

Vertical Agreements

Contributing editor
Patrick J Harrison



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Vertical Agreements 2016

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Antitrust law

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

The main Bulgarian legal act is the Bulgarian Protection of Competition Act (PCA). With its adoption in 2008, the system of prior notification of vertical agreements that existed under the old PCA was removed. Article 15 of the PCA contains a general prohibition identical to the one under article 101 of the Treaty on the Functioning of the European Community (TFEU).

The Bulgarian Commission on Protection of Competition (CPC) has adopted a special Decision No. 55/20.01.2011 on the categories of agreements (both horizontal and vertical) subject to block exemptions. In practice, the decision directly indicates that for domestic antitrust purposes (ie, where trade between member states is not affected) the same requirements and rules as those contained in the existing Community legislation on vertical restraints (Regulation (EC) No. 330/2010, Regulation No. 461/2010, etc) will apply, but having regard to the specifics of the domestic market. The CPC has also introduced separate guidelines for the application of the de minimis doctrine.

The Bulgarian Civil Procedure Code provides for civil proceedings concerning possible claims for damages that could result from the infringement of antitrust law.

Where trade between member states is affected, article 101 of the TFEU and the other Community legislation on vertical restraints apply. In practice, the CPC closely follows Community case law on vertical agreements.

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?

Similarly to article 101 of the TFEU, the PCA provides for general prohibition on all types of (including vertical) agreements, decisions and concerted practices between two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition on the relevant market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, markets, technical development or investment;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The CPC has stated that this is not an exhaustive list.

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.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive 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 anticompetitive behaviour in general, and vertical restraints in particular, is the CPC. The acts of the CPC are subject to appeal before the Bulgarian Supreme Administrative Court through two instances.

Damages that might be caused as a result of an infringement of antitrust law may be claimed directly before the civil courts. The government 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?

Vertical restraints will be subject to domestic antitrust law if the undertakings carry out their activities within Bulgaria, or outside the country should they expressly or tacitly prevent, restrain or distort competition within Bulgaria.

Domestic antitrust law will not apply with regard to actions the consequences of which may prevent, restrain or distort the competition in another state, except in cases where it has been provided for by virtue of an international treaty to which Bulgaria is a party.

If a vertical agreement has the potential to affect trade between member states, Community antitrust rules will apply in parallel to domestic antitrust law, so the vertical restraint would be assessed under both the domestic and Community antitrust rules. In such case there may only be one infringement, but it will be qualified at the same time both as an infringement of article 101 of the TFEU and the domestic antitrust law.

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

Agreements concluded by public entities

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

Antitrust law applies to vertical restraints in agreements concluded by public entities, provided they are concluded in the course of the economic activities of those public entities.

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.

In Decision No. 55/20.01.2011 on the categories of agreements subject to block exemption, the CPC makes direct reference to the existing Community sector-specific rules (both on horizontal and vertical agreements, including the sector-specific rules in the motor sector and the transfer of technology) and explains that for domestic antitrust purposes the same rules apply accordingly, but having regard to the specifics of the domestic market.

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

The PCA provides for exceptions to antitrust law regarding agreements, decisions and concerted practices with only minor effects on competition (the *de minimis* doctrine).

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, will 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 introduced separate guidelines for the application of the *de minimis* doctrine.

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

There is no official legal definition of 'agreement' for antitrust purposes under Bulgarian law, but the PCA officially contains a legal definition of 'concerted practice' as 'coordinated actions or inactions of two or more undertakings'.

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

The CPC has clarified that for antitrust purposes, 'agreement' is a much broader concept than that under civil or commercial law. In this sense, an agreement for antitrust purposes would be in place even where the agreement may be invalid, non-binding or not yet in force from a civil or commercial law perspective (eg, a draft agreement).

Following Community case law, 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 agreement may apply to newly started processes of pre-contractual negotiations where concordance between the undertakings' wills is achieved (even if it is only partial or under certain terms and conditions) that is to result in coordination of their economic behaviour on the market. There has been a case in which the CPC investigated the clauses contained in a joint-venture agreement in relation to a potential vertical agreement between the joint venture and one of its shareholders (which did not exercise control over the joint venture) even though the vertical agreement was actually 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. In finding the actual will of the undertakings, however, antitrust law 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, the purpose

of which was to restrain their trade freedom by determining a line of coordinated actions or inactions on the market.

With regard to how informal an agreement may be, the CPC has noted that it is even possible for it to take the form of tacit behaviour on the market even though no formal contact has been made between the undertakings insofar as an alignment in their market behaviour could be discerned (usually where there is no rational economic justification).

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

The PCA does not formally differentiate between related and non-related companies or parties for the purposes of vertical agreements. It appears that only the CPC's guidelines on the application of the *de minimis* doctrine introduce a definition of 'related party', but the guidelines indicate that that 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 wider application in the CPC's practice on vertical agreements. The definition given under the CPC's guidelines has been directly derived from the definition provided under paragraph 12 of the Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 101 of the TFEU (ex article 81 of the EC Treaty).

Apart from the CPC's guidelines on the application of the *de minimis* doctrine, there is no other legal definition of related party for antitrust purposes. In practice, however, the CPC seems to adopt the principle of 'vertical integration', so in cases of vertical integration there would be some immunity from antitrust law as vertically integrated undertakings are not independent undertakings. The CPC would consider that vertical integration is in place when the undertakings belong to the same economic group. It also appears that to the CPC the determination of whether two or more undertakings belong to the same economic group would relate to the concept of 'control' derived from the rules on concentrations between undertakings (ie, control by a parent company would be in place where the parent company may exercise decisive influence on the strategic business behaviour of the subsidiary, which includes 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).

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

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

In its practice the CPC has adopted the principles laid down in the Guidelines on Vertical Restraints of the European Commission that antitrust law generally does not apply to agent-principal agreements if the agent is not an independent undertaking; however, antitrust law may apply to agent-principal agreements in which the principal transfers certain commercial and financial risks onto the agent.

In 2012 the CPC investigated a case concerning principal-agency agreements in the motor vehicle sector where it concluded that the said agreements were not 'genuine' agency agreements as some considerable risks and burdens were transferred onto the agents, such as:

- the storage and risk of incidental loss of the goods (new motor vehicles);
- insurance costs for the goods;
- investment in advertising activities regarding the sale and trademark of the goods;
- rental payments by agents to the principal (which were considered the most considerable burden of all);
- monthly licence payments for the use of software products licensed by the principal; and
- costs related to guarantee services.

Those risks and burdens were considered to be substantial, disproportionate and economically inadequate to the compensation that each agent

received from the principal for the guarantee service performed by each agent. In that decision the CPC underlined the different concepts of 'agency agreement' for competition and civil law purposes.

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

No, there is no such domestic guidance. In its practice the CPC expressly refers to the rules contained in the Guidelines on Vertical Restraints of the European Commission. No decision of the CPC has so far dealt with what would constitute an agent-principal relationship in the online sector.

Intellectual property rights

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

No, there is no such guidance as Bulgarian antitrust law does not address that matter. As already mentioned above, however, Decision No. 55/20.01.2011 indicates that the same requirements as those contained in the existing Community legislation on vertical restraints would apply (eg, Regulation (EC) No. 330/2010, Regulation (EC) No. 772/2004). We believe that to be valid also for intellectual property.

Analytical framework for assessment

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

When making an assessment of a vertical agreement or restraint the CPC would go generally through three basic steps.

First, it would analyse whether the parties to the investigation are 'undertakings' or 'associations of undertakings' for antitrust purposes. Here, the CPC would assess whether each party performs an 'economic activity' and – if positive – whether what that party is investigated for falls within its economic activity or within another type of activity or powers (a public entity, for instance, may exercise both public functions and economic activity, only the latter being subject to antitrust rules).

The CPC would then assess whether the undertakings were indeed independent, as antitrust rules apply only between independent undertakings. These analyses would require the CPC to ascertain if, for instance, there was a 'vertical integration' or 'agency agreement' in place.

Next, the CPC would analyse if there was a 'vertical agreement' (or concerted practice) in place between the undertakings. Here, the CPC would first need to analyse whether there was an 'agreement' for antitrust purposes and – if positive – whether that agreement is indeed 'vertical' (and not horizontal, for instance).

Finally, it would analyse whether the vertical agreement is liable to prevent, distort or restrict competition by object or effect (ie, the vertical agreement is assessed under the general prohibition under the PCA (which is identical to that under article 101 of the TFEU)). If the vertical agreement falls within the general prohibition, it may be exempted if it contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit; and does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives, and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Block exemptions and individual exemptions are possible. The analyses here are analogous to those under Community antitrust law. Vertical agreements containing hard-core restrictions are not block exempted as they are considered to be per se illegal and may be subject to individual exemption only under very extreme circumstances. The restrictions considered as hard core are the same as under Community antitrust law (eg, resale price maintenance, restriction on territory or customers).

There are no specific domestically tailored block exemption rules. Decision No. 55/20.01.2011 indicates that the rules of the respective Community block exemptions will apply accordingly, having regard to the specifics of the domestic market. In the absence of hard-core restrictions, the de minimis doctrine applies.

In parallel to the foregoing, the CPC will also assess whether article 101 of the TFEU applies. In practice, however, the assessment performed by the CPC under domestic and Community antitrust law would be identical.

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

For domestic purposes Decision No. 55/20.01.2011 makes direct reference to market share under the Community block exemption regulations (eg, a 30 per cent market share cap regarding the supplier and the buyer under article 3 of Regulation (EC) No. 330/2010). Where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market, the CPC may decide that Decision No. 55/20.01.2011 will not apply to vertical agreements containing specific restraints relating to that market.

Further, in the absence of hard-core restrictions, market share is relevant in assessing whether an agreement has only minor importance (the de minimis doctrine). 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 markets affected by the agreement.

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

For domestic antitrust purposes Decision No. 55/20.01.2011 makes direct reference to market share under the Community block exemption regulations (eg, 30 per cent market share cap regarding the supplier and the buyer under article 3 of Regulation (EC) No. 330/2010). Where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market, the CPC may decide that Decision No. 55/20.01.2011 will not apply to vertical agreements containing specific restraints relating to that market.

Further, in the absence of hard-core restrictions the market shares are relevant in assessing whether an agreement is of a minor importance (the de minimis doctrine). 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.

In one case under the old PCA, the CPC prohibited a vertical agreement with regard to clauses that, 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 the event of failure to meet these volumes) and clauses that, in combination with the said exclusive supply, led to price maintenance at the level of the supplier (obligations of the supplier not to sell to third parties on more favourable conditions, including the price) due to, inter alia, 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. The CPC considered these clauses as 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 hand, and would be very low as compared with the price usually offered by the supplier, on the other hand. 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 as it inferred that the clauses regarding the prices, the supply and the term of the vertical agreement in combination would have anticompetitive effects.

In 2012 the CPC issued a decision on a case regarding horizontal agreements. The case concerned an investigation of several of the major food retailers in Bulgaria and possible prohibited horizontal concerted practices, the substance of which, however, was the cumulative effect of certain vertical restraints (eg, wholesale MFN clauses, exchange of sensitive information through the vertical agreements and prohibition against the simultaneous participation in competitors' promotions) imposed at the same time by all of the investigated food retailers on their suppliers. Although the investigation formally concerned horizontal agreements, the core of the whole investigation was the vertical restraints and their cumulative effects. In addition, the CPC ascertained that the food retailers

possessed buyer power in the vertical agreements with their suppliers, which facilitated the imposition of those vertical restraints. The ultimate result of the investigation was that the food retailers assumed the obligation to remove those vertical restraints.

There have been no decisions regarding online sales.

Block exemption and safe harbour

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

The PCA allows for block exemption of certain categories of agreements. The criteria for block exemptions are adopted by a decision of the CPC.

As already mentioned above, there are no unique block exemptions specifically tailored for domestic purposes (ie, where the trade between member states is not affected). Instead, Decision No. 55/20.01.2011 makes reference to the block exemption regulations applicable at a Community level (Regulation (EC) No. 330/2010, Regulation (EC) No. 1400/2002, Regulation (EC) No. 461/2010 and Regulation (EC) No. 772/2004), the requirements of which for domestic purposes apply accordingly and having regard to the specifics of the domestic market (eg, the turnover under article 2, paragraph 2 of Regulation (EC) No. 330/2010 for domestic purposes is lowered to 7 million Bulgarian leva).

Those block exemptions function in the same way as the block exemptions at a Community level.

Decision No. 55/20.01.2011 also provides that vertical agreements containing hard-core restrictions and non-compete obligations may not be block exempted. Decision No. 55/20.01.2011 will remain in force until 31 May 2023.

Types of restraint

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

Fixed and minimum resale prices are considered as hard-core restrictions. Recommended and maximum resale prices are generally permitted unless they are indirect means of determining fixed and minimum resale prices.

In 2013 the CPC imposed a sanction in the vegetable oil market for resale price maintenance that involved the direct (ie, as a contractual obligation) and indirect (ie, incentivised) determination of fixed and minimum resale prices, and the fixing of discounts and margins for two levels of trade downstream (ie, both for the distributors and their sub-distributors). The supplier had ensured an effective monitoring system to keep everything under control. The CPC dismissed the supplier's objection that the whole system constituted a recommended commercial policy only and that it was not applied in practice. The decision of the CPC is pending appeal before the court.

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

No, we are not aware of any such decisions or guidelines that have that particular matter as their subject. In 2013, however, the CPC investigated a case involving resale price maintenance in which one of the main arguments of the defendants was the short period of the alleged arrangement – four months. In that regard, the CPC noted as an aside that a vertical restraint involving resale price maintenance might be subject to individual exemption if it was indispensable for the organisation of short-term campaigns (ie, between two and six weeks) with low prices in favour of the end consumers, which was not the case with the defendants.

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

In one of its cases in 2006 under the old PCA, 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 in which they were positioned. The vertical agreement contained conditions on resale price maintenance as well as a clause dealing with 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 that may be too burdensome and hinder the execution of the distributor's obligations under the existing agreement. The vertical agreement was concluded, however, specifically for the purposes of a particular public procurement procedure 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 that were the subject of the distribution agreement were life-saving, had no generic substitutes or substantially similar products and the supply to the Ministry of Healthcare could be procured 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 ascertained 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 besides the Ministry of Healthcare. The CPC, however, granted the individual exemption only because the distribution agreement was essential for the purposes of public procurement and of prime importance to the interests of end consumers. The selling by the distributor of the products to the Ministry of Healthcare as per the price list of the supplier was essential for the distributor's participation in such 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 were essential for the purposes of public procurement.

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

No, we are not aware of any such decisions or guidelines.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

We are not aware of any such decisions or guidance issued by the CPC.

24 Explain how a supplier 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.

Two similar vertical restraints were considered by the CPC, one under the old PCA and the other in 2012 (see question 17).

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

We are not aware of any such decisions or guidance issued by the CPC.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently offer discounts to its customers) is assessed.

We are not aware of any such decisions or guidance issued by the CPC.

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

We are not aware of any such decisions or guidance issued by the CPC.

28 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 a general prohibition on vertical agreements and concerted practices that have as their object or effect the share of markets and sources of supply. The CPC assesses such vertical restraints following the respective Community regulations and guidelines.

As previously mentioned, in 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from active sales of new motor vehicles outside the territory that was assigned to them. That was considered by the CPC as a hard-core restriction.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

No, we are not aware of any such decisions or guidelines.

30 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 that have as their object or effect the share of markets and sources of supply. The CPC would assess such a vertical restraint following the respective Community regulations and the guidelines.

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

We are not aware of the CPC so far having addressed the matter.

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

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

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

The CPC has investigated few cases involving, inter alia, selective distribution. In assessing selective distribution the CPC follows the respective Community regulations and guidelines. The CPC has not addressed the matter as to whether criteria for selection must be published.

35 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 practice that selective distribution might be more dangerous in terms of competition than non-selective distribution.

According to the CPC, the type of product sometimes 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 that the selective distribution is oriented towards the distribution of products in particular categories, such as those representing a certain level of luxury (eg, jewellery, high-class watches, perfumes) or products requiring special technical knowledge and maintenance (eg, cameras, TV sets, hi-fis). That exemplary reference was made by reference to a distribution system of fizzy drinks, non-fizzy drinks, sports drinks, energy drinks, instant drinks, etc, that was not recognised by the CPC as a selective distribution system, as these products did not

pertain to any of the foregoing categories of products, although their trademark was known worldwide.

The CPC has also investigated a selective distribution system in the motor vehicle sector. It considered the system as selective, but a number of anticompetitive vertical restraints, both hard-core and non-compete, were identified by the CPC (eg, restriction of cross-supplies and resale price maintenance; restrictions on the sale of competing goods; restrictions of active sales outside the assigned territory; and restrictions on the sale of spare parts of equivalent quality outside the guarantee service).

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

We are not aware of any such decisions or guidance issued by the CPC.

37 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, we are not aware of any such decisions of the CPC.

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

We are not aware of any decisions or guidance issued by the CPC.

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

In 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from active sales of new motor vehicles outside the territory that was assigned to them; this was considered a hard-core restriction by the CPC.

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

In 2012 the CPC investigated a case of selective distribution in the motor vehicle sector where cross supplies between the dealers of new motor vehicles and new original spare parts were restricted; this was considered a hard-core restriction by the CPC.

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

We are not aware of any such decisions or guidance issued by the CPC.

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

We are not aware of any such guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

In 2012, however, the CPC investigated a case of selective distribution in the motor vehicle sector where the dealers were prohibited from selling competing goods; this was considered a hard-core restriction by the CPC.

43 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?

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

See the first case referred to in question 24 for a case of very specific circumstances that, in combination, were assessed by the CPC to have led to a state of exclusive supply.

45 Explain how restricting the supplier's ability to sell directly to end consumers is assessed.

We are not aware of any such decisions or guidance issued by the CPC. It is reasonable to conclude that for domestic antitrust purposes the CPC would follow the respective Community regulations and guidelines.

With respect to the restriction on the supplier's ability to sell directly to end consumers, in its practice the CPC has implied certain speculations as a side analysis on a case with a different main subject that it would generally not object to such restriction; however, any particular application of this restriction would be subject to consideration in terms of the factual background of the particular case.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

We are not aware of any such decisions or guidelines.

Notifying agreements

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

There is no obligation on 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 the respective vertical agreement could benefit from a block exemption.

Authority guidance

48 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 for obtaining guidance from the CPC provided for under the PCA.

Complaints procedure for private parties

49 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 unlawful vertical restraints. The procedure may be initiated by a complaint filed by a party the interests of which are affected or are threatened by the respective vertical agreement or restraint. We need to note, however, that the CPC may also act *ex officio*.

The CPC launches the proceedings within seven days as of the filing of the complaint, and designates a working group that conducts an investigation. There is no term for the 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 on which the CPC decides on the further proceedings of the file. In that closed session the CPC may adopt the following:

- a decision that no infringement is committed;
- a ruling for an additional investigation by the working group if the collected evidence is not sufficient on which to ground 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 of at least 30 days for the complainant and the defendant to provide their objections. After that they are given access to all materials collected on the file. At least 14 days after the expiry of the term for the provision of objections, the CPC determines a date for an open session on which the parties may be heard.

After the parties are heard the CPC may adopt one of the following:

- a ruling that returns the case to the working group for an additional investigation;

- a ruling through which the CPC adopts new assertions for any committed infringement, in which case the CPC complies with the procedure followed on the primary assertions of the infringement; or
- a decision by which the CPC:
 - ascertains the infringement and the party that committed it;
 - imposes sanctions, periodic sanctions or fines;
 - ascertains that no infringement has been committed or that there are no grounds to initiate actions regarding an infringement of articles 101 and 102 of the TFEU;
 - orders termination of the infringement, including by imposing behavioural or structural measures in order 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; or
 - pronounces on the inapplicability of the respective Community regulation on block exemption to the particular case and determines a time period for the amendment of the vertical agreement to be in compliance with article 101(3) of the TFEU.

Enforcement

50 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?

Since the adoption of the new PCA in 2008, there have been between one and four decisions per year concerning vertical restraints. This is not a significant percentage of the CPC's decisions.

51 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 by law considered null and void in their entirety.

Bulgarian antitrust law formally does not contain any statutory provisions regarding non-compete obligations and how they should be treated under domestic antitrust law. CPC Decision No. 55/20.01.2011, in making direct reference to the respective Community block exemption regulations (eg, Regulation (EC) No. 330/2010), provides that vertical restraints (non-compete obligations) thereunder (eg, article 5 of Regulation (EC) No. 330/2010) may not be subject to the block exemption for domestic antitrust purposes.

At the beginning of 2014 the CPC issued a decision where the subject of investigation was, *inter alia*, non-compete obligations for an indefinite period of time. The CPC analysed those following the requirements under Regulation (EC) No. 330/2010 and concluded that they were anti-competitive and therefore prohibited. The CPC was not able, however, to impose sanctions because the time limitation had elapsed.

The CPC also investigated a case under the old PCA in which the entire vertical agreement was prohibited due to the inseparability of the remainder of the vertical agreements from the non-compete obligations.

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

The CPC may directly impose sanction for infringement of antitrust law. By law the sanction may reach up to 10 per cent of turnover for the preceding financial year. The CPC has adopted a methodology on imposing sanctions that is not, however, legally binding upon the court.

52 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?

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 (dawn raids) subject to approval by the court;
- make use of third-party experts; and
- request information or cooperation from other national competition regulators from other member states as well as from the European Commission.

Private enforcement

- 54 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 the event such person has only been indirectly affected by the infringement (ie, non-parties to the respective vertical agreement).

Damages are claimed before the Bulgarian civil court, by judgment of the Bulgarian Supreme Administrative Court, or by a decision of the CPC that has not been appealed and has entered into force, this being binding upon the civil court with regard to the fact of the committed infringement and the identity of the party that committed it. The amount of the damages is, however, subject to proof.

Other issues

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

No, we are not aware of any such point.

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