

Vertical Agreements

The regulation of distribution practices
in 42 jurisdictions worldwide

2010

Contributing editor: Stephen Kinsella OBE



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Bulgaria

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Antitrust law

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

Main legal act

New Bulgarian Protection of Competition Act

The main Bulgarian legal act is the Protection of Competition Act (PCA). Since 2 December 2008 an entirely new act has been in force in Bulgaria which repealed the previous PCA in its entirety. The new PCA provides for the legal possibility that certain categories of concerted practices, agreements and decisions (ie, vertical agreements) may be subject to block exemption. The Bulgarian Commission for Protection of Competition (CPC) shall be the competent authority to introduce the block exemption criteria in a separate decision, such a decision not being subject to appeal. So far the CPC has not adopted decisions introducing block exemptions under the new PCA. Such decisions, however, had been adopted under the repealed PCA and will be mentioned below.

Among the acts adopted under the new PCA concerning vertical agreements, the CPC has introduced a methodology on the sanctions that it may impose and guidelines for application of the de minimis doctrine.

With the adoption of the new PCA, the system of prior notification of vertical agreements, which existed under the repealed PCA, was removed.

Repealed Bulgarian Protection of Competition Act

Under the regime of the repealed PCA, the CPC adopted two decisions introducing general block exemption criteria on vertical agreements (Decision 44/10.04.2001) and specific block exemption criteria on vertical agreements in the motor vehicle sector (Decision 221/29.07.2004).

As the decisions of the CPC that introduced the said criteria had been issued on the legal grounds of the repealed PCA, formally they should cease their legal effect with the repeal of the PCA. However, the CPC had indicated that Decision 44/10.04.2001 will remain in effect until 31 May 2010. The other decision concerning the motor vehicle sector, however, does not provide for any particular effective time period limitation.

Other Bulgarian legal acts

The Bulgarian Civil Procedure Code provides for civil proceedings regarding a claim of damages that could result from an infringement of the antitrust legislation.

Article 101 of the Treaty on the Functioning of the European Community (TFEU) (formerly article 81 of the EC Treaty) and the rest of the European legislation on vertical agreements

As the TFEU is very recent, all references under the new PCA are still with regard to article 81 of the Treaty Establishing the European

Community (the EC Treaty). The new PCA explicitly provides for the direct and parallel application of article 81 of the EC Treaty (post Lisbon, article 101 TFEU) and the rest of the European legislation on vertical agreements as long as the trade between member states has been affected.

In general, with the introduction of the new PCA, the Bulgarian legislation has been updated in accordance with the current European legislation in the matter of vertical agreements. However, even in the lack of domestic detailed provisions or practice or guidelines, the CPC has always closely followed the practice and guidelines of the European Commission and the European Court of Justice, even as regards the 'soft law'.

Types of vertical restraint

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

The new PCA provides for a general prohibition on all types (eg, vertical) of agreements, decisions and concerted practices between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition on the relevant market. The PCA also provides a list of prohibited agreements, decisions and concerted practices which is identical to the list in article 101 TFEU. The same list was also provided for under the repealed PCA. The CPC has stated that this is not an exhaustive list.

The concept of vertical restraint is not defined in the new PCA, nor was it defined under the repealed PCA. However, Decision 44/10.04.2001 of the CPC gives a certain understanding to the matter of vertical agreements and vertical restraints which is identical (although not so detailed) to the understanding of vertical restraints introduced in Commission Regulation No. 2790/1999 and the Guidelines on Vertical Restraints.

Legal objective

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

The main objective pursued may be outlined as the protection of competition. However, in its investigation and assessment, the CPC may also take into consideration other public relations such as consumer protection, etc. Further, the CPC may seek collaboration with other state authorities competent on the respective public relations, for example, the Bulgarian Commission for Protection of Consumers, etc.

Responsible authorities

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

The main competent authority in Bulgaria responsible for enforcing prohibitions on anti-competitive behaviour in general and vertical restraints in particular is the CPC. The CPC has a special directorate 'Prohibited agreements, decisions and concerted practices. Sector analyses'. In general the acts of the CPC are subject to appeal before the Bulgarian Supreme Administrative Court (SAC) through two instances. There are a few acts which are not subject to appeal, but they are considered not capable of affecting the rights and obligations of third parties.

The civil relations between parties with regard to damages that might have been caused as a result of the infringement of the antitrust law may be claimed directly before the civil court.

Governments and ministers do not have a role.

Jurisdiction

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

The new PCA provides that it shall not be applicable with regards to actions, the consequences of which restrain or may restrain and distort competition in another state save in cases where it has been provided for by virtue of an international treaty to which Bulgaria is party.

With regard to European legislation, the test concerns whether or not the respective vertical agreement could affect the trade between member states. In such a case the European competition rules apply in parallel to the same vertical agreement which would be assessed both under domestic legislation and under the European competition rules (ie, there will be one infringement only, but it will be classified both as an infringement of article 101 TFEU and the domestic legislation).

The competition rules regarding vertical agreements have not been applied in a pure internet context so far.

In practice the CPC would closely follow the European practice and understanding in the field, even in its assessment under domestic legislation.

Agreements concluded by public entities

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

The new PCA provides that it shall apply to public entities, including entities of the executive power and local self-governments in the event they perform 'an economic activity'.

Sector-specific rules

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

There are no such regulations adopted under the new PCA.

However, under the repealed PCA, the CPC adopted Decision 221/29.07.2004 for block exemption of categories of agreements and concerted practices in the motor vehicle sector.

General exceptions

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

The new PCA provides for exceptions to antitrust law regarding agreements, decisions and concerted practices having a minor effect on competition.

Agreements and concerted practices in relation to vertical relations are considered to have a minor effect if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement.

The exception, however, shall not apply where the agreements, decisions or concerted practices have as their object and effect:

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

The CPC has adopted guidelines on the application of the *de minimis* doctrine. These CPC Guidelines closely follow the Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 101(1) TFEU.

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction? When assessing vertical restraints under antitrust law does the authority take into account that some agreements may form part of a larger network of agreements or is each agreement assessed in isolation?

There is no explicit legal definition of 'agreement' in the Bulgarian antitrust law.

However, following European practice, the CPC has assumed in its latest practice that for the purposes of antitrust law, an 'agreement' would be in place where undertakings express their joint intention to follow a certain pattern of behaviour on the market. Further, the CPC adopts the view that the concept of a prohibited agreement may apply to newly started processes of pre-contractual negotiations where concordance between the undertakings' will is achieved (even if it is only partial or under certain terms and conditions), which is to result in coordination of their economic behaviour on the market. There has been a case where the CPC investigated the clauses contained in a joint-venture agreement in relation to a future vertical agreement between the joint venture and one of its shareholders, which did not exercise control over the joint venture, although the vertical agreement was not yet in place between the parties.

In its earlier practice the CPC also held that the content of an 'agreement' related to various forms of regulation of commercial relations. However, in finding the actual will of the undertakings, competition law was to be focused on those aspects of the will of the undertakings through which they consented to restrain their freedom to determine their independent behaviour on the market. The CPC accepted that an agreement might be in place even when the undertakings assumed a certain plan of action, which purpose was to restrain their trade freedom by determining a line of coordinated action or inaction on the market.

There is an explicit legal definition of 'concerted practice', however. According to the new PCA, 'concerted practice' is defined as coordinated actions or inactions of two or more undertakings.

Parent- and related-company agreements

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

The PCA does not formally differentiate between related and non-related parties. It appears that only the CPC's newly adopted

Guidelines on the application of the de minimis doctrine introduce a definition of 'related party'. However, the Guidelines indicate that this definition is for the purpose of the application of the de minimis doctrine itself. At present it may not be said with certainty whether this definition may have a larger application in the CPC's practice. Further, the definition given under the CPC's Guidelines has been directly derived from and follows the definition provided for under paragraph 12 of the Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 101(1) TFEU.

Apart from the CPC's Guidelines on the application of the de minimis doctrine, there is no other legal definition for antitrust purposes of 'related party'. However, in its practice the CPC seems to adopt the principle of 'vertical integration'. In other words, the CPC would hold that in cases of vertical integration there would be some immunity from competition law as such undertakings are not independent. The CPC would consider that a case of vertical integration is in place when the undertakings belong to the same economic group.

It also appears that for the CPC, the determination of whether or not two or more undertakings belong to the same economic group would relate to the concept of control. For competition purposes, control by a parent company would be in place where the parent company disposes of the possibility to exercise decisive influence on the strategic business behaviour of the subsidiary (ie, decisive influence on any of the decisions related to the determination of the budget, the business plan, major investments or the appointment of senior management).

Further, in Bulgarian legislation there are certain limitations of the principle of vertical integration. These limitations are provided for by law and concern the drug sector. The Bulgarian Medicinal Products in Human Medicine Act provides for vertical integration limitations in respect of producers of drugs and whole sellers, and retailers (ie, drugstores). In other words, the vertical integration is permitted in the relations between a producer and whole seller, but may not encompass the retailers.

Agent–principal agreements

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

The Bulgarian competition legislation does not provide for any specific regulation on matters related to agent-principal relations or agreements in respect of antitrust law, in particular from a vertical agreements perspective.

However, the CPC has adopted the principles laid down in the Guidelines on Vertical Restraints, which state that antitrust law may apply to agent-principal agreements if they are not of a genuine agency-agreement nature, the consideration being made with regard to the commercial and financial risks reviewed in the Guidelines on Vertical Restraints.

Intellectual property rights

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

Decision 44/10.04.2001 provides that the block exemption shall apply to agreements containing vertical restraints which also contain certain provisions relating to the assignment or use of IPRs under the following conditions:

- the IPRs provisions are part of a vertical agreement for sale or distribution of products;

- the IPRs provisions relate to the IPRs assignment to or use by the buyer; however, the block exemption shall not apply where IPRs are assigned to the supplier, regardless of the fact that the IPRs provisions may relate to the production or distribution of products;
- the IPRs provisions must not constitute the primary object of the agreement;
- the IPRs provisions must be directly related to the use, sale or resale of products by the buyer or buyer's customers (eg, a franchising agreement); and
- the IPRs provisions in relation to the contract products must not contain restraints of competition having the same object and effect as the vertical restraints which are not exempted under Decision 44/10.04.2001.

In the Bulgarian legislation there is no legal act regulating block exemption in cases of technology transfer agreements entered into between two undertakings permitting the production of contract products.

Analytical framework for assessment

- 13** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

As a first step the CPC would determine whether the vertical restraint is in principle subject to assessment under antitrust law and whether the impact on competition is minor (ie, the de minimis doctrine). The vertical restraint would not be subject to assessment under antitrust law in genuine agency agreements and agreements between undertakings which are not independent (ie, vertical integration). The vertical restraint would not be subject to further assessment under antitrust law if the impact on competition is minor (except for certain cases of hard-core restrictions, which are considered to always have a serious impact on competition).

If it has been ascertained that the vertical restraint is subject to assessment under antitrust law and the impact on competition is not minor, the vertical restraint would be assessed in light of the general prohibition (as stated in question 2) on all types of agreements, decisions and concerted practices between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition on the relevant market. The PCA provides that such agreements, decisions and concerted practices shall escape this prohibition in the event that they contribute to improving the production or distribution of goods or to promoting technical or economic progress (or both) while allowing consumers a fair share of the resulting benefit and which does not:

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

The new PCA also provides that the CPC may adopt a decision on block exemption criteria, thus providing a safe harbour to certain categories of agreements, decisions and concerted practices which may be considered to satisfy the above conditions. However, if following an investigation the CPC infers that a certain agreement, decision or concerted practice – falling within the scope of such a decision – does not satisfy the block exemption criteria, it may still benefit from an individual exemption. If an individual exemption is not possible, then the agreement, decision or concerted practice would be prohibited.

As mentioned above block exemptions were adopted by the CPC under the repealed PCA, that is, Decision 44/10.04.2001 generally concerning vertical agreements and corresponding to Commission Regulation No. 2790/1999 and Decision 221/29.07.2004 specifically concerning the motor vehicle sector and corresponding to Commission Regulation No. 1400/2002.

When adopting Decision 44/10.04.2001 the CPC has taken into consideration that certain vertical agreements that would fall within the scope of Decision 44/10.04.2001 may improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. The CPC has also stated that there is a likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects because the restrictions contained in vertical agreements depend on the degree of market power of the undertakings concerned and the extent to which such undertakings face competition from other suppliers of products. Further, the market power and efficiency-enhancing effects should also be subject to assessment against the market share of the respective undertakings.

However, the CPC has also taken into consideration the fact that certain vertical agreements may contain severe anti-competitive restrictions (hard-core restrictions) which are not indispensable to the attainment of positive effects, such as minimum or fixed resale prices or certain types of territorial protection, such cases being irrespective of the market share of the undertakings.

The approach adopted in Decision 44/10.04.2001 is identical to the approach adopted in Regulation No. 2790/1999, which states that the block exemption would apply to:

- an agreement where the market share of the supplier does not exceed 30 per cent (above that threshold individual exemption may be possible);
- an agreement that does not contain the hard-core restriction (if contained individual exemption is unlikely); and
- non-compete obligations which meet certain conditions.

As a parallel assessment to the above one the CPC would also assess whether or not article 101 of TFEU would apply. In practice however, the assessment performed by the CPC under national and European legislation would be identical.

- 14** To what extent does the authority consider market shares, market structures and other economic factors when assessing the legality of individual restraints? Does it consider the market positions and conduct of other suppliers and buyers in its analysis? Does it analyse whether certain types of agreement or restriction are widely used in the market?

When assessing the legality of individual restraints in some cases the CPC may take market shares into consideration up to or below certain thresholds, while in other cases the illegality of individual restraints will be assessed irrespective of the market shares. The CPC would generally consider the market share of the supplier save in cases of 'exclusive supply' where the market share of the buyer would be accounted for. The CPC would take the market shares into consideration up to a certain threshold of 30 per cent on the respective market. Up to such a market share cap it could be presumed that positive competitive effects would outweigh the negative anti-competitive effects. The CPC would take the market share into consideration below a certain market threshold when assessing the minor effect of the respective agreement or concerted practice on competition. The minor effect is presumed to be in place below an aggregate 15 per cent market share of the parties to the agreement or concerted practice on any of the relevant markets affected by such an agreement or concerted practice. The legality of the respective agreement or concerted practice is assessed without taking into consideration market shares, either up to or below the above thresholds, in cases of severe anti-competitive restrictions contained (the 'hard-core restrictions').

Further, the CPC may take into consideration the position and conduct of other suppliers and buyers in certain cases where the CPC finds that vertical agreements have effects which are incompatible with the conditions described in question 13. The CPC may do so in any particular case where it finds that access to the relevant market or competition therein is significantly restricted by the cumulative

effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers or where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market. In the first case the CPC may withdraw the benefit of the block exemption with regard to the respective vertical agreements or concerted practice, and in the latter case the CPC may adopt a decision that the block exemption shall not apply to vertical agreements containing specific restraints relating to that relevant market.

When adopting a decision that the block exemption shall not apply, the CPC would first need to infer that withdrawal would not be sufficient to overcome the anti-competitive effects. In the process of adopting a decision that the block exemption shall not apply the CPC would take into consideration the market share of each separate parallel network containing vertical restraints and the aggregate market share of all vertical restraints having similar anti-competitive effect.

The CPC may also take into consideration the effect of parallel networks when assessing the minor effect of an agreement under the *de minimis* doctrine.

The CPC would also take into consideration the whole economic environment of the relevant market, factors such as the level of competition, the number and position of competitors, barriers for entry, maturity and specifics of the market, etc.

Block exemption and safe harbour

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

The block exemption criteria with regard to vertical agreements containing vertical restraints are provided for in Decision 44/10.04.2001 of the CPC. It has been adopted in view of the principles and standings assumed in Commission Regulation No. 2790/1999.

Similar to Commission Regulation No. 2790/1999, Decision 44/10.04.2001 makes reference to market share and the presence of hard-core restrictions and non-compete obligations.

As already stated the block exemption shall apply on condition that the market share usually held by the supplier does not exceed 30 per cent of the relevant market on which the supplier is positioned. In the event the vertical agreement contains an exclusive supply clause, regard must be had to the market share held by the buyer.

The block exemption shall not apply to vertical agreements that contain hard-core restrictions almost identical to those listed under article 4 of Commission Regulation No. 2790/1999. Decision 44/10.04.2001 does not explicitly mention how it relates to territory or customer-allocation restrictions. However, in its assessment of vertical agreements, the CPC would follow closely and take into consideration article 4(b) of Commission Regulation No. 2790/1999.

The block exemption shall not apply to non-compete obligations contained in vertical agreements identical to those listed under article 5 of Commission Regulation No. 2790/1999. However, the block exemption may still apply to the remaining part of the agreement, provided it is severable from the non-compete obligation.

Types of restraint

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

The restrictions imposed by the supplier on the buyer with regard to minimum and fixed prices are regarded as hard-core restrictions and are black listed. If contained in a vertical agreement they would make the entire agreement null and void.

The supplier could, however, determine maximum prices or recommend prices.

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

No, the CPC has not had decisions where it has considered these issues concerning resale price maintenance. It would be hard to predict how they would be viewed for the time being.

- 18** Have there been any developments in your jurisdiction in relation to resale price maintenance restrictions in light of the landmark US Supreme Court judgment in *Leegin Creative Leather Products Inc v PSKS Inc* or the European Commission's review of its Vertical Block Exemption Regulation and associated guidelines?

No such developments in relation to resale price maintenance restrictions are currently known in Bulgaria.

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

In one of its cases in 2006 the CPC granted an individual exemption to a vertical agreement regarding the distribution of drugs. Each of the parties held 100 per cent market share on the relevant markets on which they were positioned. The vertical agreement contained conditions on resale price maintenance, clauses of exclusive distribution and maintenance of minimum volumes of the products in the stores of the distributor, a non-compete obligation for the distributor regarding the same or similar products and an obligation for the distributor not to enter into other agreements with third parties, which could have been burdensome and could have hindered the execution of the distributor's obligations under the existing agreement. However, the vertical agreement was concluded specifically for the purpose of executing a particular public procurement of the Bulgarian Ministry of Healthcare and the participation of the distributor in it. The purpose of the distribution agreement was to ensure the regular supply of drugs to the Bulgarian Ministry of Healthcare. Further, the drugs which were the subject of the distribution agreement were lifesaving, had no generic substitutes or substantially similar products and the supply to the Bulgarian Ministry of Healthcare could be done only with the participation of the supplier as a producer of the drugs. The term of the distribution agreement was one year, subject to further extension through the explicit written consent of the parties. The CPC determined that in principle, and without having regard to the very specific and exceptional circumstances at hand, such a vertical agreement would always objectively lead to prevention and distortion of competition although it did not encompass the whole portfolio of the supplier, nor did it prevent the distributor from selling to third parties apart from the Bulgarian Ministry of Healthcare. However, the CPC granted the individual exemption only because the distribution agreement was essential for the purposes of the public procurement execution and of prime importance to the interests of the end consumers. The selling by the distributor of the products to the Bulgarian Ministry of Healthcare as per the price list of the supplier was essential for the distributor's participation in the public procurement. Eventually the CPC explicitly noted that in future the parties had to refrain from entering into such distribution agreements and that the term extension of the existing agreement would be allowed only if it would be essential for the purposes of the public procurement.

In another case the CPC prohibited a vertical agreement with regard to clauses which in combination led to a state of exclusive supply (very high minimum supply volumes, which corresponded to the actual production capacity of the supplier, and very high liquidated damages in case of failure to meet these volumes) and clauses which in combination with the alleged exclusive supply led to price

maintenance on the level of the supplier (obligations of the supplier not to sell to third parties on more favourable conditions, including the price) due to, among other things, the economic power of the buyer. These clauses were found in a joint-venture agreement, the supplier being a shareholder in the buyer company without the ability to exercise control over the buyer, with regard to a future vertical agreement between the supplier and the buyer. The CPC considered these clauses as a part of the vertical agreement, although not actually located in it. The vertical agreement was intended for an indefinite period of time. The price intended for the buyer, however, was fixed for a certain period of time which duration would exceed the customary commercial practice and the price would be very low as compared to the price usually offered by the supplier. The CPC inferred that taking into consideration the very low fixed prices intended only for the buyer and the supplier's obligation not to sell to third parties on more favourable conditions would practically result in minimum price fixing for all possible supplies (whether to the buyer or to a third party) at the level of the supplier. In summary, the CPC prohibited the vertical agreement and determined that the clauses regarding the prices, the supply and the term of the vertical agreement in combination would lead to the vertical agreement's anti-competitive effect.

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

No, the CPC has not addressed such issues.

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

The PCA provides for a general prohibition of vertical agreements and concerted practices which have as their object or effect the share of markets and sources of supply.

Decision 44/10.04.2001 does not provide for any particular rules regarding the restriction of the territory into which a buyer may resell contract goods.

However, the CPC seems to adopt the approach of Regulation No. 2790/1999 that in order to restrict a buyer to actively resell in a certain territory, such a territory needs to have already been allocated as exclusive to the supplier itself or to another buyer. The market share should be below 30 per cent.

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

The PCA provides for a general prohibition of vertical agreements and concerted practices which have as their object or effect the share of markets and sources of supply.

Decision 44/10.04.2001 does not provide for any particular rules regarding the restriction of the customer to whom a buyer may resell contract goods in the sense of article 4 (b) of Commission Regulation No. 2790/1999. In this respect the CPC seems to adopt the approach of Regulation No. 2790/1999 that in order to restrict a buyer from actively reselling to certain customers, such customers need to have already been allocated as exclusive to the supplier itself or to another buyer. The market share should be below 30 per cent.

However, Decision 44/10.04.2001 contains a list of hard-core restrictions identical to those described in article 4(c), (d) and (e) of Commission Regulation No. 2790/1999.

23 How is restricting the uses to which a buyer puts the contract products assessed?

There is no regulation or practice with regard to this issue.

24 How is restricting the buyer's ability to generate sales via the internet assessed? Have the authorities issued decisions or guidance in relation to restrictions on using the internet for advertising or selling? Has there been antitrust-based litigation resulting in court judgments regarding restrictions on internet sales? If so, what are the key principles encapsulated in such guidelines and judgments?

The only piece of legislation that contains any relevant formulations regarding sales via the internet is Decision 221/29.07.2004. The information can be found in the preamble of Decision 221/29.07.2004 rather than in its operative part and is the same as in recitals 16 and 18 of Commission Regulation No. 1400/2002, namely:

- the right of any distributor to sell new motor vehicles or spare parts or the right of any authorised repairer to sell repair and maintenance services to any end consumer passively or, where relevant, actively and should include the right to use the internet or internet referral sites; and
- in markets where selective distribution is used, the exemption should apply in respect of a prohibition on a distributor from operating out of an additional place of establishment where he is a distributor of vehicles other than passenger cars or light commercial vehicles. However, this prohibition should not be exempted if it limits the expansion of the distributor's business at the authorised place of establishment by, for instance, restricting the development or acquisition of the infrastructure necessary to allow increases in sales volumes, including increases brought about by internet sales.

However, there has been no CPC or court practice or specific rules in this respect. Decision 44/10.04.2001 does not contain any such provisions either. There are no guidelines issued in both Decision 221/29.07.2004 and Decision 44/10.04.2001.

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

Decision 44/10.04.2001 provides for two hard-core restrictions in terms of vertical agreements establishing selective distribution:

- the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment; and
- the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

Decision 44/10.04.2001 also provides for one non-compete obligation that would not be subject to exemption: any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers. There is no explicit legal requirement or practice or guidance that the criteria for selection must be published.

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

The CPC has held in its decisions that selective distribution might be more dangerous in terms of competition than non-selective distribution.

According to the CPC, sometimes the type of product justifies particular vertical restraints that could be imposed on a distributor belonging to a selective distribution system. Although there is no established practice with regard to the matter of selective distribution, the CPC has held by way of exemplary reference in other cases that the selective distribution is oriented towards the distribution of products of particular categories, such as possessing a certain level of luxury (eg, jewellery, high class watches, perfumes, etc) or products requiring special technical knowledge and maintenance (eg, cameras, TV sets, hi-fi systems, etc). This exemplary reference was made in a comparison to and consideration of a distribution system of fizzy drinks, non-fizzy drinks, sports drinks, energy drinks, instant drinks, etc, which was not recognised by the CPC as a selective distribution system, as these products did not pertain to any of the above categories of products, although their trademark was known worldwide.

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

There is no regulation or practice with regard to this question.

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

No, there have been no such actions.

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

The possible cumulative restrictive effect of multiple selective distribution systems operating in the market might be taken into consideration by the CPC in light of its general powers to withdraw the block exemption regulation or to declare it inapplicable where competition on the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers, or where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market.

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

No, there have been no such decisions.

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

Decision 44/10.04.01 treats such a restriction in the same way as it is treated under Commission Regulation No. 2790/1999.

In other words, Decision 44/10.04.01 would treat such a restriction as a non-compete obligation which may benefit from the block exemption if the market share of the supplier does not exceed 30 per cent and the non-compete obligation is agreed for a time period no longer than five years.

Further, similar to Commission Regulation No. 2790/1999, under Decision 44/10.04.01 the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at a different level of trade, shall be considered as a hard-core restriction. Such a restriction would not benefit from an individual exemption.

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

The Bulgarian competition rules and practice have not addressed such a restriction so far.

A possible indirect interpretation in this respect, however, may be extracted from the first case referred to in question 19 where the distributor was obliged not to enter into other agreements with third parties that may be too burdensome and hinder the execution of the distributor's obligations under the existing agreement (there was a separate (non-compete) obligation concerning competing goods). The CPC interpreted this obligation as an example of a situation where entering into other agreements (which would logically suggest entering into agreements for selling of other (ie, non-compete) goods) by the distributor would involve resources such as time, personnel, material and other equipment which might jeopardise the regular supply of the life-saving drugs. According to the CPC this would reflect not only on the distributor's liability under the distribution contract but would also affect the interests of the end consumers who were in need of these drugs and had no alternative replacement. The CPC inferred that any restriction imposed on the distributor that strengthened the guarantees that the life-saving drugs would effectively and efficaciously reach the end consumers and contribute to their health would be justified and necessary. However, this had been a case of very specific and exceptional circumstances which had reached the assessment of the CPC, due to the fact that the regime of prior notification still existed under the repealed PCA.

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

The restriction on the buyer's ability to stock products competing with those supplied by the supplier would benefit from the block exemption if the market share of the supplier does not exceed 30 per cent on the relevant market and the non-compete obligation is agreed for a time period no longer than five years.

Such an obligation that is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration.

The time limitation of five years shall not apply where the contract products are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

Such a non-compete obligation may also relate to the period after termination of the agreement provided that it is for a period of time no longer than one year and relates to a point of sale at which the buyer operated during the contract period and is necessary to protect know-how transferred from the supplier to the buyer.

This obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

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

Obligations that require the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of the buyer's total purchases of the contract products and their substitutes would be considered as a non-compete obligation. It would benefit from the block exemption if the market share of the supplier does not exceed 30 per cent on the relevant market and the non-compete obligation is agreed for a time period no longer than five years.

Such an obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration.

The time limitation of five years shall not apply where the contract products are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

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

If the supplier enters into an obligation to supply to only one buyer ('exclusive supply'), it would be assessed under the general criteria of the block exemption, taking into account the 30 per cent market share cap with regard to the market share of the buyer.

In respect of the restriction on the supplier's ability to sell directly to consumers, there is no explicit regulation as to how it should be treated. However, the CPC has recently provided certain speculations in this respect in a case where the subject matter was different. From the CPC's speculations, it appears that the CPC would in general not object to such a type of restriction. However, any particular application of this restriction would be subject to consideration in terms of the factual environment of the particular case.

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

There are no specific rules regarding the treatment of franchising agreements save the possibility of imposing a post-term non-compete obligation which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

In general the CPC is willing to consider franchise agreements in the light of the Commission Guidelines on Vertical Agreements.

- 37** Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed. Would the analysis differ where the buyer commits to 'most favoured' terms in favour of the supplier?

There are no specific rules as to how the obligation of the supplier to supply the contract products to the buyer on most favourable terms should be treated.

However, the CPC has determined that such an obligation in combination with other vertical restraints (eg, very high minimum supply volumes and very high liquidated damages if failure to meet the minimum volumes; indefinite period of time of the agreement; very low fixed supply prices for a time period of the agreement which is longer than what is customary according the good commercial practice in the respective sector; the fact that the supplier may be the only one on its relevant market to supply all or a predominant part of the overall demand on the downstream market of the contract products) could amount to anti-competitive behaviour.

Notifying agreements

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

There is no obligation for the parties to a vertical agreement to give prior notification to the CPC. It would be for the respective parties

to decide and assess whether or not the respective vertical agreement could or could not benefit from the block exemption.

Authority guidance

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

There is no formal procedure within the PCA for obtaining guidance from the CPC. The assessment of the respective vertical agreement will be made in the process of ascertaining infringements of the competition rules.

Complaints procedure for private parties

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

There is a formal procedure whereby private parties can complain to the CPC about alleged vertical restraints. The procedure is initiated by a complaint from a party whose interests are affected or may be negatively affected by the respective vertical agreement.

The CPC launches proceedings within seven days of the complaint being lodged and then designates a working group to conduct an investigation. The investigation concludes with a report of the working group.

Within 14 days of the end of the investigation, the CPC conducts a closed session during which the CPC decides on the further proceedings of the case. During this closed session the CPC may adopt the following acts:

- a decision that no infringement has been committed;
- a ruling which returns the case to the working group for additional investigation if the collected evidence is not sufficient to make a decision; or
- a ruling through which the CPC brings the assertions for infringement of the competition rules to the defendant (statement of objections).

In the third case the CPC determines a time period not earlier than 30 days for the claimant and the defendant to provide their objections and they are given access to all materials collected on the case.

Not earlier than 14 days from the expiry of the term for provision of objections, the CPC determines a date for an open session on which the parties may be heard.

After the parties have been heard the CPC may do the following:

- make a ruling which returns the case to the working group for additional investigation;
- make a ruling through which the CPC adopts new assertions for committed infringement in which case the CPC would comply with the procedure followed on the primary assertions for infringement; or
- make a decision through which the CPC:
 - ascertains the committed infringement and the party having committed the infringement;
 - imposes a sanction, periodical sanction or fines (or all of the above);
 - ascertains that no infringement of PCA has been committed or that there are no grounds to initiate actions regarding a committed infringement of articles 101 and 102 TFEU;
 - pronounces the termination of the committed infringement by imposing behavioural or structural measures for competition to be restored;
 - pronounces on the inapplicability of the block exemption for the particular case and determines a time period for the

amendment of the vertical agreement in compliance with the competition rules or its termination; or

- pronounces on the inapplicability of the respective European Regulation on block exemption for the particular case and determines a time period for the amendment of the vertical agreement in compliance with article 101(3) TFEU.

Enforcement

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

Actual relevant statistics on this matter may not be provided mainly due to the fact that the practice is waiting to be shaped in future. Two main reasons for this are that under the repealed PCA the obligation for prior notification and the sanctions of fixed amounts rather than a percentage of the turnover still existed. The new PCA has been in force for a little more than a year and it is difficult to predict how the practice will evolve.

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

Vertical agreements that contain hard-core restrictions are considered to be null and void by law, with no prior decision needed.

Vertical agreements that contain certain anti-competitive obligations remain in effect if the remainder of such vertical agreements may be severed from the anti-competitive obligations. In such a case only the anti-competitive obligations are null and void by law, and no prior decision is needed. The CPC has had a case where the entire vertical agreement has been prohibited due to the inseparability of the remainder of the vertical agreement from the anti-competitive obligations.

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

Under the new PCA the sanctions that could be imposed may be up to 10 per cent of the annual turnover of the undertaking or the association of undertakings for the preceding financial year. The repealed PCA used to provide for a fixed amount of the sanctions.

The CPC has also introduced an entirely new methodology which entered into force in the beginning of February 2009.

As the new PCA has entered into force recently there are no trends that may be identified.

Individuals may be subject to a fine of 500 levs to 50,000 levs.

Investigative powers of the authority

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

When conducting an investigation the CPC may:

- request information and tangible, written, digital and electronic evidence irrespective of the carrier;
- take someone's oral or written evidence;
- conduct an investigation on the spot;
- assign the conduct of expertise from outside experts; or
- request information or cooperation from another national competition regulator of the another member state and from the European Commission.

Private enforcement

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

Private enforcement is possible. Any person (either an individual or a legal entity) that has incurred damages may make a claim, even if the infringement has not been directly oriented towards such a person (ie, non-parties to the respective vertical agreement).

The damages are claimed before the Bulgarian civil court, the judgment of the Bulgarian Supreme Administrative Court or the decision of the CPC which has not been appealed and has entered into force,

being binding upon the civil court with regard to the infringement committed and the identity of the party who committed such an infringement. However, the amount of the damages is subject to proof.

As the provisions regarding the right to claim damages resulting from infringement of the antitrust law are comparatively new in terms of private enforcement, no practice has yet been established and no time predictions could be provided.

Other issues

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

No, there is not.

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