

Vertical Agreements

The regulation of distribution practices
in 41 jurisdictions worldwide

2009

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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Since 2 December 2008 an entirely new act has been in force in Bulgaria which repealed the previous PCA in its entirety.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, inter alia 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.

Further, with regard to the fines and sanctions that could be imposed, the new PCA provides that CPC shall also introduce a methodology that shall be published on its internet site.

Among the newly adopted acts under the new PCA concerning vertical agreements CPC has introduced only a new methodology on the sanctions that CPC may impose.

Repealed Bulgarian Protection of Competition Act

Under the regime of the repealed PCA, CPC had adopted two decisions introducing block exemption criteria on vertical agreements in general (Decisions 44/10.04.2001) and specific block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As the decisions of CPC having introduced the said criteria had been issued on the legal grounds of the repealed PCA, formally they should cease their legal effect with the repeal of the PCA.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, CPC had indicated that Decision 44/10.04.2001 would remain in effect until 31 May 2010. The other decision concerning the motor vehicle section however does not provide for any particular effective time period limitation.

As the new PCA has been quite a recent piece of legal act with almost no practice whatsoever on it, for the time being it may not be predicted with certainty whether CPC would intend keeping to the above two decisions in future without introducing new ones, or would soon adopt new decisions. So far CPC has both adopted some new acts and restated other, which had been adopted under the repealed CPC.

Other legal acts

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

Article 81 of the Treaty for Establishing the European Community and the rest of the European legislation on vertical agreements

The new PCA explicitly provides for the direct and parallel application of article 81 of the Treaty for Establishing the European Community (the Treaty) 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 with the current European legislation in the matter of vertical agreements. Up to this moment even in the lack of domestic detailed provisions or practice or guidelines CPC has always followed closely the practice and the 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 PCA provides for a general prohibition 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, and in particular those which:

- (i) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (ii) share markets or sources of supply;
- (iii) limit or control production, markets, technical development or investment;
- (iv) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at competitive disadvantage; and
- (v) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to customary commercial practice, have no connection with the subject of the main contract or its execution.

The text is identical to the text of article 81 of the Treaty. The same list was provided for under the repealed PCA. However, CPC has stated that this is not an exhaustive list.

The concept of vertical restraint is not defined in the new PCA, neither was it defined under the repealed PCA. However, Decision 44/10.04.2001 of CPC shapes a certain understanding on the matter of vertical agreements and vertical restraints.

Legal objective

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

The main objective pursued may be outlined as the protection of competition. However, in its investigation and assessment CPC may also take into consideration other public relations such as consumer protection etc. Further, 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 agencies

- 4 What agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible agencies, 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 Bulgarian Commission for Protection of Competition. In general the acts of CPC are subject to appeal before the Bulgarian Supreme Administrative Court (SAC) through two instances. There are just few acts which are not subject to appeal, but 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 to them as a result from the infringement of the antitrust law may be claimed directly before the civil court. The final judgment of SAC that is subject to no further appeal, or the act of CPC which has not been appealed and therefore entered into force are binding upon the civil court.

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?

The new PCA provides that it shall not be applicable with regard to actions which consequences 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 where to Bulgaria is a party.

With regard to the European legislation the test concerns whether or not the respective vertical agreement could affect the trade between Member States. However, in some cases the new PCA provides that both the domestic legislation and the European competition rules may apply in parallel to the same vertical agreement. In such cases the respective agreement would be assessed both under the domestic legislation and under the European competition rules. In such a case there will be one infringement only, but it will be classified both as an infringement of article 81 and the domestic legislation.

In practice CPC would follow closely the European practice and understanding in the field, even in its assessment under the 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 for public entities, including entities of the executive power and the local self-governments.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry? Please identify the rules and the sectors they cover.

There are no such regulations adopted under the new PCA.

However, under the repealed PCA CPC had adopted Decision 221/29.07.2004 to 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 from antitrust law regarding agreements, decisions and concerted practices having 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 new PCA also provides that CPC shall be competent to adopt further guidelines on the application of the above general standings. The CPC has just adopted its Guidelines on the application of the de minimus doctrine. These CPC Guidelines closely follow the Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 81(1) of the Treaty.

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 agency take into account that some agreements may form part of a larger, interrelated 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 the European practice, CPC has assumed in its latest practice that for the purposes of antitrust law 'agreement' would be in place where undertakings express their joint intention to follow a certain pattern of behaviour on the market. Further, 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 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 actually the vertical agreement was not yet in place between the parties.

In its earlier practice CPC also held that the content of '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. 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 actions or inactions on the market.

On the other side, there is an explicit legal definition of 'concerted practice'. 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)?

PCA does not formally differentiate between related and non-related parties. It appears that only 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 purposes 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 CPC's practice. Further, the definition given under 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 81(1) of the Treaty.

Apart from 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 CPC seems to adopt the principle of 'vertical integration'. In other words CPC would hold that in cases of vertical integration there would be some immunity from competition law as such undertakings are not independent. CPC would consider that a case of vertical integration is in place when the undertakings belong to the same economic group.

It appears that for CPC the determination of whether or not two or more undertakings belong to the same economic group would relate to the concept of control. Further, 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 the 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, on the one side, and retailers (ie, drugstores), on the other side. In other words the vertical integration is permitted in the relations producer-whole seller, but may not encompass the retailers.

Agent-principal agreements

11 In what circumstances does antitrust law 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 and/or agreements in respect of antitrust law, and in particular from vertical agreements perspective.

However, in its latest practice CPC adopted the principles laid down in the European Commission Guidelines on Vertical Restraints that antitrust law may apply to agent-principal agreements if they were not of genuine agency-agreement nature, the consideration being made with regard to the commercial risks reviewed in the European Commission 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:

- (i) the IPRs provisions are a part of a vertical agreement for sale or distribution of products;
- (ii) 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;
- (iii) the IPRs provisions must not constitute the primary object of the agreement;
- (iv) 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
- (v) 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 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.

The new PCA provides that agreements, decisions and concerted practices shall not be prohibited in the event that any such an agreement, decision and concerted practice contributes to improving the production or distribution of goods or to promoting technical and/or economic progress 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 CPC may adopt a decision on block exemption criteria regarding certain categories of agreements, decisions and concerted practices which may be considered to satisfy the above conditions. However, if following an investigation CPC infers that a certain agreement, decision or concerted practice, falling within the scope of such a decision, does not satisfy the above mentioned conditions CPC shall pronounce that the block exemption shall not apply.

As mentioned above under the new PCA, CPC has neither adopted a new decision on block exemption of vertical agreements nor has it restated Decision 44/10.04.2001 or Decision 221/29.07.2004 which had been adopted under the repealed PCA.

However, Decision 44/10.04.2001 was adopted for the purposes of harmonisation of the Bulgarian competition legislation with the European competition rules and in particular following the standings assumed in Commission Regulation 2790/1999. If a new decision is adopted under the new PCA it might be reasonable to infer that such a decision might contain the basic standings of Decision 44/10.04.2001.

When adopting Decision 44/10.04.2001 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 a better coordination between the participating undertakings. CPC has also stated that the likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends 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, CPC has also taken into consideration the fact that certain vertical agreements may contain severe anti-competitive 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.

14 To what extent does the agency 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?

When assessing the legality of individual restraints in some cases 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. CPC would generally consider the market share of the supplier save the cases of 'exclusive supply' where the market share of the buyer would be accounted for.

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.

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 considerations market shares, either up to or below the above thresholds, in cases of severe anti-competitive restrictions contained (the so called 'hardcore restrictions').

Further, CPC may take into consideration the position and conduct of other suppliers and buyers in certain cases where CPC finds that vertical agreements have effects which are incompatible with the conditions described in question 13. 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 CPC may withdraw the benefit of the block exemption with regard to the respective vertical agreements or concerted practice and in the latter case 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 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 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.

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 CPC. It has been adopted with a view to the principles and standings assumed in Commission Regulation 2790/1999.

Scope of application

The block exemption shall apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions, under which the parties may purchase, sell or resell certain products.

The block exemption shall also apply to non-reciprocal vertical agreements where:

- the buyer has a total turnover not exceeding BGN 15,000 levs;
- the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods; or
- the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

The block exemption shall also apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if:

- all its members are retailers of goods (ie, selling to end consumers); and
- no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding BGN 7 million levs;

The block exemption does not cover cases of vertical agreements between competitors, cases of rent and lease agreements and in the relations between undertakings and end consumers.

Hardcore restrictions

The block exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (i) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (ii) the restriction of active or passive sales to end consumers by members of a selective distribution system, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
- (iii) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade; or
- (iv) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-consumers

or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Vertical agreements containing the above vertical restraints shall be considered null and void.

Non-compete obligations

The block exemption shall not apply to any of the following obligations contained in vertical agreements.

- (i) any direct or indirect obligations of the buyer not to produce, purchase, sell or re-sell products which are competitive to the contract products;
- (ii) any direct or indirect 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 during the previous year of the contract products and their substitutes

Such non-compete obligations are not covered by the block exemption when their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered. The five-year limit for non-compete obligations does not apply when the products are resold by the buyer 'from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer'. In such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer.

- (iii) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell products, unless such obligation: relates to products which compete with the contract products; and is limited to the premises and land from which the buyer has operated during the contract period; and is indispensable to protect know-how transferred by the supplier to the buyer.

The duration of such post term non-compete obligation is covered by the block exemption provided that it is limited to a period of one year after termination of the agreement. 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.

- (iv) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

The block exemption shall still apply to the remaining part of the vertical agreement if that part is severable from the non-exempted obligations.

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 hardcore restrictions and are black listed. If contained in a vertical agreement they would make the whole vertical agreement null and void.

The supplier however could determine maximum prices or recommend prices.

- 17** 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*. If not, is any development in this area anticipated? Has there been any more general discussion by the relevant agency (or any other influential stakeholder) of the policy in your jurisdiction regarding resale price maintenance?

No such developments have been known in Bulgaria in this relation so far.

- 18** Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint? Have the decisions addressed the efficiencies that it is alleged can arise out of such restrictions?

In one of its cases in 2006 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 price maintenance as well as a clause of exclusive distribution, 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 may be too burdensome and hinder the execution of the distributor's obligations under the existing agreement. However, the vertical agreement was concluded for the purposes of execution of 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 Health Ministry. 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. CPC ascertained that in principle such a vertical agreement could 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, CPC granted the individual exemption only because the distribution agreement was essential for the purposes of the public procurement execution. The selling 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 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 CPC prohibited a vertical agreement with regard to clauses which in combination lead 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 lead 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 without the ability to exercise control over the buyer, with regard to a future vertical agreement between the supplier and the buyer. 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 that would exceed the customary commercial practice, on the one side, and would be very low as compared to the price usually offered by the supplier, on the other side. 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, CPC prohibited the vertical agreement as it inferred 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.

19 How is restricting the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

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, in its practice CPC seems to adopt the approach of Regulation 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.

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

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.

However, in its practice CPC seems to adopt the approach of Regulation 2790/1999 that in order to restrict a buyer to actively resell 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.

21 How is restricting the uses to which a buyer puts the contract products assessed under antitrust law?

There is no regulation or practice in this relation.

22 How is restricting the buyer's ability to generate sales via the internet assessed under antitrust law? Have the agencies issued decisions or guidance in relation to restrictions on internet selling? If so, what are the key principles?

The only act that contains any relevant formulations regarding sales via internet is Decision 221/29.07.2004. The formulations might be found in the preamble of Decision 221/29.07.2004 rather than in its operative part. They are the same as those in recitals 16 and 18 of Commission Regulation 1400/2002, namely:

- The right of any distributor to sell new motor vehicles or spare parts or 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.

- 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 is no practice or specific rules in this respect. Decision 44/10.04.2001 does not contain any such provisions either. There are no guidelines issued to both Decision 221/29.07.2004 and Decision 44/10.04.2001.

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

Decision 44/10.04.2001 provides for two hardcore 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.

24 Are selective distribution systems more likely to comply with antitrust law where they relate to certain types of product? If so, which types of product and why?

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

According to CPC sometimes the type of products 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, 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 technics, 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 CPC as a selective distribution system, as these products did not pertain to any of the above categories of products, although their trade mark was known worldwide.

25 Regarding selective distribution systems, are restrictions on internet sales by approved distributors permitted? If so, in what circumstances? Must internet sales criteria mirror offline sales criteria or would discrepancies be permitted?

There is no regulation or practice in this relation.

26 Does the relevant agency 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 on the market might be taken into consideration by CPC in light of its general powers to withdraw the block exemption regulation or to declare it inapplicable where, in the first case, 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, in the second case, where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market.

27 Has the agency 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.

28 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed under antitrust law?

Decision 44/10.04.2001 states that an obligation on the buyer not to manufacture, purchase, sell or resell would be considered as non-compete. However, it may benefit from the block exemption in case the market share of the supplier does not exceed 30 per cent on the relevant market and the non-compete obligation is assumed for a time period not 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.

Such a non-compete obligation may also relate to the period after termination of the agreement provided that it is for a period of not more 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.

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

The restriction on the buyer's ability to stock products competing with those supplied by the supplier would benefit from the block exemption in case the market share of the supplier does not exceed 30 per cent on the relevant market and the non-compete obligation is assumed for a time period not 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.

Such a non-compete obligation may also relate to the period after termination of the agreement provided that it is for a period of not 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.

30 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products assessed under antitrust law?

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 in case the market share of the supplier does not exceed 30 per cent on the relevant market and the non-compete obligation is assumed for a time period not 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.

31 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed under antitrust law.

In case 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, in its recent practice CPC provided certain speculations in this respect in a case where the subject matter was different. Despite this fact it appeared from CPC's speculations elaborated as a side analysis to this case that CPC would in general not object against 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.

32 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 under antitrust law?

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

Update and trends

On 2 December 2008 an entirely new Protection of Competition Act entered into force for Bulgaria. One of the most important newly introduced changes is that the obligation for preliminary notification of the parties to a vertical agreement has been left behind. Another important change is the amount of sanctions that could be imposed for infringement which are changed from a fix amount to up to 10 per cent of the annual turnover for the preceding financial year. It has been provided for that even a non-party to the agreement may claim damages in terms of private enforcement. The new Protection

of Competition Act provides for the direct and parallel application of articles 81 and 82 of the Treaty in case of infringement of antitrust law where trade between member states is affected.

In the first quarter of 2009 a whole new set of acts of CPC have been in the process of preparation and adoption by CPC. They are still waiting to be introduced.

In a nut shell, the competition practice of CPC and the courts is still to be shaped and established on most of the newly introduced standings.

- 33** 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 under antitrust law. 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, in its practice CPC has assessed 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 to 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 lower market of the contract products) could amount to anti-competitive behaviour.

Notifying agreements

- 34** Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify it of any particular categories of agreement? If there is a formal notification procedure, how does it work? What type of ruling (if any) does the agency deliver at the end of the procedure? And how long does this take? Is a reasoned decision published at the end of the procedure?

There is no obligation for the parties to a vertical agreement to give prior notification to 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.

Agency guidance

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

There is no formal procedure for obtaining guidance from CPC provided for under PCA. The assessment of the respective vertical agreement will be done in the process of ascertainment of infringements of the competition rules.

Complaints procedure for private parties

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

There is a formal procedure whereby private parties can complain to CPC about alleged vertical restraints.

The procedure is initiated by a complaint from a party which interests are affected or are threatened to be affected in a negative way by the respective vertical agreement.

CPC launches the proceedings within seven days as of the lodging of the complaint.

CPC designates a working group which conducts an investigation.

The investigation concludes with a report of the working group.

Within 14 days of the end of the investigation CPC conducts a close session on which CPC decides on the further proceedings of the case. On this closed session 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 ground a decision;
- a ruling through which CPC brings the assertions for infringement of the competition rules to the defendant (statement of objections).

In the third case 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, CPC determines a date for an open session on which the parties may be heard.

After the parties have been heard CPC may adopt the following acts:

- a ruling which returns the case to the working group for additional investigation;
- a ruling through which CPC adopts new assertions for committed infringement in which case CPC would comply with the procedure followed on the primary assertions for infringement;
- a decision through which CPC:
 - ascertains the committed infringement and the party having committed the infringement;
 - imposes a sanctions, periodical sanctions and/or fines;
 - ascertains that no infringement of PCA has been committed or that there are no grounds to initiate actions regarding a committed infringement of articles 81 and 82 of the Treaty;
 - pronounces on the termination of the committed infringement, including by imposing behavioural or structural measures for the 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;
 - 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 81(3) of the Treaty.

Enforcement

37 How frequently is antitrust law applied to vertical restraints by the agency? What are the main enforcement priorities regarding vertical agreements?

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 that are that under the repealed PCA the obligation for prior notification and the sanctions of fixed amounts rather than percentage of the turnover still existed.

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

Vertical agreements which contain hardcore restrictions are considered in their entirety null and void by law, with no prior decision needed.

Vertical agreements which 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. CPC in its practice has had a case where the entire vertical agreement has been prohibited due to the inseparability of the remainder of the vertical agreements from the anti-competitive obligations.

39 May the agency impose penalties itself or must it petition the courts or another administrative or government agency? What sanctions and remedies can the agency or the courts impose when enforcing the prohibition of vertical restraints? 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.

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

The repealed PCA used to provide for a fix amount of the sanctions.

As the new PCA has entered into force very recently there has been no sanctions imposed under it and no trends may be identified.

Individuals may be subject to a fine within BGN 500 levs and BGN 50,000 levs.

Investigative powers of the agency

40 What investigative powers does the agency have when enforcing the prohibition of vertical restraints?

When conducting an investigation 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;
- request information or cooperation from another national competition regulator of the another Member State as well as from the European Commission.

Private enforcement

41 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 claim, even in case the infringement has not been oriented directly 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 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 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

42 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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