but also any UK court or competition authority can do so.

- (c) The Competition (Amendment, etc.) (EU Exit) Regulations 2020 amend the above 2019 Regulations to, in particular, make transitional arrangements in relation to antitrust and merger cases initiated by the Commission during the transition period over which the European Commission will continue to have competence. They also make provisions for cases in which responsibility for the Commission's monitoring and enforcement of remedies is transferred to the UK competition authorities to enable the CMA and concurrent regulators to monitor and enforce transferred EU antitrust commitments, antitrust directions and merger remedies.

(5) For the purposes of subsection (4), a principle or decision is to be treated as not excluded from the law of England and Wales, Scotland and Northern Ireland if it is excluded only by virtue of an exclusion or revocation in the Competition (Amendment etc.) (EU Exit) Regulations 2019.

(6) Subsection (2) does not apply so far as the person is bound by a principle laid down by, or a decision of, a court or tribunal in England and Wales, Scotland or Northern Ireland that requires the person to act otherwise.

(7) Subsection (2) does not apply if the person thinks that it is appropriate to act otherwise in the light of one or more of the following—

(a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before IP completion day;

(b) differences between markets in the United Kingdom and markets in the European Union;

(c) developments in forms of economic activity since the time when the principle or decision referred to in subsection (2)(b) was laid down or made;

(d) generally accepted principles of competition analysis or the generally accepted application of such principles;

(e) a principle laid down, or decision made, by the European Court on or after IP completion day;

(f) the particular circumstances under consideration.

(8) In subsection (2)(b), the reference to principles laid down before IP completion day is a reference to such principles as they have effect in EU law immediately before IP completion day, disregarding the effect of principles laid down, and decisions made, by the European Court on or after IP completion day.

(9) In this section, references to a decision of the European Court or the European Commission include a decision as to—

(a) the interpretation of a provision of EU law;

(b) the civil liability of an undertaking for harm caused by its infringement of EU law

The EU-UK Trade and Co-operation Agreement of 24 December 2020 (“TCA”) contains provisions requiring the UK to have and maintain a competition regime (dealing, *inter alia*, with anti-competitive agreements and practices) that meets certain principles. It also contains provisions for developing arrangements for future cooperation between the EU and the UK authorities.

Thus, the final effect of the above legislation is that from the end of the transition period (i.e. from 31 December 2020):

- (a) UK companies doing business in the EU are still subject to the application of EU competition law, enforced by the European Commission;
- (b) the CMA has jurisdiction to investigate anti-competitive behaviour that affects the UK even if the Commission begins an investigation into the same behaviour. Companies are potentially subject to parallel EU competition and CMA proceedings regarding allegedly anti-competitive behaviour, such as agreements and cartels that affect both the UK and the EU. However, the CMA only investigates suspected infringements of Chapter I prohibition under the Competition Act 1998, not Article 101 of the TFEU. The same applies regarding abuses of dominance under Chapter II prohibition and Article 102 of the TFEU.

The Chapter I prohibition contained in the Competition Act 1998, similar to Article 101 of the TFEU, prohibits agreements between businesses that may affect trade in the UK and which have the object or effect of restricting competition within the UK or a part of the UK. Breach of the Chapter I prohibition means an agreement is void, and the parties may be liable to substantial fines. In addition, third parties whom such prohibited agreements have harmed may have a claim for damages before the courts.

The Chapter I prohibition does not apply to purely unilateral conduct; in such cases, there is no agreement or concerted practice between the parties. However, the definition of “agreement” in Chapter I is pretty broad and catches anything that expresses the parties’ intention to conduct themselves on the market in a specific way, including an oral understanding or a tacit “concurrence of wills” between the parties.

2. Competition and Markets Authority

The Competition and Markets Authority (“CMA”) is the principal competition authority in the United Kingdom. It is an independent non-ministerial department of the UK Government. The CMA is responsible for all aspects of competition cases, looking into anti-competitive behaviour by firms, market investigations, and merger reviews. It also has the power to enforce consumer laws to protect consumers. The CMA also advises the UK Government on competition and consumer policy issues.

The CMA was established on 1 October 2013 by the Enterprise and Regulatory Reform Act 2013 (“ERRA”)¹¹⁶ and began its role and authority on 1 April 2014. The CMA results from the merger (and abolition) of the Competition Commission and Office of Fair Trading. The CMA’s principal statutory duty, as set out in the Enterprise and Regulatory Reform Act 2013, is the promotion of competition for the benefit of consumers¹¹⁷.

¹¹⁶ Enterprise and Regulatory Reform Act 2013, Schedule 4, THE COMPETITION AND MARKETS AUTHORITY, Part 1, General (membership) paragraph 1:

- (1) The CMA is to consist of—
- (a) a person appointed by the Secretary of State to chair the CMA and the CMA Board (the “chair”), and
 - (b) other persons appointed by the Secretary of State as follows—
 - (i) persons appointed to membership of the CMA Board (see Part 2);
 - (ii) persons appointed to membership of the CMA panel (see Part 3);
 - (iii) persons appointed to the CMA Board and the CMA panel membership.
 - (iv) a person (the “OIM panel chair”) appointed to chair the Office for the Internal Market panel and to membership of the CMA Board;
 - (v) other persons appointed to membership of the Office for the Internal Market panel (“the OIM panel”) (see Part 3A).
- (2) The Secretary of State must consult the chair before making an appointment under sub-paragraph (1)(b).

¹¹⁷ Enterprise and Regulatory Reform Act 2013, Chapter 24, Part 3 THE COMPETITION AND MARKETS AUTHORITY, Section 25 (The Competition and Markets Authority):

- (1) There is to be a corporate body known as the Competition and Markets Authority.
- (2) In this Part, that body is referred to as “the CMA”.
- (3) The CMA must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers.
- (4) Schedule 4 (which makes provisions about the CMA) has an effect.

CMA Board

The CMA Board is generally responsible for exercising the CMA’s statutory duties and functions and ensuring that the CMA is governed effectively. The Secretary of State appoints the Board members (including the Chair), and there is a minimum number of five members. Currently, there are ten Board members¹¹⁸. Under the ERRA, the Board can delegate functions to sub-committees and has formed several sub-committees. The term of appointment of CMA Board members is five years. Only half of the board members may serve as CMA employees.

The CMA Board established “rules of procedure” that, together with relevant statutory provisions, provide for the responsibilities of the Board, matters reserved for the Board, the operation of various committees, and the roles of each Board member.

CMA Panel

The CMA consists of a set of experts independent from CMA staff. The Panel currently consists of 33 members appointed by the Chair with the Board’s consent in open competition based on their experience and ability in competition law, finance, and economics. The Panel is mainly responsible for market investigations, merger inquiries, and regulatory references and appeals. The CMA Panel Chair leads the Panel. Panel members are appointed for a term of eight years.

Chair and Chief Executive

The CMA Chair is responsible for leading the Board and setting the CMA’s overall strategy.

The CMA Chief Executive is responsible for the day-to-day running of the CMA and is accountable to Parliament for properly using public funds. The Secretary of State also appoints the Chief Executive for a five-year term but, unlike the Chair, may be reappointed.

The CMA has published guidance on the legal framework and its powers and processes for antitrust and cartel enforcement from 1 January 2021. The guidance focuses on the rules and procedures that apply to cases with an EU cross-border element under the competition law prohibitions after 31 December 2020.¹¹⁹

¹¹⁸ <https://www.gov.uk/government/publications/cma-structure>

¹¹⁹ In relation to competition law enforcement the guidance covers:

(a) Cases initiated by the European Commission before 31 December 2020 (Continued Competence Cases).

Chapter I of the Competition Act 1998 prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and which affect trade within the United Kingdom. It considers the definitions of each of these elements and guides exclusions to the prohibition and infringement risks.

The Chapter I prohibition deals with anti-competitive agreements. The prohibition's wording is similar to the prohibition in Article 101 of the Treaty on the Functioning of the European Union (TFEU).

As previously mentioned, an agreement caught by the Chapter I prohibition is automatically void and unenforceable. However, if the anti-competitive restrictions can be severed from the rest of the agreement, the unenforceability only affects the anti-competitive restrictions and not the whole agreement.

3. Exemptions

Under UK competition law, there is a specific framework for assessing vertical agreements. Most vertical agreements benefit from the automatic exemption provided by the VABEO, which generally means they fall outside the UK prohibitions on anti-competitive agreements. Additionally, there is limited immunity from fines for what is known as a "small agreement." This term refers to agreements between parties whose combined group turnovers in the last financial year preceding the infringement did not exceed £20 million¹²⁰. However, this immunity does not extend to price-fixing arrangements.

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- (b) The CMA's enforcement in "Continued Competence Cases".
 - (c) Live CMA investigations (those opened by the CMA with an EU aspect prior to 31 December 2020).
 - (d) New CMA investigations after 31 December 2020.
 - (e) Transfer of EU antitrust commitments and remedies.
 - (f) Consideration of EU law principles under section 60A of the Competition Act 1998.
 - (g) The continued application of other domestic legislation and procedure, including the CMA's leniency regime and competition director disqualification orders.
 - (h) Retained EU law, covering the status of EU block exemptions that have been retained in UK law.
 - (i) The application of other guidance relevant to antitrust cases.

¹²⁰ Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262)

While many franchises and agency agreements may qualify as small agreements and, therefore, avoid financial penalties, if they are deemed “prohibited agreements”, they will not be exempt from other enforcement actions by the CMA or third-party legal actions for damages in court. Furthermore, the CMA can withdraw immunity from financial penalties in some instances.

An agreement falling within the Chapter I prohibition may, however, be exempt from the prohibition if it gives rise to benefits that outweigh its anti-competitive effects.

It is worth noting that businesses can no longer notify authorities for a preliminary ruling on agreements and, therefore, must assess whether the criteria for the exemption apply.

4. Sanctions

An infringement of the UK competition rules set out in Chapter I may result in the following:

- a) penalties of up to 10% of the worldwide turnover of the undertaking for the previous business year;
- b) a third-party damages claim for loss caused by the infringement in question;
- c) an injunction to stop the infringing activity;
- d) unenforceability of part (or whole) of the agreement; and
- e) disqualification of directors.

Cases before 31 December 2020

Section 60A applies to all cases from 31 December 2020 (“exit day”) onwards; therefore, it applies to any CMA or concurrent regulator investigations or UK court cases that were ‘live’ on 31 December 2020 and about facts pre-dating that date.

Under section 60A, the general principle remains that the CMA and the UK courts must act to secure that there is no inconsistency between the principles that they apply and the decisions they reach in determining a matter arising under Part 1 of the Competition Act 1998 about competition within the UK and the principles laid down by the TFEU and the CJEU before the end of the transition period, and any relevant decision made by the CJEU before the end of the transition period, so far as applicable immediately before the end of the transition period in determining any corresponding question arising in EU law. In determining any such matter,

they must also have regard to any relevant decision or statement of the Commission made before the end of the transition period and not withdrawn.

Section 60A then allows the CMA and the UK courts to depart from the principles of the TFEU and CJEU case law existing before the end of the Brexit transition period where they consider appropriate to do so, considering one of the following prescribed factors:

- (a) the differences between Chapter I prohibition and the corresponding provisions of EU law as those provisions of EU law had effect immediately before exit day;
- (b) differences between the relevant market in the UK and the same market in the EU;
- (c) developments in forms of economic activity since the principle of the TFEU or case law was laid down or made;
- (d) generally accepted competition analysis principles or the application of such principles;
- (e) a principle laid down, or decision made, by the CJEU on or after exit day;
- (f) the peculiarity of the circumstances under consideration.

In addition, the CMA and the UK courts will not be under an obligation to secure that there is no inconsistency between the principles they apply or decisions they reach and TFEU or CJEU principles or decisions pre-dating the end of the transition period where they are bound by a principle or decision of a court or tribunal in the United Kingdom that requires them to act otherwise.

5. Procedure and Enforcement

The CMA has adopted a series of guidelines issued by the previous competent authority, the Office of Fair Trading, on interpreting and applying various substantive and procedural aspects of the Competition Act 1998, including the prohibition in Chapter I.

The CMA also issued new guidance and rules on various procedural topics. These included rules of procedure contained in the Competition and Markets Authority Competition Act 1998 Rules (SI 2014/458) (“CMA Rules”). These explained the CMA’s procedures for investigating suspected Chapter I prohibitions.

CMA Guidance on the CMA's investigation procedures in Competition Act 1998 cases took effect in April 2014 and was last updated in January 2022. This guidance outlines the CMA's procedures and explains how CMA conducts Competition Act investigations.

6. The divergence of UK competition law from EU competition law

Although, as already stated, the Chapter I prohibition contained in the Competition Act 1998 is similar to Article 101 of TFEU for the assessment of vertical agreements (for example, in relation to agency, the non-equivalence principle in selective distribution and resale price maintenance). There are, however, differences and points of divergence between the European Commission Regulation 2022/720 and the UK's VABEO (SI 2022/516).

Vertical agreements intended to be implemented in or have effects in the EU and the UK should be drafted bearing the obligations under both regimes in mind.

The relevant topics are the following:

(1) Restrictions as to territories and customers

The definitions for active and passive sales are similar under the EU and the UK competition regimes. However, UK competition law clarifies explicitly that the distributors' general advertising or promotion reaching customers in a specific group or territory will be considered active selling to that group or territory, even if it also reaches other customers.

(2) Shared exclusivity

Under Articles 1(1)(h) and 4(b)(i) of the EU Regulation 2022/720, suppliers can appoint up to five exclusive distributors for any given territory or customer group.

The UK VABEO does not limit shared exclusivity to a specific number of suppliers. Still, it states that suppliers should restrict the number of exclusive distributors to "*one or a limited number*", determined "*in proportion to the allocated geographical area or customer group in such a way as to preserve the incentive of the distributors to invest in promoting and selling the*

supplier's goods or services, while providing the supplier with sufficient flexibility to design its distribution system". In addition, the CMA's VABEO Guidance states that exclusive distribution should not be used to shield many distributors from competition outside the exclusive geographical area. The effect allows suppliers to appoint more than five distributors in a given territory or customer group in the UK.

(3) Dual distribution

Dual distribution is a vital strategy where a supplier actively engages both upstream and in the retail market. This means the supplier sells directly to customers and uses distribution channels, effectively competing with independent distributors at the downstream level.

Dual distribution is explicitly covered by the block exemption under Regulation 2022/720 and the VABEO. This framework allows importers or wholesalers to operate upstream in a dual distribution context, provided they do not compete with the distributor from whom they buy the products.

It is essential to recognise that any information exchanged between a supplier and a buyer in a dual distribution situation—when it does not qualify for the exemption under Section 3(1) of the VABEO—must be assessed on a case-by-case basis according to the Chapter I prohibition. Article 2(5) of Regulation 2022/720 makes it clear that the block exemption excludes any information exchanges unrelated to the implementation of the vertical agreement or unnecessary for purposes of the production or distribution of contract goods or services.

The CMA Guidance emphasises that the block exemption solely applies to genuine vertical restraints, explicitly excluding horizontal agreements among competing entities. In non-reciprocal vertical agreements between competing firms, the advantage of the block exemption includes the necessary exchange of information for implementing that agreement. However, the CMA Guidance does not impose an additional requirement that such exchanges result in improved production or distribution of the contracted goods or services.

(4) Tacit renewal of non-compete obligations

The EU 2022 Guidelines provide that non-compete obligations that are tacitly renewable beyond five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the agreement with a reasonable notice period and at a reasonable cost.

In the UK, non-compete clauses that are tacitly renewable beyond five years are not covered by the block exemption as they are deemed to be concluded indefinitely. They are considered “excluded restrictions” and must be assessed individually under the Chapter I prohibition.

(5) Online Intermediation Services

In the EU, contracts relating to the supply of online intermediation services are not covered by the block exemption in Regulation 2022/720 if the online platform has a hybrid function (as a dual distributor of the relevant products), and such contracts or agreements would need to be assessed individually under Article 101 of the TFEU.

In the UK, contracts relating to the supply of online intermediation services are, if criteria are met, covered by the VABEO block exemption, irrespective of whether the supplier of online intermediation services is a hybrid platform.

(6) Parity clauses

Parity obligations (or Most Favoured Nation clauses (MFNs)) require one party to agree to offer the other party goods or services on terms no worse than those offered to its customers or third parties. EU and UK approaches to parity clauses have diverged significantly.

In the EU and the UK, the block exemptions are available for narrow retail parity clauses (relating only to direct sales channels) and “non-retail” parity obligations, which relate to the conditions under which manufacturers, wholesalers or retailers purchase goods or services as inputs.

However, Regulation 2022/720 has removed the benefit of the block exemption contained in Regulation 330/2010 for across-platform retail parity obligations imposed by online

intermediation services suppliers, namely direct or indirect obligations that cause buyers of such services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services or on their websites (so-called “wide online parity clauses”). Instead, this parity obligation is categorised as an “excluded restriction, ” meaning it must be assessed individually under Article 101 of the TFEU.

The UK takes a much stricter approach. VABEO categorises all broad retail parity clauses (online or offline) as hardcore restrictions. However, as a result of the judgment of the Competition Appeal Tribunal published on 8 August 2022 in the case *1380/1/12/21 BGL (Holdings) Limited & Others v Competition and Markets Authority*, it must not be taken for granted that the Competition Appeal Tribunal would accept the CMA’s position that broad retail parity clauses should be assumed to have the object of restricting competition, notwithstanding the relevant provisions in the VABEO.¹²¹

(7) Combining exclusive and selective distribution

According to Regulation 2022/720 in the EU, combining exclusive and selective distribution systems within the same EU territory does not qualify for the block exemption. However, suppliers can combine selective and exclusive distribution in different territories across the EU. In the UK, it is permissible to combine exclusive distribution with selective distribution in the same territory as long as they operate at different levels of the distribution chain. For instance, exclusive distribution can occur at the wholesale level, while selective distribution occurs at the retail level.

¹²¹ In the case *1380/1/12/21 BGL (Holdings) Limited & Others v Competition and Markets Authority* the Competition Appeal Tribunal (CAT) annulled the CMA’s decision to impose a fine of £17.9 million on BGL (Holdings) Ltd and a number of its subsidiaries that operated the price comparison website Compare The Market, in relation to their use of wide retail price parity clauses in contracts entered into with home insurance providers for the advertising and sale of their products through Compare The Market. The CAT found that the CMA had not defined the relevant markets correctly and that there was no reliable evidence to conclude that the existence of the price parity clauses had any adverse effect on either prices quoted by home insurers or the commissions charged by price comparison websites.

(8) Duration

Whilst Regulation 2022/720 will expire on 31 May 2034, the UK VABEO will expire much earlier, on 1 June 2028.

(9) Agreements later exceeding the market share threshold

Under both Regulation 2022/720 and the VABEO, if a market share rises above 30%, then an agreement will continue to benefit from the exemption for two calendar years after the year in which the market share threshold is exceeded. However, if the market share exceeds 35% in the UK, the exemption will only apply for one year after exceeding the threshold.

7. Agency agreements

As seen at the outset of this article, Chapter I prohibition only applies to agreements between two or more independent undertakings. Therefore, it does not apply to an agency agreement if the commercial agent bears no (or very little) financial or commercial risk about the agreement in question. The *ratio* is that the agent is not treated as an independent undertaking of the principal and forms part of the same economic unit as its principal.

Under the CMA's VABEO Guidance, for an agency agreement to fall outside the prohibition of Chapter I, a commercial agent must not bear any of the following risks:

- (a) contract-specific risks which are directly related to the contracts concluded and negotiated by the agent on behalf of the principal;
- (b) risks related to market-specific investments;
- (c) risks related to other activities undertaken on the identical product market by the agent, to the extent that the principal requires these activities to be taken as part of the agency relationship by the agent at its own risk and not on behalf of the principal.

As a result of the above, an agency agreement will be outside the scope of the Chapter I prohibition where:

- (a) the agent does not acquire the property in the goods bought or sold under the agency agreement and does not supply the services purchased under the agency agreement;

- (b) the agent does not contribute to the costs relating to the supply or purchase of the contract products, including the costs of transporting the goods;
- (c) the agent does not maintain at its own cost or risk stocks of the contract goods, including the cost of financing the stock and the cost of lost stock and can return unsold goods to the principal without charge;
- (d) the agent does not take responsibility for the customers' non-performance of the contract, except for the loss of the agent's commission;
- (e) the agent does not assume responsibility towards customers of other third parties for loss or damage resulting from the supply of the contract products unless the agent is at fault;
- (f) the agent is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities explicitly relating to the contract products;
- (g) the agent does not make market-specific investments in equipment, premises or training of personnel;
- (h) the agent does not undertake other activities within the same product market required by the principal under the agency relationship;
- (i) the agent does not undertake responsibility towards third parties for damage caused to the product sold;
- (j) the agent does not take responsibility for other types of financial risks, such as the risk of incurring costs due to deferred payment from credit cards or the risk of customer insolvency;
- (k) the agent does not make market-specific investments in customer support services, such as after-sales and technical support, to the extent that these services affect the relationship between the agent and the principal in that market¹²².

An agency agreement may fall under Chapter I prohibition in consideration of its contractual provisions if the agent incurs one or more of the risks listed above, as the agent will be treated as an independent undertaking and the agreement between the agent and principal will be

¹²² Paragraph 4.14 CMA's VABEO Guidance

subject to the Chapter I prohibition as any other vertical agreement. The assessment will have to be made on a case-by-case basis.

8. Distribution agreements

In principle, Chapter I prohibition does not apply and VABEO applies to distribution agreements if:

- (a) the distributor does not compete with the supplier in the manufacturing of the products;
- (b) the market shares of the supplier and distributor combined are below the 30% threshold;
and
- (c) the distribution agreement does not contain hardcore restrictions.

Under paragraph 10.17 of the CMA's VABEO Guidance, the CMA will undertake a complete competition analysis in assessing cases above the market share threshold of 30%. While other factors may be taken into account on a case-by-case basis, the following factors are particularly relevant to establishing whether a vertical agreement brings about an appreciable restriction of competition under the Chapter I prohibition:

- (a) nature of the agreement;
- (b) the market position of the parties;
- (c) market position of competitors (upstream and downstream);
- (d) market position of buyers of the contract products;
- (e) entry barriers;
- (f) level of trade;
- (g) nature of the product;
- (h) dynamics of the market.

Hardcore restrictions are those provisions whose inclusion in a distribution agreement determines that the block exemption in UK competition law cannot apply. The following are considered hardcore restrictions in a distribution agreement:

- (a) price-fixing or resale price maintenance (RPM). This provision has as its direct or indirect objective to impose a fixed or a minimum resale price

on the buyer, for which an exemption under Section 9 of VABEO does not apply.

- (b) territorial restrictions and customer exclusivity. A restriction on the distributor's freedom to decide to whom and in which territories to sell the products.
- (c) cross supplier between distributors within a selective distribution system. A supplier cannot impose an exclusive purchase commitment on its distributors or territorial resale restrictions regarding their sales to other distributors of the same network.
- (d) resales by members of a selective distribution system. Whilst suppliers may restrict a distributor in a selective distribution network in respect of the location of its business premises or from making sales in a territory reserved to an exclusive distributor, they cannot restrict their distributors in a selective distribution network to as to the users to whom they may sell (including online sales).
- (e) access to spare parts. Suppliers cannot be restricted from selling spare parts to end-users, independent repairers, or other service providers.
- (f) broad retail parity clause. Those provisions prohibit agreeing that prices of goods or services offered through a sale channel must be equal to those applied to another sale channel.

Consideration must now be given to the different types of distribution arrangements and their contractual provisions, which, given their specific peculiarities, may fall under Chapter I prohibition.

9. Single branding

Under the heading of 'single branding' fall those distribution agreements which have, as their central element, a provision whereby the distributor is obliged or induced to concentrate its orders for a particular type of product with one supplier. That requirement can be found amongst others in non-compete and quantity-forcing obligations imposed on the distributor.

Above the market share threshold or beyond the time limit of five years, single branding agreements are no longer covered by the block exemption and, therefore, must be individually assessed.

10. Exclusive distribution agreements

“Exclusive distribution system” means a distribution system where the supplier allocates a geographical area or customer group exclusively to itself or to one or a limited number of buyers, determined in proportion to the assigned geographical area or customer group in such a way as secure specific volumes of business that preserve their investment efforts, and restricts other buyers from actively selling into the exclusive geographical area or to the exclusive customer group¹²³.

In an exclusive distribution system, the main possible competition risks are market partitioning, which may facilitate price discrimination, and reduced intra-brand competition, particularly in sole exclusivity. When most, all, or the strongest of the suppliers active in a market operate an exclusive distribution system, this may also soften inter-brand competition and facilitate collusion, both at the supplier and the distribution level. Lastly, exclusive distribution may lead to the foreclosure of other distributors, thereby reducing intra-brand competition at the distribution level¹²⁴.

11. Selective distribution agreements

Selective distribution agreements, too, are deemed vertical agreements. “Selective distribution system” means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected based on specified criteria and where these distributors undertake not to sell such goods or services to other distributors not authorised by the supplier within the geographical area reserved by the supplier in the agreement to operate that system¹²⁵.

¹²³ Section 8(7) VABEO

¹²⁴ Paragraph 10.64 CMA’s VABEO Guidance

¹²⁵ Section 2(1) VABEO

The criteria used by the supplier to select distributors can be qualitative or quantitative in nature (or both). In an exclusive distribution system, the distributor is protected against active selling from outside its exclusive geographical area. In contrast, in a selective distribution system, the distributor is protected against active and passive sales by unauthorised distributors.

The possible competition risks of selective distribution systems potentially leading to an infringement of the Chapter I prohibition include a reduction in intra-brand competition and, especially in case of cumulative effect, the foreclosure of certain types of distributors, as well as the softening of competition and potentially the facilitation of collusion between distributors due to the limitation of the number of distributors¹²⁶.

Therefore, it can be said that selective distribution agreement falls outside Chapter I prohibition if one of the following criteria is met:

- (a) *necessity*, where the proper distribution of a product can only be ensured by a selective distribution arrangement;
- (b) *non-discrimination*, where the supplier selects the distributor on objective qualitative criteria and without discrimination;
- (c) *proportionality* between the requirements of the product and the restrictions imposed by the supplier.

12. Franchise agreements

Franchising presents some specific characteristics, such as the use of a uniform business name, the application of uniform business methods (including the licensing of intellectual property rights) and the payment of royalties in return for the benefits granted. Given these specificities, provisions strictly necessary for the functioning of franchising can be considered to fall outside the scope of the Chapter I prohibition. This concerns, for instance, restrictions that prevent the franchisee from using the know-how and assistance provided by the franchisor for the benefit of the franchisor's competitors and non-compete obligations relating to the goods or services purchased by the franchisee that are necessary to maintain the common identity and reputation

¹²⁶ Paragraph 10.86 CMA's VABEO Guidance

of the franchise network. In the latter case, the duration of the non-compete obligation is irrelevant as long as it does not exceed the duration of the franchise agreement¹²⁷.

Vertical restraints contained in franchise agreements will be assessed under the guidance applicable to the distribution system that most closely corresponds to the nature of the particular franchise agreement. For instance, a franchise agreement that gives rise to a closed network - since franchisees are prohibited from selling to non-franchisees - is to be assessed under the principles applicable to selective distribution. In contrast, a franchise agreement that does not create a closed network but which grants geographical exclusivity and protection from active sales by other franchisees shall be assessed under the principles applicable to exclusive distribution¹²⁸.

13. Vertical agreements in the online platform economy

As seen, undertakings active in the online platform economy are often qualified as agents in contract or commercial law. However, this qualification is not material for categorising their agreements under the Chapter I prohibition. Vertical agreements entered by undertakings active in the online platform economy will only be classified as agency agreements - that fall outside the scope of the Chapter I prohibition - where they fulfil the conditions set out above under the heading agency agreements¹²⁹.

Section 2(1) VABEO defines online intermediation services as a service that allows undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded and that constitutes an information society service. Undertakings active in the online platform economy that do not provide online intermediation services within the meaning of Section 2(1) of the VABEO may be categorised as either suppliers or distributors to apply the VABEO. This categorisation may affect, in particular, the definition of the relevant market to use the market share thresholds set out in Section 6(1) of the VABEO, the applicability of Section 8 of the

¹²⁷ Paragraph 10.105 CMA's VABEO Guidance

¹²⁸ Paragraph 10.106 CMA's VABEO Guidance

¹²⁹ Paragraph 6.31 CMA's VABEO Guidance

VABEO (hardcore restrictions), and the applicability of Section 10 of the VABEO (excluded restrictions).

Hardcore restrictions explicitly relating to online sales may similarly result from contractual terms setting out direct or indirect obligations. In addition to the direct prohibition of the use of the internet to sell the contract goods or services, examples of obligations that are not permitted - as they indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographic areas or customers - are those:

(a) requiring the distributor to:

- a. prevent customers in another geographical area from viewing its website or online store or re-route customers to the manufacturer's or seller's online store. However, obliging the buyer to offer links to the online stores of the supplier or other sellers is not a hardcore restriction;
- b. terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's geographic area;
- c. sell the contract goods or services only in a physical space or in the physical presence of specialised personnel;
- d. seek the supplier's prior authorisation before making individual online sales transactions; or

(b) prohibiting the distributor from:

- a. using the supplier's trademarks or brand names on its website or in its online store;
- b. establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's server or a third-party server;
- c. using an entire online advertising channel, such as search engines or digital comparison tools, or restrictions which indirectly prohibit the use of a whole online advertising channel, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines or a

restriction on providing price-related information to price comparison services¹³⁰.

However, it is worth noting that the following terms imposed by a supplier on a distributor in respect of online sales are permitted:

- (a) how the contract goods or services are to be sold online;
- (b) the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales, provided it is not a means of preventing the effective use of the internet by the distributor to sell the contract goods or services;
- (c) ensuring the quality or a particular appearance of the distributor's online store;
- (d) the display of the contract goods or services in the online store (such as the minimum number of items displayed or the way the supplier's trademarks or brands are shown);
- (e) a direct or indirect ban on the use of online marketplaces;
- (f) that the distributor operates one or more brick-and-mortar shops or showrooms, for instance, as a condition for becoming a member of the supplier's selective distribution system;
- (g) that the distributor sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick-and-mortar shop¹³¹;
- (h) that the distributor pays a different wholesale price for products sold online than for products sold offline (dual pricing)¹³².

14. Conclusion

Although the current divergence from the EU is somehow limited, over time, the divergence in the area of competition law and vertical agreements block exemptions will likely expand. Drafting agreements encompassing UK and EU markets will require much closer care and

¹³⁰ Paragraph 8.38 CMA's VABEO Guidance

¹³¹ CMA's VABEO Guidance 8.41

¹³² CMA's VABEO Guidance 8.42

attention, keeping in mind the two different sets of prohibition and the development of the law, particularly after 1 June 2028, the date of expiry of VABEO¹³³.

United Kingdom, January 2025

Rocco Franco

Lawyer in London (United Kingdom)

¹³³ Sect.16 VABEO

CHAPTER VII

REGULATION (EU) 2022/720 ON VERTICAL AGREEMENTS AND CONCERTED PRACTICES AND ITS APPLICATION IN SPAIN BY THE "CNMC" AND THE SPANISH COURTS AND TRIBUNALS

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CHAPTER VII – REGULATION (EU) 2022/720 ON VERTICAL AGREEMENTS AND CONCERTED PRACTICES AND ITS APPLICATION IN SPAIN BY THE "CNMC" (SPANISH ANTITRUST AUTHORITY) AND THE SPANISH COURTS AND TRIBUNALS

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1. Introduction

The Spanish antitrust authority, currently the National Markets and Competition Commission (“Comisión nacional de mercados y de la competencia”) (hereinafter, CNMC) as well as the Spanish courts and Antitrust tribunals have traditionally dealt with vertical agreements, from the point of view of the applicable Antitrust law, under Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter, TFEU), the EU Regulations on the application of the TFEU to such agreements and, in particular, the Block Exemption Regulations on vertical agreements and concerted practices in force at every moment - vertical block exemption regulation 720/2022 or VBER 720/2022- and the European Guidelines which, pursuant to those Regulations, set out the principles for the assessment of vertical agreements and concerted practices under Article 101 TFEU, and the case-law of the Court of Justice of the European Union (hereinafter referred to as the CJEU) interpreting those rules.

Moreover, we must not forget that Articles 1, 2 and 3 of the current Spanish Law 15/2007, of July 3rd, on the Defence of Antitrust (hereinafter, LDC or Antitrust Law), through which national and EU antitrust rules are applied in Spain, and whose principles include effectiveness in the fight against conduct that restricts antitrust, include the aforementioned regulations.

For this reason, in this chapter dedicated to the Spanish legal system, we will focus on the most relevant aspects of the legal treatment of vertical restraints in Spain, both by the CNMC and by the Courts of Justice.

Finally, it should be noted that, since the current Regulation (EU) 2022/720 on Vertical Block Exemption (hereinafter, the VBER 720/2022) entered into force very recently, i.e. on June 1st, 2022, the authors of this paper are not aware of any decision issued either in administrative proceedings by the CNMC or by the courts in which the aforementioned regulation has been applied.

2. The legal regulation of vertical agreements in Spain

2.1. Applicable regulation in Spain

The Antitrust law applicable to vertical agreements in Spain are essentially set out in the following provisions:

- o Defence of Antitrust Act 15/2007, of July 3rd (hereinafter, “LDC”) (“Ley de Defensa de la Competencia”).
- o The Defence of Antitrust Regulation, approved by Royal Decree 261/2008, of February 22nd, which aims to develop the LDC (hereinafter, “RDC”) (“El Reglamento de Defensa de la Competencia”).
- o The National Commission for Markets and Competition Creation Act 3/2013 of June 4th, (“Ley de creación de la Comisión Nacional de los Mercados y la Competencia”).
- o The Powers of the State and Autonomous Regions Coordination Act in Defence of Antitrust Act 1/2002, of February 21 st, (“Ley de Coordinación de las Competencias del Estado y las Comunidades Autónomas en materia de Defensa de la Competencia”)

In addition to the local regulations, the legislative *acquis communautaire* is directly applicable in Spain (Articles 101 and 102 TFEU, the block exemption regulations applicable to vertical agreements and the Guidelines on Vertical Restraints).

2.2. Application of Spanish regulation to vertical restraints

Vertical restraints will be subject to the LDC in Spain if they can be considered as a prohibited conduct under that law which has as its object, has or may have the effect of preventing, restricting or distorting antitrust in all or in part of the Spanish market.

As a general rule, the Spanish antitrust authorities do not apply the Spanish law extraterritorially, unless a specific conduct, despite being carried out in Spain, has effects in Spain.

2.3. Definition of the concept of "vertical agreements" under Spanish law and most common vertical restraints

There is no specific and concrete definition of the concept of "vertical agreement" in Spanish law, having to resort to the definition provided in Article 1 of Regulation (EU) 2022/270, which defines it as "an agreement or concerted practice between two or more undertakings which operate, for the purposes of the agreement or concerted practice, at different levels 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".

As in the rest of Europe, the most common vertical restraints in Spain are found in the following types of agreements:

- Resale price restrictions: These are agreements or concerted practices which have as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to which the buyer must adhere. Such agreements are regarded as hardcore restrictions.
- Single branding: These are agreements whereby the buyer is obliged or encouraged to sell exclusively or mainly products of a single brand. The supplier, thus, obliges the buyer to cover all its needs in a given market by sourcing from a single supplier, although this does not necessarily mean that the buyer is obliged to buy directly from the supplier, but that it cannot buy, resell or integrate into its own products, competing goods or services.
- Customer exclusivity: Under an exclusive customer allocation agreement, the supplier agrees to sell its products to a single distributor for resale by that distributor to a particular group or category of customers. In such an agreement, the distributor is usually limited in its ability to make active sales to other groups or categories of customers allocated by that supplier to other distributors.
- Exclusive distribution: An exclusive distribution system is one in which the supplier allocates a territory or a group of customers exclusively to one buyer or to a limited number of buyers, so that those distributors are the only ones who can resell those products in that territory

or to those customers exclusively, while restricting his other buyers from actively selling into the exclusive territory or to the exclusive group of customers.

- Selective distribution: In selective distribution agreements, the supplier undertakes to sell the contract goods or services, directly or indirectly, only to distributors selected on the basis of specific criteria, and the distributors undertake not to sell such goods or services to unauthorised distributors or agents in the territory reserved by the supplier to apply this system. The criteria used by the supplier to select distributors can be qualitative or quantitative: quantitative criteria directly limit the number of distributors, e.g. by imposing a fixed number of distributors. Qualitative criteria indirectly limit the number of distributors by imposing conditions which cannot be fulfilled by all distributors, for instance with regard to the range of products to be sold, the training of sales personnel, the service to be provided at the point of sale or the advertising and presentation of the products.

Qualitative criteria may relate to the achievement of sustainability objectives, such as climate change, environmental protection or limiting the use of natural resources. For example, suppliers could require distributors to provide recharging services or recycling facilities at their points of sale or to ensure that goods are delivered via sustainable means, such as a “cargo bike” rather than a motor vehicle.

Selective distribution systems are comparable to exclusive distribution systems in the sense that they restrict the number of authorised distributors and resale possibilities. The main difference between the two types of distribution systems lies in the nature of the protection granted to the distributor. In an exclusive distribution system, the distributor is protected against active sales from outside his exclusive territory, whereas in a selective distribution system the distributor is protected against active and passive sales by unauthorised distributors.

- Franchising: Franchise agreements include licensing of intellectual or industrial property rights (IPR) in relation to, in particular, trademarks or registered signs and know-how for the use and distribution of goods or services. In addition to the IPR licence, the franchisor usually provides commercial or technical assistance to the franchisee for the duration of the contract. Licensing and assistance are integral parts of the franchised business object. The

franchisor usually receives a royalty from the franchisee for the use of a particular business method. Franchising may allow the franchisor to establish, with limited investment, a uniform network for the distribution of its products. In addition to the provision of a business method, franchise agreements typically contain a combination of several vertical restraints relating to the products to be distributed, for instance selective distribution or non-compete clauses. Franchising (with the exception of industrial franchise agreements) has some specific features, such as the use of a uniform trade name, uniform business methods (including the licensing of IPR) and the payment of royalties in return for the benefits granted.

- Exclusive supply: In exclusive supply agreements, the supplier assumes the obligation to sell the contract products only or mainly to a single buyer, for the purpose of resale or for a particular use.
- Initial access payment: In this type of agreement, the supplier pays its distributor a fee to gain access to its distribution network.
- Category management agreement: Under this agreement, the distributor entrusts the supplier with the marketing of a category of products, which generally includes not only the supplier's products, but also products of its competitors. The supplier thus has an influence on the placement of the product, its promotion in the establishment and the selection of products for the establishment.
- Tying: A tying arrangement is one whereby customers who purchase one product (the tying product) are obliged to also purchase a different product from the same or a nominated supplier (the tied product).

2.4. Legal regulation in Spain of vertical agreements as possible “prohibited collusive behaviour”

2.4.1. Types of agreements or practices prohibited under the LDC

For antitrust purposes, the LDC distinguishes 3 types of prohibited agreements or practices:

- o Collusive conduct (the prohibitions of which apply to both horizontal and vertical agreements);
- o Abuse of dominant position;

- o And distortion of free antitrust by unfair acts.

2.4.2. Vertical restraints as prohibited collusive conduct

According to article 1 of the LDC, in line with the provisions of art. 101 TFEU, is prohibited any agreement, decision or recommendation, as well as any concerted or consciously parallel practice, which has as its object, produces or may produce the effect of preventing, restricting or distorting antitrust in all or part of the national market, and particularly those consisting in:

- a) Fixing, directly or indirectly, prices or other commercial or service conditions.
- b) Limiting or controlling production, distribution, technical development or investment.
- c) Market sharing or sourcing.
- d) The application, in commercial or service relations, of unequal conditions for equivalent services which place some competitors at a disadvantage compared to others.
- e) The subordination of the conclusion of contracts to the acceptance of supplementary performances which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

Explanatory remarks:

- o According to the CJEU's own definition, "agreement" is to be understood as any oral or written agreement by which several economic operators agree to carry out certain conduct having as its object or effect the restriction of antitrust, indicating that there is an agreement whenever there is a concert of wills between several independent companies.
- o According to the Spanish Courts (Judgment C-A of the Audiencia Nacional of 29.11.2016), it is not necessary for the purpose of infringing free antitrust to be achieved, it is sufficient that the conduct is aimed at that purpose, whether or not it is successful. In other words, the conduct must be capable of achieving the purpose of ending the distortion of free antitrust.
- o These prohibitions apply to both horizontal and vertical agreements.

- o These prohibitions also apply to situations of restriction of antitrust arising from the exercise of administrative powers or caused by the actions of public authorities or public undertakings, when they are not legally protected.
- o Infringement of the above prohibitions has the following consequences:
 - The nullity as of right of such agreements, decisions or recommendations, provided that they are not covered by any of the following legal exemptions.
 - And, furthermore, in accordance with art. 71 of the LDC, the infringers will be liable for the damages caused. All of the above, taking into account that, for these purposes:
 - a) An infringement of antitrust law is any infringement of Article 101 or 102 TFEU or Article 1 or 2 LDC.
 - b) The action of a company is also attributable to the company or persons controlling it, except where its economic behaviour is not determined by any of them.
- o While the former Spanish national antitrust authority (known as the "Court of Defence of Antitrust"), replaced by the current CNMC, could expressly authorize this type of agreement for a certain period of time when certain requirements were met, with the current LDC, in line with European law, a system of "legal exemptions" was implemented that entails SELF-EVALUATION by the companies themselves.

2.4.3. Legal exemptions in Spain from vertical restraints which would in principle be prohibited

Under Spanish LDC, not every vertical restraint that would in principle be prohibited if it met the above conditions would be punishable. This would be the case if such an agreement could fit into one of the following SIX LEGAL EXEMPTIONS provided for in the LDC:

1st.- Agreements which contribute to improving the production or marketing and distribution of goods and services or to promoting technical or economic progress:

According to art. 1.3 LDC, the prohibition of paragraph 1 shall not apply to agreements, decisions, recommendations and practices which contribute to improving the production or marketing and distribution of goods and services or to promoting technical or economic progress, without any prior decision to that effect being necessary, provided that:

- a) Allow consumers or users to share equally in their benefits.
- b) Do not impose restrictions on the companies concerned which are not indispensable to the attainment of those objectives, and
- c) Do not allow the participating companies the possibility of eliminating antitrust in respect of a substantial part of the products or services covered.

2nd.- Agreements that comply with Community block exemption regulations:

According to Art. 1.4 LDC, the prohibition in paragraph 1 shall not apply to collective agreements, decisions or recommendations, or concerted or consciously parallel practices which comply with the provisions laid down in Community block exemption regulations, including Regulation (EU) 2022/720, even when the relevant conducts are not capable of affecting trade between EU Member States.

3rd.- Agreements which, by Royal Decree of the Government, comply with the provisions of legal exemption 1 above:

Pursuant to Article 1.5 LDC, the Government may also declare by Royal Decree (“Real Decreto”) the application of section 3 of the aforementioned Article 1 to certain categories of conducts, following a report by the Antitrust Defence Council and the National Antitrust Commission.

This would be the case, for example, of the Exemption Regulation on the exchange of information on Late Payments (Royal Decree 602/2006).

4th.- Conduct resulting from the application of a law:

Pursuant to Art. 4.1 LDC, without prejudice to the possible application of the Community Defence of Antitrust provisions, the prohibitions of Arts. 1, 2 and 3 LDC shall not apply to conduct resulting from the application of a law.

5th.- Conduct of lesser importance:

Pursuant to Article 5 of the LDC, the prohibitions set out in Articles 1 to 3 of the LDC shall not apply to conducts which, due to its minor importance, are not capable of significantly affecting antitrust, and the criteria for delimiting conduct of lesser importance shall be established by regulation, taking into account, among other things, market share.

Thus, the RDC, in development of the LDC, regulates in its articles 1 to 3 these minor conducts, in the following terms:

- o Conduct of minor importance in terms of market share (Art. 1 RDC): (“De minimis rule”)

For the purposes of Article 5 RDC, they are understood to be of minor importance, without the need for a prior declaration to that effect:

- a) Conducts between real or potential competitor companies when their combined market share does not exceed 10 per cent in any of the relevant affected markets.

- b) Conducts between companies that are neither real or potential competitors, where the market share of each does not exceed 15 per cent in any of the relevant affected markets.

- c) In cases where it is not possible to determine whether the conduct is between competitors or between non-competitors, the percentage of 10 per cent of each in the relevant affected markets will apply.

- d) When, in a relevant market, antitrust is restricted by the cumulative effects of parallel agreements for the sale of goods or services concluded by different suppliers or distributors, the market share percentages set out in the previous paragraphs shall be reduced to 5 per cent. A cumulative effect will not be found to exist if less than 30 per cent of the relevant market is covered by parallel networks of agreements.

- o Conduct excluded from the concept of minor conduct (Art. 2 RDC):

- o According to Art. 2.1 RDC, irrespective of Art. 1 RDC, conducts between competitors which have as its object, directly or indirectly, separately or in combination with other factors controlled by the participating companies, shall not be deemed to be of minor importance:

- (a) The setting of prices for the sale of products to third parties;

- (b) limiting production or sales;

(c) the allocation of markets or customers, including bid rigging, or the restriction of imports or exports.

o According to Art. 2.2 RDC, irrespective of Art. 1 RDC, conducts between non-competitors which are aimed, directly or indirectly, separately or in combination with other factors controlled by the participating companies, shall not be deemed to be of minor importance:

- a) The establishment of a fixed or minimum resale price to which the buyer must adhere;
- b) the restriction of active or passive sales to end-users by members of a selective distribution network, without prejudice to the possibility for the supplier to restrict the capability of such members to operate outside the authorised establishment;
- c) the restriction of reciprocal supplies between distributors belonging to the same selective distribution system, including between distributors operating at different levels of trade;
- d) an agreed restriction between a supplier of components and a buyer who incorporates them into other products that limits the supplier's capability to sell those components as spare parts to end-users, independent repairers or other service providers not entrusted by the buyer for the repair or maintenance of its products;
- e) the establishment of any non- antitrust clause whose duration is indefinite or exceeds five years;
- f) the restriction of the territory into which, the buyer may sell the contract goods or services or of the costumers to whom he may sell them, except:
 1. The restriction of active sales in the territory or to the group of customers reserved exclusively for the supplier or allocated exclusively by the supplier to another buyer, when such a prohibition does not restrict sales by the buyer's customers;
 2. the restriction of sales to end users by a buyer operating in the wholesale trade;
 3. the restriction of sales to unauthorised distributors by members of a selective distribution system; and
 4. the restriction of the buyer's ability to sell components to customers who would use them to manufacture the same type of goods as those produced by the supplier.

o Pursuant to Art. 2.3 RDC, irrespective of Art. 1 RDC, collective agreements, decisions or recommendations or concerted or consciously parallel practices between competitors which, for the purposes of the agreement, operate at different levels of the production or distribution chain, shall not be deemed to be of minor importance when such agreements contain any of the restrictions referred to in Art. 1(1) and (2) RDC.

o Pursuant to art. 2.4 RDC, irrespective of the provisions of the previous article, they shall not be considered to be of minor importance:

a) Conducts by companies holding or benefiting from exclusive rights;

b) conducts by companies in relevant markets where more than 50 per cent of the relevant market is covered by parallel networks of vertical agreements having similar consequences.

o Pursuant to art. 2.5 RDC, for the purposes of the provisions of this article:

(a) Active sales shall mean actively approaching individual customers within the exclusive territory or exclusive customer group of another distributor by, among others, direct mail or visits; advertising in the media; other activities specifically targeting those customers; and the establishment of a warehouse or distribution centre in the exclusive territory of another distributor.

(b) passive sales shall mean responding to non-actively solicited orders from individual customers or specific customer groups, including the delivery of goods and services to such customers.

(c) A non-compete obligation means any direct or indirect obligation which prohibits the buyer from manufacturing, purchasing, selling or reselling goods or services which compete with the contract goods or services, or any direct or indirect obligation which requires the buyer to purchase from the supplier or from another companies designated by the supplier, more than 80 per cent of its total purchases of the contractual goods or services and their substitutes in the reference market, calculated on the basis of the value of its purchases in the preceding year.

o Other minor conduct (Art. 3 RDC):

Without prejudice to the provisions of Articles 1 and 2 RDC, and for the purposes of the provisions of the LDC, the Council of the National Competition Commission may declare

Articles 1 to 3 of the LDC not applicable to conducts which, in view of its legal and economic context, are not capable of significantly affecting antitrust.

o The Council of the National Competition Commission may adopt Communications to develop the criteria for the delimitation of conducts of lesser importance of Article 5 of the LDC.

6 th.- Agreements in respect of which the CNMC declares the prohibition of art. 1 LDC inapplicable:

Pursuant to Art. 6 LDC, when the public interest so requires, the National Antitrust Commission, by means of a decision adopted ex officio, may declare, following a report from the Council for the Defence of Antitrust, that Article 1 is not applicable to an agreement, decision or practice, either because the conditions of paragraph 1 are not met or because the conditions of paragraph 3 of said article are met.

3. The national competition authority (the "CNMC") and the Spanish courts

3.1. Competition public bodies: The CNMC and the bodies of the Autonomous Communities ("Comunidades Autónomas")

In Spain, in accordance with the provisions of art. 5.1 d) of Law 3/2013, the public body competent to apply the provisions of the LDC is the National Commission for Markets and Competition (CNMC), without prejudice to the competences corresponding to the regional antitrust authorities in their respective areas and those of the competent jurisdiction.

The CNMC is a public body with its own legal personality, independent from the government and subject to parliamentary control. It came into operation in 2013, when it was approved the unification of the regulatory bodies and the competition authority into the CNMC, involving the integration of the six supervisory bodies that were in operation at the time: the National Competition Commission, the National Energy Commission, the Telecommunications Market Commission, the National Postal Sector Commission, the State Council for Audiovisual Media and the Railway and Airport Regulation Committee.

Together with the CNMC, Spanish legislation (art. 13 LDC), provides that the competent bodies of the Autonomous Communities for the application of the LDC shall exercise the corresponding executive powers in their territory in proceedings involving the conducts provided for in articles 1, 2 and 3 of the LDC, being also entitled to challenge before the competent jurisdiction acts of the autonomous or local public administrations in their territory subject to administrative law and general provisions of lower rank than the law from which obstacles to the maintenance of effective antitrust in the markets are derived.

3.2. Main functions of the CNMC in antitrust matters

Thus, the CNMC's main functions in antitrust matters include the following:

- Apply the provisions of Law 15/2007, of July 3rd, on conducts that prevent, restrict or distort antitrust, without prejudice to the competences corresponding to the regional authorities of Defence of the antitrust in their respective spheres and those of the competent jurisdiction.
- To apply Articles 101 and 102 of the Treaty on the Functioning of the European Union and its secondary legislation in Spain, without prejudice to the powers corresponding to the competent jurisdiction.
- Adopt measures and decisions to implement the mechanisms for cooperation and case allocation with the European Commission and other national antitrust authorities of the Member States provided for in Community law, and in particular, in the Council Regulation (EC) No 1/2003 of December 16th 2002 on the implementation of the rules on antitrust laid down in Articles 101 and 102 of the TFEU.
- Act as a consultative body on matters relating to the maintenance of effective antitrust, including reporting on the criteria for the quantification of the compensations that the authors of the conducts envisaged in Articles 1, 2 and 3 of Law 15/2007, of July 3rd, must pay to the complainants and third parties who have been harmed as a result of those conducts, when required to do so by the competent judicial body.
- To challenge before the competent jurisdiction the acts of public administrations subject to administrative law and general provisions of lower rank than the law from which obstacles to the maintenance of effective antitrust in the markets are derived.

3.3. Organisation and operation:

Structure:

The CNMC exercises its functions through two governing bodies: the Council and the President, who is also the President of its Council.

The Council is the collegiate decision-making body. It is composed of ten members appointed by the Government, at the proposal of the Ministry of Economic Affairs and Digital Transformation, from among persons of recognised prestige and professional competence in the Commission's field of action.

The Council may act in plenary or in chambers. For this purpose, it is organised into two chambers: one dedicated to antitrust issues (Antitrust Chamber) and the other to the supervision of regulated sectors (Regulatory Oversight Chamber). The Plenary is composed of all the members of the Council and is chaired by the President.

In addition, the CNMC has four directorates of instruction (Antitrust; Energy; Telecommunications and the Audiovisual Sector, as well as Transport and the Postal Sector) which depend on the President. These functions are complemented by a Department for the Promotion of Antitrust and a Department for Internal Control, which monitors procedures.

Operation:

The operation of the CNMC is in line with EU regulations, particularly in the energy, telecommunications, audiovisual, transport, postal and Defence of Antitrust sectors.

In antitrust matters, the CNMC investigates and sanctions anti-competitive practices on the basis of complaints or on its own initiative, with the Antitrust Directorate having the investigative functions set out in the Law on the Defence of Antitrust.

Both the Antitrust Directorate and the other three investigating Directorates (the Energy Directorate, the Telecommunications and Audiovisual Directorate, and the Transport and Postal Directorate) exercise their investigating functions independently of the Council and cannot receive any indications from the government, in order to guarantee the independence of their actions.

Thus, for the exercise of the sanctioning power, due functional separation shall be ensured between the investigation phase, which shall be the responsibility of the Directorate of Antitrust, and the decisional phase, which shall be the responsibility of the Council.

3.4. The administrative sanctioning procedure in the area of prohibited conducts:

3.4.1. Duration

The maximum period for issuing and notifying the decision ending the sanctioning procedure for anti-competitive conduct is 24 months from the date of the decision to initiate the procedure, except in those cases in which it may be suspended or, exceptionally, extended, and its distribution between the investigation and resolution phases is established by regulation.

3.4.2.- Instruction of the procedure

The procedure is initiated ex officio by the Antitrust Directorate either on its own initiative or on the initiative of the CNMC's Council, or on the basis of a complaint. Any natural or legal person, whether interested or not, may file a complaint regarding conduct prohibited by the LDC.

The complaint is made in writing and delivered to the CNMC registry, describing precisely the alleged anti-competitive conduct or conduct contrary to sectoral regulation of which it is aware, identifying those responsible and providing the evidence available.

The Antitrust Directorate shall initiate proceedings where there is rational means of evidence of prohibited conduct and shall notify the parties concerned of the decision to initiate proceedings.

On being informed of the possible existence of an infringement, the Antitrust Directorate may carry out a confidential inquiry, including an investigation at the premises of the companies involved, in order to determine, on a preliminary basis, whether the circumstances justifying the initiation of proceedings for the imposition of penalties are met.

The Council of the CNMC, at the proposal of the Antitrust Directorate, may decide not to initiate proceedings arising from the alleged conduct prohibited by the LDC or by Articles 101

or 102 of the TFEU and to close the proceedings when it considers that there is no evidence of an infringement.

In accordance with the provisions of Article 10(2) of Directive (EU) 2019/1 of December 11th 2018, the CNMC shall inform the European Commission of the closure of the proceedings when the CNMC informed the European Commission of the initiation of an investigation on the basis of Article 101 or 102 TFEU.

In the case of a complaint, the Antitrust Directorate may decide not to initiate proceedings on the grounds that the investigation of the facts covered by the complaint is not a priority.

The Antitrust Directorate, once the case has been opened, shall carry out the investigative measures necessary to establish the facts and determine who is responsible.

The facts which may constitute an infringement shall be set out in a statement of facts which shall be notified to the parties concerned so that, within a period of one month, they may reply to it and, if appropriate, submit any evidence they consider relevant.

Once the necessary investigative measures have been carried out, the Antitrust Directorate will present a so called proposal of decision (“propuesta de resolución”), which will be notified to the interested parties and to the CNMC Council so that, within a period of one month, they may submit any arguments they deem appropriate to the Council.

3.4.3. Procedure before the Council of the CNMC

The Council of the CNMC may order, ex officio or at the request of any interested party, to carry out tests other than those already performed before the Investigation Directorate in the investigation phase, as well as the performance of complementary actions in order to clarify issues necessary for building its judgement, with the Investigation Directorate conducting such complementary tests and actions as it may be ordered to perform.

At the proposal of the interested parties, the Council of the CNMC may decide to hold a hearing.

The Council of the National Competition Commission, having concluded the proceedings and, if appropriate, having informed the European Commission in accordance with the provisions

of Article 11.4 of Council Regulation (EC) No 1/2003 of December 16th 2002 on the implementation of the rules on antitrust provided in Articles 101 and 102 of the TFEU, shall issue a decision.

3.4.4. Resolutions of the CNMC Council

Resolutions of the CNMC Council may declare:

- a) The existence of conduct prohibited by the LDC or by Articles 101 or 102 of the TFEU.
- b) The existence of conducts which, because of its minor nature, are not capable of significantly affect antitrust.
- c) No evidence of prohibited practices.

Resolutions of the CNMC Council may also contain:

- a) An order to cease the prohibited conduct within a specified period of time.
- b) The imposition of specific conditions or obligations, whether structural or behavioural. In the choice between structural or behavioural conditions of equivalent effectiveness, the one that is least burdensome for the companies concerned shall be chosen.
- c) The order to remove the effects of prohibited practices contrary to the public interest.
- d) The imposition of fines.
- e) The closing of the proceedings in the cases provided for in the LDC.
- f) And any other measures authorised by the LDC.

Important remark in regards of the nullity of agreements: Article 1.2 of the LDC sanctions the nullity of agreements, decisions and recommendations prohibited by the LDC (art. 1.1), provided that they are not covered by the exemptions provided for in the LDC itself.

With regard to nullity, it should be noted that under Spanish law the effects of nullity are *ex tunc*. On the other hand, in application of the principle of conservation of legal transactions that prevails in Spanish law, despite a clause being declared null and void for contravening the provisions of the LDC, the rest of the contract will remain in force, provided that the clause

declared null and void does not constitute an essential element of the contract (see Supreme Court Judgment of June 30th 2009, Case 315/2004 and February 26th 2009, Case 109/2009).

In the event of non-compliance with obligations, resolutions or agreements of the CNMC, the Council may impose fines and other enforcement measures.

3.4.5. Conventional termination

3.4.5.1. The object of conventional termination in the LDC:

The resolution of a sanctioning proceeding by means of conventional termination constitutes a way of ending a sanctioning proceeding initiated for a possible substantive infringement of LDC i.e. for infringement of Articles 1, 2 and/or 3 LDC and, if applicable, Articles 101 and/or 102 TFEU. Therefore, the termination by agreement does not extend to other CNMC sanctioning proceedings initiated for the rest of the infringements of the LDC.

The LDC provides the prohibition of certain anti-competitive conducts and regulates the sanctioning procedure for these conducts. The normal form of termination of these sanctioning proceedings is the CNMC Council's express pronouncement on the merits of the case, declaring an infringement of Articles 1, 2 and/or 3 of the LDC and, if applicable, of Articles 101 and/or 102 TFEU to be accredited or not accredited.

Notwithstanding this, the regulation provides for the possibility of terminating the proceedings by agreement. This is an atypical form of termination of the sanctioning proceedings, in which the CNMC decides to terminate the sanctioning proceedings by making binding commitments voluntarily offered by the alleged infringer, without the need for a declaration on the accreditation of the infringement and neither, consequently, the imposition of a sanction.

The purpose of the termination agreement is twofold. On the one hand, it seeks to achieve a rapid restoration of the conditions of antitrust that have been jeopardised by the restrictive

conduct detected, through commitments that resolve the competition problems or eliminate unjustified restrictions of competition, safeguarding the welfare of consumers and the public interest. On the other hand, it makes it possible to comply with the principle of administrative efficiency, enabling a more appropriate use of the CNMC's resources, by facilitating a reduction in the number of proceedings and a shortening of the time taken to resolve the sanctioning proceedings in which the conventional termination is agreed.

For these reasons, in general, the earlier the proceedings are brought in the preliminary investigation phase, the more feasible the conventional termination of sanctioning proceedings is, insofar as the greater the well-founded conviction of the commission of an infringement, the more difficult it is for the CNMC to observe and justify that the public interest is safeguarded without the need to sanction infringing conduct. Moreover, the more advanced the investigation phase of a case is, the more blurred is the effect of satisfying the public interest that is obtained through the prompt termination of the case and that allows for a rapid implementation of the remedies that put an end to the situation of restriction of antitrust detected.

In principle, conventional termination will not be admissible in cases where, as a general rule, there are no viable commitments within the meaning of Article 52 LDC, either in order to address the competitive effects of the conduct under investigation or to sufficiently ensure the public interest.

Likewise, in order to safeguard the dissuasive nature of antitrust law, even by accepting the conventional termination of a sanctioning proceeding and not ruling on the accreditation of the infringement of the LDC, the CNMC may assess in the conventional termination resolution itself the compatibility of the conduct analysed with antitrust.

Commitments that may lead to the conventional termination of an infringement proceedings may be behavioural or structural, as well as a mixture of both types. For example, commitments to modify conduct, to terminate certain agreements, to remove clauses from agreements,

contracts or statutes, to disinvestment, to refrain from engaging in certain economic activities, etc.

Finally, it should be borne in mind that the conventional termination is a form of termination of the sanctioning proceedings that is different from the settlement agreement of Community law , which is not reflected in Spanish antitrust law.

3.4.5.2. The CNMC guidelines on conventional termination:

The CNMC has published a Communication on the conventional termination of sanctioning proceedings, which establishes guidelines that, in general, can guide the CNMC's own actions and, at the same time, help companies on how to proceed when requesting and processing the conventional termination of their sanctioning proceedings.

In these guidelines, the CNMC regulates: (i) the object of the conventional termination; (ii) the cases in which the conventional termination is applicable; and (iii) the manner in which the conventional termination is initiated, processed and resolved.

3.4.5.3. Criteria applied by the CNMC to agree on conventional termination:

In order to agree to initiate proceedings aimed at the conventional termination of a disciplinary case and to finally accept the commitments submitted, the CNMC will apply the criteria set out below, although it should be clarified that the decisions to initiate and accept are discretionary for the CNMC, and that each disciplinary case has its own specificities, so that the CNMC will apply said criteria on a case-by-case basis.

Thus, these criteria would basically be as follows:

- The decision to initiate proceedings for the termination of the agreement is the responsibility of the CNMC's Investigation Directorate, following a proposal from the alleged authors of the prohibited conduct.

- Without prejudice to the abovementioned, the Investigation Directorate may invite the alleged authors to request the initiation of conventional termination, if it considers that the circumstances of the case make conventional termination advisable. As a general rule, this invitation would take place at the same time as the initiation of the disciplinary proceedings, although it could also take place after such initiation.

In this regard, when adopting the decision to initiate proceedings for conventional termination, it is taken into account that this will enable a reduction in the number of proceedings and shorten the time taken to resolve the case, in order to enable a rapid implementation of the remedies that put an end to the situation of restriction of antitrust that has been detected. For this reason, the CNMC will take a very positive view of the fact that the proposal for conventional termination is presented as soon as possible after the initiation of the sanctioning proceedings.

- Furthermore, in order to adopt this initiation decision, the Investigation Directorate takes into account various factors, both substantive and procedural, which are relevant in order to safeguard the criteria for admissibility of a termination by agreement set out in art. 52 LDC, specifically, the resolution of the effects on antitrust and the guarantee of the public interest.

- Moreover, for the acceptance of the proposed commitments, and in order to fulfil the legal requirement that the commitments must address the effects on antitrust, the CNMC will assess whether the proposals meet the following requirements:

- The commitments submitted effectively address the identified competition concerns in a clear and unambiguous manner.
- These commitments can be implemented quickly and effectively.
- The monitoring of compliance and effectiveness of commitments is feasible and effective.

3.4.5.4. Proceedings of the conventional termination:

(1) Initiation of the proceedings:

- Once a disciplinary case has been started, any of the alleged authors may request the Investigation Directorate to initiate proceedings for its conventional termination.

- As noted above, the earlier a request for termination is filed, the more likely it is to be successful, and in particular, it should be filed, as a general rule, before the expiration of the time limit for allegations to the statement of facts provided for in Article 50.3 LDC.
- In order to make the application, it is not necessary for all the alleged authors in the case to be present, although the application must cover all the alleged prohibited conduct for which the applicant is responsible and identified in the initiation of the sanctioning case or, if appropriate, in the corresponding Statement of Facts.
- Before formally submitting a request to initiate proceedings for the conventional termination of the sanctioning proceedings, it is advisable for the alleged offender to contact the Investigation Directorate in order to outline the commitments he would be prepared to submit.
- The request for initiation of conventional termination should contain the outline of the commitments that the alleged offender would be willing to provide, as well as a justification as to why these commitments are considered appropriate and sufficient to enable the conventional termination of the sanctioning proceedings.
- Once the formal request has been received, the Investigation Directorate will agree to accept or refuse, stating the reasons, the initiation of proceedings aimed at the conventional termination of the sanctioning proceeding.
- The Agreement to initiate proceedings leading to the conventional termination of the sanctioning procedure shall, as a general rule, set a time limit of fifteen working days for the requesting party to submit the first version of its commitments, unless the first version of commitments has already been submitted with the request for initiation. The Agreement shall also provide for the suspension of the computation of the maximum time limit for the sanctioning procedure until the conclusion of the proceedings leading to the conventional termination. The Agreement shall be notified to all interested parties in the proceedings.
- The failure to submit a first proposal for commitments within the time limit indicated implies the withdrawal of the request for conventional termination, the continuation of the sanctioning procedure and the lifting of the suspension of the calculation of the maximum time limit to resolve the sanctioning procedure.

- The fact that the Investigation Directorate agrees to initiate the conventional termination of a sanctioning file does not necessarily imply the submission of a proposal for conventional termination to the CNMC Council, nor does it prevent the continuation of the sanctioning file if the Investigation Directorate considers that the commitments finally submitted are not proportionate or sufficient to resolve the effects on antitrust of the conduct under investigation, guaranteeing the public interest.

(2) Proceedings:

- Commitment proposals shall identify the commitments to be submitted, the parties subject to the commitments, their territorial scope of application, the deadlines for their implementation and their period of validity.

- Any request for confidentiality in relation to the proposal for commitments submitted to the Research Directorate must be supported by a reasoned and item-by-item justification for the confidentiality requested, having to bring also a non-confidential version of the proposal for commitments, which may be amended by the Research Directorate to include data which confidentiality is rejected.

- The Investigation Directorate shall immediately forward each proposal for commitments to the CNMC Council. At the same time, the Investigation Directorate shall communicate the non-confidential version of the first commitments to the other alleged infringers and to the other interested parties in the sanctioning proceedings, so that they may submit any arguments they deem appropriate, within a period of ten (10) working days.

- As regards the other alleged authors in the infringement proceedings who also wish to request conventional termination of the proceedings, they may either adhere to the commitments submitted or submit commitments of their own in respect of the conduct under investigation. In the latter case, the additional commitments will follow the same procedure as the commitments submitted by the party that requested the initiation of conventional termination.

- In addition, the Investigation Directorate may send the non-confidential version of the commitments submitted to third parties who are not interested parties in the case, within the

framework of requests for information in accordance with the provisions of Article 39.1 LDC, in order to obtain elements of assessment on the adequacy of these commitments.

- In addition, the Directorate for Research may request the party which has submitted commitments to provide any clarification or modification which it deems necessary in relation to the commitments.

- The Investigation Directorate will submit to the CNMC Council the proposal for conventional termination provided for in article 39.5 RDC, if it considers that the first commitments submitted are proportionate and sufficient to resolve the effects on antitrust of the conducts under investigation, guaranteeing the public interest.

- Otherwise, the Directorate for Research shall declare the first proposal for commitments to be inadequate and shall give the party which submitted the commitments a period of ten working days within which to submit a second proposal for commitments.

- The failure to submit the second commitment proposal within the deadline implies the withdrawal of the request for conventional termination, the continuation of the sanctioning procedure and the lifting of the suspension of the running of the maximum time limit for the sanctioning procedure.

- If the Investigation Directorate considers that the second commitments submitted are proportionate and sufficient to resolve the effects on antitrust of the conducts under investigation, guaranteeing the public interest, it will submit to the CNMC Council the proposal for conventional termination as provided in article 39.5 RDC.

- In the event that the Investigation Directorate considers that the second commitments submitted are not proportionate or sufficient to resolve the effects on antitrust of the conducts that are the subject of the case, guaranteeing the public interest, it shall agree, stating the reasons, to consider the party that has submitted the commitments as having withdrawn its request for conventional termination, continuing the processing of the sanctioning procedure and restarting the computation of the maximum time limit for the resolution of the case. This agreement shall be notified to all interested parties in the case.

(3) Decision:

- Once the proposal for conventional termination has been submitted to the CNMC Council by the Investigation Directorate, in cases in which it has also been initiated for an infringement of Articles 101 and/or 102 TFEU in relation to the conduct that is the object of the conventional termination, the CNMC Council will decide to forward the Investigation Directorate's proposal for conventional termination to the European Commission, for the purposes of the provisions of Article 11.4 of Council Regulation (EC) No 1/2003 of December 16th 2002.

- In relation to the proposal for the conventional termination of the Research Directorate, the CNMC Council may declare that:

- The sanctioning proceedings are finalised by conventional termination, considering the commitments finally presented to be adequate.

- The commitments submitted are not proportionate or do not adequately address the effects on antitrust arising from the conducts which are the subject of the case, guaranteeing the public interest, urging the Investigation Directorate to continue with the sanctioning procedure.

- New commitments must be submitted to resolve the problems detected. The Council will decide on these new commitments by agreeing on the conventional termination or by urging the Investigation Directorate to continue the sanctioning procedure.

- When the CNMC Council instigates the continuation of the sanctioning procedure, the Investigation Directorate will agree to restart the computation of the maximum period for the resolution of the sanctioning file from the date of the CNMC Council's agreement and will notify all the interested parties in the file.

- The decision of the CNMC Council terminating the procedure by conventional termination shall contain the minimum content expressed in Article 39.6 RDC.

(4) Surveillance:

- The failure to comply with the termination resolution shall give rise to the adoption of the measures provided for in Article 39.7 RDC.

- In these cases, the CNMC may open a new sanctioning procedure based on articles 1, 2 and/or 3 LDC and, if applicable, on articles 101 and/or 102 TFEU, against the same conducts that were the object of the conventional termination.

3.4.5.5.- Main cases resolved in conventional termination by the CNMC :

Among the main cases resolved in conventional termination by the CNMC, we highlight the following:

S/0498/13 - CLUB EXCELLENCE IN MANAGEMENT THROUGH INNOVATION -
26/02/2015

S/0466/13 - SGAGE - AUTHORS - 09/07/2015

S/DC/0522/14 - THYSSENKRUPP - 12/01/2016

S/DC/0510/14 - FOOD SERVICE PROJECT - 10/03/2016

S/DC/0548/15 - SCHWEPPEES - 29/06/2017

S/DC/0567/15 - MARKET RESEARCH PHARMACEUTICAL INDUSTRY - 13/07/2017

S/DC/0604/17 - MEDIAPRO FOOTBALL - 07/02/2018

S/0630/18 - AGIC GNSUR - 11/10/2018

S/0631/18 - ADIDAS SPAIN - 06/02/2020

S/0049/19 ISDIN, S.A. (ISDIN) – 30/11/2022

3.5. Transparency of the CNMC's actions

The CNMC is obliged to make public all the provisions, resolutions, agreements and reports issued in application of the laws that regulate them, once they have been notified to the interested parties, after resolving, where appropriate, on the confidential aspects of their content and after dissociating the personal data referred to in Organic Law (“Ley Orgánica”) 3/2018 on Data Protection, except for the name of the authors.

3.6. Courts: Contentious-administrative jurisdiction (“jurisdicción contencioso-administrativa”):

No administrative appeal may be lodged against the resolutions and acts of the President and the Council of the National Antitrust Commission, and only a contentious-administrative appeal may be lodged directly, in sole instance, before the Contentious Administrative Chamber of the National High Court, under the terms provided in Law 29/1998, of July 13th , Regulating Contentious-Administrative Jurisdiction, (Jurisdicción contencioso-administrativa”) before the National High Court (“Audiencia Nacional”)(D.A 4^a).

Judgments handed down by the Audiencia Nacional may be appealed before the Third Chamber of the Supreme Court by means of an appeal in cassation, if the procedural requirements for admissibility are met.

According to statistics published by the CNMC (CNMC Annual Report 2022, the latest published at the time of writing this paper), during 2022 the National High Court (AN) and the Supreme Court (SC) handed down 110 rulings resolving challenges to resolutions adopted by the CNMC in the exercise of its functions of supervising antitrust in the markets. Of these 110 rulings, 103 correspond to the NA and 7 to the SC.

4. Liability for infringements of antitrust law

Under Spanish law, those who have suffered damage caused by an infringement of antitrust law (e.g. by vertical restraints that are prohibited and not legally exempted) can claim against the infringer and obtain full compensation before the Commercial Courts.

Thus, in 2017, and for the purposes of transposing Directive 2014/104/EU of the European Parliament and of the Council of November 26th 2014 on damages actions for breaches of antitrust law, the Royal Decree-Law (“Real Decreto ley”) 9/2017 of 26 May added a new Title

VI to the LDC (arts. 71 to 81), which includes the regime on compensation for damages caused by restrictive antitrust practices, the legal regulation of which includes the following aspects:

4.1. Liability for antitrust law infringements

According to the LDC (art. 71), infringers of antitrust law shall be liable for the damages caused, with any infringement of Articles 101 or 102 TFEU or Articles 1 or 2 of the LDC being considered an "infringement of antitrust law" and, in such cases, the actions of a companies shall also be deemed to be attributable to the companies or persons controlling it, except where its economic behaviour is not determined by any of them.

4.2. Right to full compensation

Any natural or legal person who has suffered damage caused by an infringement of antitrust law shall be entitled to claim against the infringer and obtain full compensation before the ordinary civil courts, such compensation consisting of restoring the person who has suffered damage to the situation in which he would have been had the infringement of antitrust law not been committed and comprising, therefore, the right to compensation for emerging damage and loss of profit, plus the payment of interest. All this, without this entailing overcompensation by means of punitive, multiple or other types of compensation.

4.3. Joint and several liability

Companies and associations, unions or groups of companies, which have jointly infringed antitrust law shall be jointly and severally liable for full compensation for the damages caused by the infringement, although, without prejudice to the right to full compensation, when the infringer is a small or medium-sized enterprise , subject to certain exceptions provided for by law, it shall only be liable to its own direct and indirect purchasers if: (i) its market share in the respective market was less than five percent at all times during the infringement, and (ii) the application of the joint and several liability regime provided for in the previous paragraph would irretrievably undermine its economic viability and cause a loss of the full value of its assets.

As an exception of the first paragraph of this section, persons benefiting from immunity from fines under a leniency programme shall be jointly and severally liable: (a) to their direct or indirect purchasers or suppliers, and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings which were involved in the same infringement of antitrust law.

An infringer who has paid compensation may recover damages from the other infringers in an amount to be determined according to their relative responsibility for the damage caused.

The amount of the contribution of the infringer benefiting from immunity from fines under a leniency programme will not exceed the amount of the harm it has caused to its own direct or indirect purchasers or suppliers. When the harm is caused to a person or undertaking other than the direct or indirect purchasers or suppliers of the infringers, the amount of any contribution of the above-mentioned beneficiary to other infringers will be determined by reference to its relative responsibility for such harm.

4.4. Time limit for bringing damages actions

In general, and except in those cases in which the time limit may be interrupted, the action to claim liability for damages suffered as a result of infringements of antitrust law shall be barred after five years, with the limitation period starting at the time when the infringement of antitrust law has ceased and the claimant is aware or could reasonably have been aware of the following circumstances: (a) the conduct and the fact that it constitutes an infringement of antitrust law; (b) the damage caused by the said infringement; and (c) the identity of the infringer.

4.5. Effect of decisions of the antitrust authorities or the competent courts

A finding of an infringement of antitrust law made in a final decision of a Spanish antitrust authority or of a Spanish court shall be deemed irrefutable for the purposes of an action for damages brought before a Spanish court.

In cases where damages are claimed as a result of actions for damages for infringement of antitrust rules, an infringement of antitrust law shall be presumed, unless proven otherwise, to exist when it has been established in a final decision of antitrust authority or court of any other Member State, and without prejudice to the possibility of pleading and proving new facts of which it was not aware in the original proceedings.

The provisions of this paragraph are without prejudice to the rights and obligations of the courts under Article 267 TFEU.

4.6. Quantification of damages

The burden of proving the damage suffered as a result of the infringement of antitrust law shall be on the plaintiff.

If it is established that the claimant suffered damages, but it is practically impossible or exceedingly difficult to quantify them precisely on the basis of the available evidence, the courts are entitled to estimate the amount of the claim for damages.

Infringements qualified as cartels shall be presumed to cause damages, unless proven otherwise. (Ex. Truck cartels).

In proceedings related to claims for damages for infringements of antitrust law, the Spanish authorities may report on the criteria for the quantification of the compensation to be paid by the infringers to those who have been harmed as a result of such infringements, when requested to do so by the competent court.

4.7. Effects of extrajudicial settlements on the right to damages

The right to damages of a damaged party who has been a party to an extrajudicial settlement shall be reduced by the proportionate share that the infringer with whom an agreement has been achieved has in the damage that the infringement of antitrust law has caused him.

Infringers with whom an extrajudicial settlement has not been reached may not claim a contribution for the remaining compensation from the infringer.

Notwithstanding the abovesaid, when the co-infringers who have not reached an extrajudicial settlement are unable to pay the remaining compensation, the injured party may claim it from the person with whom he concluded the settlement, unless otherwise agreed.

In determining the amount of the contribution that a co-infringer may recover from any other co-infringer under its relative liability for the harm caused by the antitrust law infringement, the courts shall take due account of damages paid in the context of a prior extrajudicial settlement involving the respective co-infringer.

4.8. Cost overruns

The right to compensation can only relate to the additional costs actually borne by the damaged party, which have not been passed on and which have caused him harm.

All of the above, taking into account the following: (i) that in no case may the compensation for consequential damages suffered at any level of the chain exceed the damage of the cost overruns that level; (ii) that the right to full compensation also entails the right of the injured party to claim and obtain compensation for loss of profit as a result of a total or partial repercussion on of the cost overruns; (iii) that the courts shall have the power to calculate in accordance with the law the part of the cost overrun passed on; (iv) that the defendant may rely in its defence on the fact that the claimant passed on all or part of the cost overrun resulting from the infringement of antitrust law; and (v) that the burden of proof that the cost overrun was passed on shall be on the defendant, which may reasonably require the exhibition of evidence held by the claimant or third parties.

As regards proof of overrun's costs and their pass-on, where in an action for damages the existence of the claim or the determination of the amount of damages depends on whether, or to what extent, a cost overrun was passed on to the claimant, taking into account the commercial practice that price increases are passed on further down the supply chain, the burden of proving the existence and amount of such pass-on shall be on the plaintiff, who may, to a reasonable extent, require the exhibition of evidence in the possession of the defendant or third parties.

For the purposes of the abovesaid, indirect purchaser, it shall be presumed to have established that the cost overrun was passed on to it when it proves that: (a) the defendant has committed an infringement of antitrust law; (b) the infringement of antitrust law resulted in and the cost overrun to the defendant's direct purchaser; and (c) the indirect purchaser purchased the goods or services which are the subject of the infringement of antitrust law, or purchased goods or services derived from or containing them. This is without prejudice to the fact that the presumption is rebutted if the defendant proves that the cost overruns were not passed on, in whole or in part, to the indirect purchaser.

4.9. Damages actions brought by claimants at different levels of the supply chain

In order to avoid those actions for damages brought by claimants at different levels of the supply chain led to multiple liability or no liability of the infringer, courts hearing a claim for damages arising from an infringement of antitrust law when assessing whether the rules of the burden of proof on passing-on of the cost overrun set out in the preceding paragraphs, may, through the means available under EU or national law, give due consideration to the following elements:

- a) Actions for damages that relate to the same infringement of antitrust law, but are brought by claimants at other levels of the supply chain;
- b) judgments arising out of actions for damages referred to in the preceding letter;
- c) relevant information of public domain arising from the public enforcement of antitrust law.

This is without prejudice to the rights and obligations of national courts in accordance with Article 30 of Regulation (EU) N° 1215/2012.

4.10. Suspensive effect of the extrajudicial settlement of disputes

The courts hearing an action for damages for infringement of antitrust law may stay the proceedings for a maximum of two years if the parties to the proceedings are pursuing an extrajudicial settlement of the dispute relating to the claim.

4.11. Document production. Means of proof

With regard to evidence, the aforementioned Royal Decree-Law introduced Articles 283 bis letters a) to k) into the Civil Procedure Act, which regulate the procedure to be followed to access sources of evidence in proceedings for damages claims for infringement of antitrust law. This regulation is important since it is a procedural figure that was practically unknown until the entry into force of this rule. In summary, the set of the aforementioned provisions regulate the right to request the exhibition of relevant evidence in the possession of the parties or a third party. Such a request must be substantiated in a reasoned request for the viability of the exercise of the action for damages and may be prior to or contemporaneous with the lawsuit filed to claim the damages generated.

The Court will only allow the disclosure of specific evidence or limited and limited categories of evidence, after weighing the proportionality of the measure(s) requested and the legitimate interests of the parties and third parties.

If the disclosure of evidence containing confidential information is ordered, the decision adopting them shall also mention the measures necessary to protect such confidentiality.

5. Most relevant decisions handed down in Spain on vertical restraints

5.1. Resale price fixing in distribution contracts

Decisions of the Council of the CNMC of November 23rd 2022 (File. S/0019/19 LABORATORIOS GALDERMA)

Subject of the case:

On November 23rd 2022, the Antitrust Division of the CNMC issued the following decision in the above-mentioned case processed by the Antitrust Directorate (CD) following a complaint filed on March 6th 2017 against LABORATORIOS GALDERMA, S.A., for alleged conduct prohibited by Article 1 of the LDC, consisting of the application of dual prices, i.e. different prices depending on the resale channel, physical or online.

Content of the complaint:

The complainant claimed that GALDERMA would have applied dual prices, depending on the resale channel (physical or on-line), including the refusal to supply products in case of non-compliance with the conditions imposed, and that this would be contrary to the provisions of article 1 of the LDC.

According to the complaint, as of November 29th 2016, there was a change in the wholesale conditions of the products manufactured by GALDERMA. Based on the complainant's customer profile, as the owner of a website, GALDERMA unilaterally decided to change the commercial conditions and discounts it had been applying in order to control sales prices on the internet.

The complainant stated that GALDERMA offered him as an exceptional measure to maintain the sales conditions with the discounts applied until that date in the processing of orders for units sold exclusively to pharmacies and parapharmacies, excluding from any discount the units sold by GALDERMA to the website.

Furthermore, the complainant indicated that non-acceptance of these conditions would result in the refusal to supply the orders placed, not only for the website, but also for the pharmacy, as he asserted had happened with the LACOVIN branded product.

The abovementioned actions were denounced as discriminatory for electronic sales compared to sales in physical premises, which would indirectly lead to a ban on the sale of products via the internet. As explained in the complaint, establishing restrictions on marketing through channels other than the traditional ones would mean imposing a selective distribution system that would not be protected by law, given that the sale of GALDERMA's parapharmaceutical products does not require specific services.

Legal assessment by the Antitrust Chamber of the CNMC Council:

The CNMC's legal assessment of the facts of the case was as follows on the basis of Commission Regulation (EU) No 330/2010 of April 20th 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices:

1st.- According to the resolution, article 1 of the LDC prohibits agreements that have as their object, produce or may produce the effect of preventing, restricting or distorting antitrust in all or part of the national market.

2nd.- Insofar, between the contracts signed between GALDERMA and the operators that distribute its INNEOV and LACOVIN brand products, specifically pharmacies, could apply different wholesale prices that would benefit those operators that distribute the products in the online resale channel as opposed to physical distributors, the CNMC agreed to analyse whether these agreements constituted a restriction of antitrust contrary to article 1 of the LDC.

3rd.- The CNMC's Antitrust Division considered that these agreements, as they were between operators operating at different levels of the chain, were vertical in nature within in the sense of Article 1.1.a) of the Block Exemption Regulation.

4th. - Regarding the applicability of the Block Exemption Regulation, article 1.4 of the LDC establishes that the prohibition provided in paragraph 1 of the same article shall not apply to agreements, decisions, or collective recommendations, or concerted or consciously parallel practices that comply with the provisions established in the EU Regulations on the application of article 101.3 of the Treaty on the Functioning of the European Union to certain categories of

agreements, decisions of associations of companies and concerted practices, even when the corresponding conduct cannot affect trade between EU Member States.

5th.- In order for the block exemption to apply to vertical agreements, they must not contain any of the restrictions listed in Article 4 of the Regulation, which contains a list of hardcore restrictions that lead to the exclusion of the entire vertical agreement from the scope of application of the Block Exemption Regulation. Among the hardcore restrictions of antitrust, Article 4 refers to vertical agreements which, directly or indirectly, separately or in combination with other factors under the control of the parties, have as their object: "b. the restriction of the territory into which, or of the customers to whom, the buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services".

6th.- For, the antitrust Division of the CNMC Council, in this regard, the Guidelines on vertical restraints state, in paragraph 5219: "The Internet is a very powerful tool for reaching a greater number and diversity of customers than would be possible using more traditional sales methods, and for this reason certain restrictions on the use of the Internet are treated as restrictions on sale or resale. [The Commission therefore considers the following examples as hardcore restrictions on passive sales in view of the ability of these restrictions to limit the distributor in reaching a greater number and diversity of customers: [...] (d) agreeing that the distributor will pay a higher price for products intended to be resold online by the distributor than for those intended to be resold offline. This does not preclude the supplier from offering the buyer a fixed royalty (not a variable royalty, where the amount increases according to the volume of business done offline, as this would indirectly lead to dual pricing) to support its online or offline sales efforts".

7th.- Therefore, the application of so-called "dual pricing", that is, the application of a different price depending on the resale channel, physical or online, is considered a particularly serious restriction.

Decision:

The CNMC decided not to initiate sanctioning proceedings and to close the proceedings as a result of the complaint filed against LABORATORIOS GALDERMA, S.A., as it considered that there was no evidence of an infringement of article 1 of the LDC.

It should be noted that the CNMC issued its decision on the basis of the application of the Block Exemption Regulation and the European Commission's 2010 Guidelines on Vertical Restraints. This is despite the fact that on the date on which this decision was issued (23.11.22), the guidelines 2022/C248/01 of June 30th, which replaced those of 2010, had already been published.

Despite the fact that, under the CNMC's view, the application of so-called "dual pricing", is considered a particularly serious restriction, the decision not to initiate sanctioning provisions was based on the following criteria:

- With regard to commercial conditions, GALDERMA had no standard distribution contracts. Thus, the conditions of sale of the products manufactured by GALDERMA are those stipulated on the back of the order forms, as well as on the back of the invoices issued by GALDERMA.
- On the basis of the documents provided by GALDERMA, it was found that it did not differentiate within each sales channel the volume of physical sales versus online sales.
- With regard to the establishment of recommended prices for the different channels, it was found that the price lists applied by GALDERMA were unique for all sales channels, physical or online, throughout the national territory. Moreover, in the case of dermo cosmetic products and non-prescription advertising medicines, such as those investigated, the recommended price was freely set by GALDERMA, and it was up to the customer to set the retail price it considered appropriate.
- And both the commercial conditions and the recommended prices approved by GALDERMA were in line with the provisions of the Block Exemption Regulation.

CNMC Council Decision of November 30th 2022 (File. S/0049/19 ISDIN)

Summary of the decision:

The purpose of this resolution was to decide on the proposal for conventional termination submitted to the Antitrust Chamber of the CNMC Council by the Antitrust Directorate in the

framework of a sanctioning procedure initiated against ISDIN, S.A., in order to assess whether the requirements set out in the Defence of Antitrust regulations were met in order to proceed with the conventional termination.

The characteristics of the market analysed and the scope of the facts of the case and the proposed commitments concerned the entire Spanish territory and, in particular, the wholesale trade in perfumery and cosmetic products and the retail trade in cosmetic and hygiene products in specialised shops.

Subject of the file:

The CNMC's Antitrust Directorate initiated sanctioning proceedings against ISDIN, S.A. after receiving a complaint from an operator engaged in the distribution and marketing of parapharmacy and body and health care products. In particular, it was investigating possible conduct prohibited by Article 1 of the LDC and Article 101 of the TFEU, consisting of fixing the resale prices, through the company's online channel, of certain skin care products, at least from June 2018 to February 2019.

The complaint filed:

On September 23rd 2019, a complaint was filed by CASTILLO GRANDA, S.L. (CASTILLO GRANDA) against ISDIN, for alleged conduct prohibited by the LDC, consisting of "fixing minimum resale prices and abuse of dominant position, manifested in the application of unfair prices, refusal to supply, discrimination and tying".

About ISDIN's distribution system and its pricing and discount policy:

In the CNMC's view, ISDIN distributes its products in Spain through the selective distribution system, distributing its skin care products in Spain mainly through the pharmacy channel, ISDIN's pricing policy being based on the existence of a retail price recommendation system, suggested by the company itself through the lists sent to its customers, as well as through the "Love Isdin" website, which in practice entails the fixing of those prices.

Commitments made by ISDIN:

ISDIN requested the conventional termination of the procedure and to this end submitted a series of commitments aimed at resolving the antitrust problems detected, in particular, by implementing a series of measures aimed at preventing the possible fixing of resale prices, in addition to compensating for the particular damage caused by its conduct.

In the CNMC's view, these commitments entailed the implementation of an objective, transparent and non-discriminatory system of rebates, which would avoid the possible linking of rebates to the pursuit of a certain pricing policy by their retail distributors.

In addition, ISDIN undertook to improve its policy of communicating recommended prices to its distributors and to promote its internal culture of Antitrust law compliance. To this end, ISDIN would establish an early warning system for potential infringements and training on antitrust issues for its staff.

Finally, ISDIN committed to ensure that its commercial department staff would not have access to certain information related to pharmacies' sales prices. In particular, it committed to implement actions to prevent business intelligence tools from being used to monitor resale prices.

These commitments would be valid for a period of three years.

Decision:

The CNMC considered that the above commitments submitted by ISDIN adequately addressed the Antitrust concerns identified and closed the sanctioning proceedings against ISDIN by way of conventional termination, and without imposing a fine.

5.2. Selective distribution contracts and restrictions on internet retailing

Resolution of the Council of the CNMC of July 12th 2023 (File. S/0013/21 AMAZON/APPLE BRAND GATING)

In relation to the resolution issued by the CNMC on July 12th 2023 in this case, at the time of the adoption of the resolution (July 12th 2023) the 2022 RECAV was already fully in force as the transitional period had ended on May 31st 2023. In any case, as indicated by the CNMC in

its decisions, the conclusions reached by the CNMC are the same regardless of whether Regulation (EU) 2022/720 or Regulation (EU) 330/2010 is considered applicable.

Summary of the Decision:

On October 31st 2018, Amazon and Apple signed two contracts updating Amazon's terms and conditions as an authorised Apple reseller. These included a number of anti-competitive clauses affecting the online retailing of electronic products in Spain.

Exclusion or "brand gating" clauses

Both companies agreed that only a number of Apple-appointed resellers could sell Apple-branded products through Amazon's website in Spain.

As a result of the application of these clauses:

More than 90% of the resellers who had been using Amazon's website in Spain to retail Apple products were excluded from the main online marketplace in Spain;

Sellers not authorised by Apple to sell their products on Amazon's website in Spain lost an important sales channel, insofar as this website handles most of the online purchases of electronic products in Spain;

Sales of Apple-branded products on the online marketplace were concentrated on Amazon itself, drastically reducing antitrust among resellers of Apple-branded products;

Sales of Apple products through the Amazon website in Spain by sellers based in other EU countries were reduced, thereby limiting trade between Member States; and

There was an increase in the relative prices paid by consumers for the purchase of Apple products on the online market in Spain.

The resellers most affected by this clause were Apple's Non-Authorised Resellers, generally small operators who do not have a direct commercial relationship with APPLE but who sell its products and who were the most active on Amazon's website in Spain and, therefore, those who exerted the most competitive pressure on prices on that website.

Advertising clauses and marketing limitation clauses

Under the Advertising clauses, Amazon and Apple limited the ability of brands competing with Apple to purchase advertising space on Amazon's website in Spain to advertise their products when certain searches are made for Apple products, as well as during the purchasing process for those products.

The marketing limitations clauses provided that Amazon may not, without Apple's consent, conduct marketing and advertising campaigns that are specifically targeted at customers who have purchased Apple products on Amazon's website in the Spain and encourage those consumers to switch from an Apple product to a competing product.

As a consequence of the above clauses, Apple's competitive pressure generated by competitors' advertisements on Amazon's website in Spain, and by the marketing campaigns that the latter may carry out and that the rest of the brands must bear, is reduced. Furthermore, these limitations are directly detrimental to consumers as (i) limit their ability to discover new brands and/or alternative products to Apple's; (ii) increase their search costs and (iii) reduce their ability to switch.

Apple and Amazon charged with sanctions and penalties

The CNMC considers that these clauses, which jointly contribute to changing the dynamics of the sale of Apple products on Amazon's website in Spain, restrict intra-brand and inter-brand antitrust and constitute a single and continuous infringement of Article 1 of the Law on the LDC and Article 101 of the Treaty on the Functioning of the European Union (TFEU), which began with the adoption of these clauses in October 2018. The CNMC ordered the cessation of

the conduct and fined the Apple Group's companies with 143,640,000 euros and the Amazon Group's companies with 50,510,000 euros.

5.3. Vertical single agreements on branding in the form of imposition of minimum quantities

CNMC Council Decision of November 12th 2019 (File. S/DC/0617/17)

In this decision, the CNMC sanctioned Mediaset and Atresmedia for anti-competitive practices in the marketing of television advertising. Both channels were obliged to modify this commercial strategy within three months. The total penalty amounted to 77.1 million euros.

According to this resolution, Mediaset and Atresmedia had developed commercial policies in the sale of television advertising, the result of which had been to concentrate in their channels a combined share of more than 85% of the entire market. In this way, they limited the ability of the other television channels to capture advertising revenues, with the risk of being driven out of the market.

To this end, Mediaset and Atresmedia generally imposed a high minimum investment quota on their advertisers, which represented a significant percentage of their overall advertising campaign. Failure to comply with this investment commitment could be penalised.

Both channels had paid incentives to media agencies known as extra premiums. This remuneration to the intermediaries is conditional on each agency reaching a certain volume or share of investment in the total advertising invoiced by Mediaset and Atresmedia. Revenues from the extra premiums have a significant weight in the agencies' income statement.

By means of these two practices, the two major broadcasters had induced advertisers and agencies to concentrate a large part of their television advertising budget on Mediaset and Atresmedia.

On the other hand, the two channels usually marketed advertising in packages or modules of channels. Each module includes one of the channels with the highest audience share (more attractive and very difficult for advertisers to replace) with other channels with lower audience share of each channel. In this way, they ensured that advertising was also concentrated on the lower-rated channels of Mediaset and Atresmedia.

The sale of advertising through packages of channels is reinforced by the so-called single channel pattern (so-called simulcast), which involves the simultaneous transmission of advertising on the different channels of the network, following the pattern of the channel with the highest audience share.

The combined effect of the above practices is that the other television operators (other national broadcasters, regional broadcasters, pay-TV, etc.) find it difficult to compete on equal terms with the channels which are equivalent in terms of audience, and which are owned by Mediaset and Atresmedia. The other operators are therefore excluded from the television advertising market.

The abovementioned restrictive effect also has a negative impact on the demand for audiovisual content in Spain and on antitrust in the free-TV market. This is because the difficulty to monetise audiences limits the ability of third-party operators to acquire attractive audiovisual content in order to improve their audience.

Such actions are considered to be single-brand vertical agreements in the form of minimum quantity forcing (as defined in the European guidelines on vertical agreements).

Each television group would be practising this type of agreement independently, although the commercial conditions applied by both channels are very similar. The assessment of the effects takes into account their cumulative nature, since they represent 85% of the television advertising market in Spain (more than 40% each).

Sanctions:

According to the decision, the unlawful conduct sanctioned constitutes an infringement of Article 1 of Law 15/2007 and Article 101 of the Treaty on the Functioning of the EU and the fine amounts to a total of 77.1 million euros. Mediaset España Comunicación SA and Publiespaña SAU are jointly and severally liable to pay a fine of 38.9 million euros, while Atresmedia Corporación de Medios de Comunicación SA and Atres Advertising SLU are jointly and severally liable to pay a fine of 38.2 million euros.

Change in trading conditions:

The decision also obliged both channels to cease their conduct and to adapt their commercial and contractual relations within a maximum period of three months.

5.4. Vertical restrictions on internet sales and advertising in franchise agreements

CNMC Council Decision of February 6th 2020 (File. S/DC/0631/18 ADIDAS)

The decision issued by the CNMC in this case was the FIRST DECISION in which the CNMC extensively analysed vertical restraints on internet sales and advertising, thus joining the trend followed in recent years by other antitrust authorities (such as the European Commission and the German and French authorities) in dealing with this type of vertical restraints.

On February 6th 2020, the CNMC adopted a decision declaring the conventional termination of a sanctioning proceeding initiated against Adidas' Spanish subsidiary for including in its contracts with selective distributors and franchisees contractual conditions imposing restrictions on internet sales and advertising, post-contractual non-compete obligations and restrictions on cross-selling.

This case was initiated ex officio following a complaint from an Adidas franchisee in November 2018. The sports equipment manufacturer instrumentalised commercial relations with its distributors through written contracts, which included general sales conditions and other specific conditions for the Internet.

Their wording varied over time and there were different models of franchise contracts signed at different points in time. These contracts contained various anti-competitive practices restricting online sales and advertising, or cross-selling, and imposing post-contractual non-compete obligations (the latter only on some franchisees).

Problematic clauses identified:

1st.- Restrictions on Internet sales and advertising: according to the CNMC in its decision, these restrictions are assimilated to a ban on sales that could constitute hardcore restrictions of antitrust under the provisions of Article 4(c) of Regulation 330/2010 on the exemption of vertical restraints.

- Restrictions on Internet sales: Three types of restrictions were identified:

(i) Obligation to sell exclusively at the physical point of sale

(ii) Failure to provide in the contract the possibility of selling over the Internet

(iii) General pre-approval by Adidas of the domain name (URL) of the Selective Reseller's or Franchisee's website

- Internet advertising restriction: Ban on the use of the Adidas brand on search engines imposed on selective resellers and franchisees without prior authorisation.

2nd.- Post-contractual non-compete obligation: this obligation prohibited franchisees from investing in companies that might compete with Adidas outside the point of sale for one year after the end of the contract. This type of obligation was included in two older models of the franchise contract which were still in force.

3rd.- Prohibition of cross-selling between selective distributors and between franchisees: The CNMC considered that this prohibition constituted a hardcore restriction of antitrust under Article 4(b) of the Vertical Restraints Exemption Regulation 330/2010.

Commitments made by Adidas:

Adidas requested the conventional termination and submitted commitments aimed at eliminating the identified antitrust problems. In particular, this concerns the proactive communication of the new contractual framework with the following modifications:

- In relation to restrictions on internet sales: Adidas undertook (i) to actively communicate to all selective distributors and franchisees the current contractual framework which already foresaw the possibility for them to sell via the internet; and (ii) to dispense with the prior approval of the domain name and replace it by a mere "verification" in order to check that the Adidas name does not appear in the top-level domain.
- Regarding the restriction on internet advertising: Adidas committed to waive prior authorisation and to communicate to all selective distributors and franchisees that they are allowed to advertise on the internet, as well as the use of the Adidas brand name in the headline or description of sponsored search engine advertisements.
- Concerning the post-contractual non-compete obligation: Adidas undertook to communicate the withdrawal of this obligation to the franchisees affected by its application.
- Concerning the prohibition of cross-selling: Adidas undertook to modify the wording of the problematic clauses to: (i) clarify that only sales to distributors who were not part of the selective distribution network, or the franchise network were prohibited; and (ii) expressly state that cross-selling between selective and franchised distributors allowed.

The CNMC considered that these commitments adequately addressed the antitrust problems identified and thus approved the Conventional termination of the file.

5.5. Setting of resale prices in franchise contracts

CNMC Council Decision of 10.03.2016 (File. S/DC/0510/14 FOOD SERVICE)

Subject of the case:

The subject-matter of the case was the system of management by FOOD SERVICE PROJECT, S.L. (FSP) of the franchised brands and the current wording of the franchise contract and of certain annexed documents, which could give rise to antitrust problems giving rise to an infringement of Article 1 of the LDC. This practice took place within the framework of the

vertical relationship between FSP and its franchisees of designation and imposition from FSP to those of all the suppliers of products and services, as well as fixing the RP (“Retail price”) to these franchisees, due to the system of centralised printing of the letters, the computer support where the data were uploaded and the communication system set up by the franchising company.

On the one hand, with regard to the procurement system, the wording of the franchise contract and Annex I could raise antitrust concerns by imposing suppliers and services beyond those listed as exceptions in the notice on vertical restraints, as they were not necessary to ensure the overall image of the company. They also did not reflect the actual practice of the much more flexible system.

On the other hand, with regard to the RP system, although the franchise contract clearly established the franchisee's freedom to set the RP, actual practice could be making it difficult to change those.

Conventional termination on the basis of the commitments submitted by FSP:

As stated in that decision, the termination of the sanctioning proceedings in respect of prohibited practices requires that the proposed commitments by, in this case, FSP, resolve the effects on antitrust arising from the investigated conduct and that the public interest is sufficiently safeguarded.

The commitments contained in the proposal submitted by FSP were based on the modification of the wording of the franchise agreement and other documents annexed thereto, as well as the documents comprising the FSP's Brand Management System.

The Council's Antitrust Board's assessment of the final commitments proposed by FSP was that they were adequate to restore conditions of effective antitrust in the market for the provision of informal catering services and in the narrower market for take-home collection.

On the one hand, as regards the sourcing system, the commitments proposed by FSP would make possible to easily identify mandatory products/suppliers subject to authorisation/approval, as opposed to free products not linked to FSP's image, homogeneity or intellectual property rights, for which franchisees do not have to be subject to conditions

imposed by FSP, but to recommendations advantageous to them and can decide freely and without dissuasion of any kind, whether to accept those suppliers or not.

On the other hand, as far as the RP system is concerned, these commitments would make it possible to modify the maximum recommended RP set by FSP for each product offered on the menu, dishes and drinks, through an option which, while maintaining the centralised printing of the price list, as this is considered part of the company's image, facilitates the franchisee's exercise of its freedom to modify the maximum recommended prices, reminding franchisees of this possibility and streamlining the modification system, thus guaranteeing franchisees their freedom to act on them.

In addition, FSP expressed its commitment to regularly remind franchisees of their right to freely set the RP of the products offered to customers in their establishments.

Consequently, the Antitrust Division of the CNMC Council found that the final commitments proposed by FSP resolved the identified antitrust concerns arising from FSP's conduct in Spain in the product market for casual dining and agreed to the conventional termination of the case.

5.6. Non-genuine agency contracts

Decision of the CNMC Council of 30.07.2009 (File. S/0652/07 REPSOL/CEPSA/BP)

Existence of prohibited practice - Fine - art. 1 Law 16/89

By Decision dated July the 30th, 2009 (File. S/0652/07), the Council of the former CNMC sanctioned REPSOL COMERCIAL DE PRODUCTOS PETROLÍFEROS, S.A (REPSOL), CEPSA ESTACIONES DE SERVICIO. S.A (CEPSA), and BP OIL ESPAÑA, S.A (BP), for infringement of Articles 1 of Law 16/1989, on the Defence of Antitrust and 81 of the ECT (now Article 101 of the TFEU), by having indirectly fixed the retail price to independent entrepreneurs operating under its banner, restricting antitrust between the service stations in its network and between the rest of the service stations.

In this CNMC resolution, the Council analysed the special relationship between oil operators and petrol station managers operating as commission agents and resellers in the light of antitrust rules.

This commercial linkage means that in practice what are formally known as commission or agency contracts are in practice no more than simple resale contracts on the part of service stations and are therefore subject to antitrust law.

To the extent that these petrol station managers are entrepreneurs who take significant risks, they must be free to set their selling prices, and therefore the direct or indirect fixing of the prices at which they sell their product by the supplier is prohibited by antitrust rules.

In this context, the Council of the National Antitrust Commission considered that the REPSOL, CEPSA and BP had committed an infringement of art. 1 of the LDC and art. 81.1 of the TCE by having indirectly fixed the retail price in the petrol stations operated under the CODO and DODO regimes, which are managed by independent entrepreneurs, entrepreneurs who assume non-negligible risks in their activity.

The analysis leads to the conclusion that the way in which oil operators set the price at which service stations buy fuel from them and the way in which they set the commissions they receive in return for their services, together with other factors in their commercial relationship, removes the incentives for petrol stations to discount and thus compete via prices.

By virtue of such practices, the maximum and recommended prices communicated by the operator become, de facto, fixed prices, removing the retail distributor's freedom to set the retail price of fuel at his service station.

The Council understood that the effect of this conduct is that each oil operator controls the retail prices of all the service stations under its banner, both those which it can, because it manages

them directly, and those which it cannot, because they are managed by independent businessmen. In this way, they prevent price antitrust between the stations in their network and also between service stations in different networks, since the maximum and recommended prices communicated by the three operators (and followed by the service stations in view of the impossibility of discounting) are contractually based on the prices in the area of influence and are therefore the same.

The result is that, irrespective of the brand, location, or economic regime of operation of the petrol station, all of them apply the same maximum or recommended price set by their operator, which is also aligned with the maximum or recommended price set by the other operators.

This is therefore a vertical practice of indirect price-fixing which also has the effect of horizontal price-fixing and thus a lack of antitrust between the service stations of the three operators (inter-brand antitrust).

The sanction imposed consisted of a pecuniary part, calculated according to the number of affected stations of each operator (REPSOL, five million euros; CEPSA, one million eight hundred thousand euros; and BP, one million one hundred thousand euros) and another part of behavioural conditions. In the latter, the Council also ordered the sanctioned companies to eliminate all contractual clauses, as well as those elements of their commercial relationship, which had the effect of indirectly fixing prices.

CNMC Decision N° 32/2013 of March 12th 2015

In relation to the previous decision, in the CNMC's decision of 12.03.2015, the CNMC declared the non-compliance with the third provision of the Resolution of the National Competition Commission of July 30th 2009, issued in the sanctioning file 652/07 REPSOL/CEPSA/BP, which constitutes a very serious infringement typified in section 4.c) of article 62 of Law 15/2007, of July 3rd, on the Defence of Antitrust, for which REPSOL COMERCIAL DE

PRODUCTOS PETROLÍFEROS, S.A. was held responsible, and for which a sanction of 8,750,000 euros was imposed.

In this other CNMC decision, and in line with what the CNMC had already ruled in its 2009 decision, the CNMC states that "from the point of view of antitrust law, fuel distribution contracts can only be divided into two types: distribution contracts (CODO and DODO) to which the antitrust rules apply, whether they are called non-genuine agency contracts or supply or sale and purchase contracts, and (so-called genuine) agency contracts to which, in principle, Article 81.1 EC Treaty and 1 LDC only with regard to the obligations imposed on the agent in relation to the sale of the contractual products to third parties on behalf of the person acting, although certain nuances are admitted in the latter case".

And that "There is no doubt that so-called improper commission contracts, or non-genuine agency contracts, contain clauses whereby the service station manager assumes non-negligible risks which make him an independent operator, regardless of the fact that, by virtue of the type of contract, he distributes fuel in the name and on behalf of his main operator. This implies, of course, that these contracts are subject to antitrust law.

Spain, January 2025

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