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The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2019

3rd Edition

A practical cross-border insight into vertical agreements and dominant firms

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PREFACE

Welcome to the 2019 edition of *The International Comparative Legal Guide to: Vertical Agreements and Dominant Firms*. We are honoured to introduce this comprehensive guide to the antitrust and competition law community on behalf of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

These remain interesting times in competition law, for both enforcers and private practitioners. It is our hope and belief that this guide will serve as a useful tool for those seeking insight into the competition regimes of other jurisdictions, and a concise primer on vertical agreements and dominant firms for those less familiar with the field.

This 2019 edition of the Guide brings together leading competition law practitioners from top firms across the globe – firms that Paul, Weiss is proud to partner with in several high-profile matters. The wealth of experience and insight offered by our fellow contributors has made this guide an incomparable resource for antitrust attorneys in every jurisdiction. We extend our deepest gratitude to our partners for the considerable time and effort they have put into this project.

We hope you find this latest version of the Guide to be a worthy companion in your practice, and we welcome any suggestions for further improvements in future editions.

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The International Comparative Legal Guide to: Vertical Agreements and Dominant Firms

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Australian Competition & Consumer Commission (**ACCC**) is the Australian independent statutory authority that has the role of investigating and enforcing laws relating to vertical agreements and dominant firm conduct under the *Competition and Consumer Act 2010* (Cth) (the **Act**). Whilst there is no single "vertical agreements" prohibition in the Act, the Act regulates vertical agreements and vertical conduct through the following prohibitions:

- Anti-competitive agreements and concerted practices.
- Misuse of market power.
- Exclusive dealing conduct.
- Resale price maintenance (**RPM**).

The Act regulates dominant firm conduct through the misuse of market power and exclusive dealing prohibitions. These prohibitions are explained in more detail in sections 2 and 3.

1.2 What investigative powers do the responsible competition authorities have?

The ACCC has compulsory information-gathering powers under section 155 of the Act that enable it to obtain information, documents and oral evidence to determine whether a party's agreement or conduct contravenes the Act.

The ACCC also has search warrant and seizure powers (i.e. "dawn raid" powers) under the Act to gather evidentiary material.

Under a search warrant, the ACCC can seize goods or documents, inspect, handle and measure goods and equipment, take samples of goods and make copies of documents. The ACCC inspector, pursuant to a search warrant, may also require any person on the premises to answer questions and produce documents that relate to the reasons for entry to the premises.

The ACCC can also request parties to provide information and documents to it voluntarily in response to an investigation.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

After the ACCC commences an investigation, it will ordinarily request (voluntarily) or require (by compulsory notice under section 155 of the Act) the relevant party to provide information and documents relating to the alleged contravention. Such requests can be made more than once (i.e. for different types of information and documents) and the ACCC can also require individuals to provide evidence under oath or affirmation.

Once the ACCC has gathered sufficient information, it will determine whether to take enforcement action and if so, what type of action to take. If the ACCC decides to take some type of enforcement action, the next steps in the process will depend upon the action taken (i.e. the process will be different for administrative resolutions, court-enforceable undertakings or legal proceedings).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The ACCC has the ability to accept an administrative resolution from a party that it considers is likely to be in contravention of the Act. An administrative resolution is a written undertaking from a party setting out detailed terms and conditions of the resolution and may include agreeing to stop the conduct, compensating those who have suffered loss and/or taking other measures to ensure that the conduct does not recur.

The ACCC can also resolve contraventions of the Act by accepting court-enforceable undertakings from a party under section 87B of the Act. Section 87B undertakings usually require a party to remedy the harm caused by the alleged contravention, accept responsibility for its actions and/or establish or improve its trade practices, compliance programs and culture.

There are also a number of remedies and penalties available to the ACCC by way of court order including declarations, injunctions, pecuniary penalties and other remedial orders.

1.5 How are those remedies determined and/or calculated?

Whether the ACCC will accept an administrative resolution or court-enforceable undertakings from a party or pursue more serious enforcement action in declarations, remedies and penalties through court action will depend on a number of factors. These factors include whether the alleged contravention is of significant public interest or concern, whether the conduct results in substantial consumer or small business detriment and/or whether the ACCC action will have a deterrent effect or clarify aspects of the law.

In general, the more serious the alleged contravention, the more likely the ACCC will seek declarations, remedies or penalties through court proceedings.

The maximum penalties for contraventions of the vertical agreement or dominant firm conduct provisions of the Act are the greater of: (for corporations) AUD 10 million, three times the gain derived from the illegal conduct (if calculable) or 10% of annual turnover in the 12 months preceding the conduct; and (for individuals) AUD 500,000.

A number of factors are taken into account by the court in calculating the appropriate level of penalty for a contravention, including the nature and extent of the contravening conduct, the amount of loss or damage caused, the circumstances in which the alleged contravention took place, the financial size and market power of the contravening party, the deliberateness of the contravention, the period over which the alleged contravention extended, whether the contravention arose out of the conduct of senior management, whether the party has a corporate culture conducive to compliance with the Act and whether the party has cooperated with the ACCC.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Unless the ACCC has decided that it will not accept administrative resolutions or court-enforceable undertakings from a party because it otherwise wishes to pursue court action, either the ACCC or the party can seek to resolve the matter by administrative resolution or court-enforceable undertakings.

There is no formal process for such negotiations – a party can offer to resolve a matter with the ACCC by preparing an administrative resolution and if the ACCC does not wish to take legal action, it will consider the proposal and may seek amendments to it. For the proposal to be accepted by the ACCC, the party would need to commit to the relevant resolution in writing to the ACCC. In other instances, the ACCC will actively inform a party that a matter can be resolved by the party giving a certain written administrative resolution or a court-enforceable undertaking. Parties can negotiate the form of the resolution with the ACCC.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

If the ACCC seeks declarations, remedies, penalties or other orders against a party for contravention of the Act, it is required to prove its case before the courts.

The ACCC will take into account a number of factors in deciding whether to pursue litigation, including whether the relevant conduct is of significant public interest or concern and whether ACCC action will have a deterrent effect or clarify aspects of the law. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious, the party is a repeat offender, there is reason to be concerned about future behaviour or the party is unwilling to provide a satisfactory resolution.

The legal standard of proof of contraventions of the vertical agreement and dominant firm conduct provisions is the balance of probabilities.

1.8 What is the appeals process?

The ACCC and/or the relevant party can appeal a decision of the court on liability and/or penalty within 21 days.

For an appeal to succeed, a party must convince the appeal court that there was an error of law and that the error was of such significance that the decision should be overturned.

The hearing of the appeal does not consider any new evidence or information that was not presented in the original case (except in special circumstances) and does not call witnesses to give evidence. The appeal court, however, will review all the relevant documents filed by the parties for the original case and consider legal argument from both parties to the appeal.

The appeal court's decisions can further be appealed to the High Court by either party within 28 days through a two-step process. First, the ACCC or party will need to apply for and be granted special leave to appeal to the High Court. The High Court will grant special leave to appeal for questions of law that are of public importance, where there are differences of opinion between courts or if the case is in the interests of the administration of justice. Once leave is granted, an appeal hearing is conducted to hear the matter. The High Court's decision is final.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Private actions for contravention of the vertical agreement, vertical conduct and/or dominant firm conduct provisions of the Act are available, but rare. Any individual or corporation that has suffered loss may bring a claim for damages for the amount of loss or damage suffered as a result of the contravention. Punitive damages are not available.

Private legal actions differ from ACCC actions in a few respects. Firstly, a private party does not have the benefit of obtaining information and documents through an investigative process like the ACCC before commencing legal proceedings (although a party will generally be able to obtain documents in the usual discovery process). Secondly, the private party cannot seek penalties and thirdly, a private party need not be a "model litigant" like the ACCC.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The Act contains the following general exceptions that may apply to certain vertical agreements, vertical conduct and/or dominant firm conduct that would otherwise contravene the Act:

- where the agreement or conduct is specifically authorised by law;
- acts or provisions of a contract relating to employment conditions;
- restraints of trade during or after the termination of employment;
- compliance with particular standards;
- partnership conditions between individuals;
- contracts for the sale of a business or shares of a company with respect to the protection of goodwill;
- exclusivity conditions on the export of goods or services from Australia; and
- acts done in concert by ultimate users or consumers of goods or services against the supplier of those goods or services.

Exclusive dealing (supply or acquisition of goods or services on restrictive conditions) and anti-competitive agreements are subject to a related body corporate exemption.

With respect to RPM and exclusive dealing, a party can obtain immunity from contravention of the Act by lodging a **notification** with the ACCC and showing that the public benefits from the conduct would outweigh any public detriments.

A party may also seek immunity for vertical agreements, vertical conduct or dominant firm conduct if it can show that the public benefits from the conduct would outweigh any public detriments or, for some forms of conduct, that it would not have the effect (or likely effect) of substantially lessening competition. This process is known as "**authorisation**" and is a longer and more expensive process than notification.

The ACCC also has the power to grant class exemptions for specific types of business conduct if it is satisfied that the conduct would not substantially lessen competition or would be likely to result in overall public benefits. At this stage, no class exemptions have been granted by the ACCC.

1.11 Does enforcement vary between industries or businesses?

While the ACCC generally takes the same approach to enforcing the Act across different industries and businesses, it will take a more vigorous enforcement approach where the alleged contravention is:

- in an industry involving essential goods or services;
- in a concentrated industry and has a serious impact on consumers or small business;
- in a significant, new or emerging industry;
- industry-wide or is likely to become widespread if the ACCC does not intervene; or
- engaged in by a larger or well-known company.

In addition, each year the ACCC outlines its enforcement priorities which may target particular industries or businesses. This year, the ACCC has indicated that its enforcement action for vertical agreements and dominant firm conduct will focus on the commercial construction, agricultural, financial services and essential services sectors (such as energy and telecommunications).

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The ACCC and the courts will take into account all the relevant circumstances, including an industry's regulatory context, in determining whether a party is in contravention of the vertical agreement or dominant firm conduct provisions of the Act.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

While the ACCC is a statutory authority that is independent of the government, its enforcement priorities can be influenced by the political environment.

In recent years, the conduct of financial institutions (including the Financial Services Royal Commission established in late December 2017), electricity retailers and digital platforms has come under political scrutiny. As a result, the ACCC has been given increased powers to deal with conduct by market participants in these sectors and the ACCC has enforced the Act where appropriate.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The ACCC's priorities for 2019 include:

- investigating conduct that may contravene the misuse of market power and concerted practices provisions of the Act;
- competition issues concerning the use of customer loyalty schemes, digital platforms and consumer data;
- competition issues arising from pricing in the financial services and essential services (such as energy and telecommunications) sectors;
- criminal and civil cartel conduct; and
- anti-competitive conduct in the agricultural, commercial construction, financial services, energy and telecommunications sectors.

1.15 Describe any notable case law developments in the past year.

There have not been any significant dominant firm conduct cases determined in the past year but the ACCC's case against Ramsay Health Care Australia Pty Limited was part-heard and is expected to conclude in December 2019. The ACCC alleges that Ramsay threatened to substantially reduce or entirely withdraw surgeons' access to operating theatres at Ramsay's Baringa Private Hospital if those surgeons carried out procedures at a competing day surgery. In circumstances where Baringa is the only private in-patient facility in Coffs Harbour, the ACCC alleges that this was a misuse of market power and constituted exclusive dealing. The case was brought under the now repealed misuse of market power prohibition. The ACCC is yet to commence proceedings under the new misuse of market power provisions which came into effect in November 2017.

As for vertical agreements and conduct, the most notable development is the *Pacific National* case outlined under question 2.24 below.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Other than RPM (which is a *per se* contravention of the Act), a vertical agreement or vertical conduct is prohibited by the Act if it has the purpose, effect or likely effect of substantially lessening competition in a market. Accordingly, while vertical agreements and vertical conduct in contravention of the Act can attract significant penalties, they are not considered to be as serious as horizontal agreements or conduct (which are *per se* contraventions under the Act and can attract criminal sanctions).

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Vertical agreements must take the form of a contract, arrangement, understanding or concerted practice which includes a legally binding contract, an informal agreement whereby the parties accept mutual rights and obligations, a meeting of minds to proceed in a particular way or cooperative or joint activity that removes the uncertainty of competition.

An agreement will be considered vertical if none of the parties to the agreement is, or is likely to be, in competition with each other in respect of the goods or services which are the subject of the alleged conduct. If the parties are, or are likely to be, in competition but the conduct falls under both horizontal and vertical agreement or conduct laws, there is a "carve-out" provision that requires the conduct to be assessed under the vertical agreement or conduct laws (i.e. subject to a competition test and not a *per se* contravention).

2.3 What are the laws governing vertical agreements?

There are several types of laws governing vertical agreements and vertical conduct; namely, exclusive dealing, general anti-competitive conduct, misuse of market power and RPM.

Exclusive dealing is a vertical agreement or conduct that contains some type of restriction on acquisition, supply or resupply of goods or services which has the purpose, effect or likely effect of substantially lessening competition in a market. Vertical agreements or concerted practices can also contravene the law if they have the purpose, effect or likely effect of substantially lessening competition in a market regardless of any vertical restriction.

Misuse of market power is conduct by a party that has a substantial degree of power in a market that engages in conduct (which can be vertical) that has the purpose, effect or likely effect of substantially lessening competition in a market.

RPM can be a vertical agreement or vertical conduct that involves conduct by the supplier of goods or services imposing minimum resupply prices on re-suppliers of those goods or services.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

As mentioned above, RPM is a *per se* breach of the Act.

2.5 What is the analytical framework for assessing vertical agreements?

For vertical agreements or vertical conduct that are *per se* contraventions, the relevant analysis is determining whether the relevant agreements or conduct fall within the particular provisions of the Act. There is no competition analysis.

For vertical agreements or conduct that only contravene the Act if they have the purpose, effect or likely effect of substantially lessening competition in a market, the first step in the analysis is to determine whether the conduct falls under the relevant provisions of the Act. This may include ascertaining whether a contract, arrangement, understanding or concerted practice exists or whether the agreement or conduct falls within the exclusive dealing or misuse of market power provisions. Once it has been determined that the relevant vertical agreement or conduct falls within the relevant provision, the next question is whether it has the purpose, effect or likely effect of substantially lessening competition in a market.

Purpose is a subjective test but objective circumstances can be taken into account. The effect or likely effect of a vertical agreement or conduct starts with identifying the relevant market in which the agreement or conduct has or is likely to have an impact, and then undertaking a counterfactual analysis to determine the state of competition in the market with and without the relevant agreement or conduct. Where there is a substantial lessening of competition between the factual and counterfactual worlds, the Act is contravened.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Where the competition test is applicable, market definition is the first step in determining whether there is a substantial lessening of competition. In defining a market, it is necessary to look at the product, geographic, functional and temporal aspects of a market in the context of substitution possibilities.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Whether an agreement or conduct is considered to be vertical or horizontal will depend on the circumstances of each case. Where the relevant agreement or conduct is clearly between supplier and customer, the law will treat it as vertical. However, where the facts demonstrate some form of competitor-competitor conduct, the relevant agreement or conduct may be characterised as horizontal. There is a "carve-out" provision for agreements or conduct that fall within both horizontal and vertical agreement or conduct laws, such that the agreement or conduct will be examined under the vertical agreement or conduct laws (i.e. subject to a competition test).

2.8 What is the role of market share in reviewing a vertical agreement?

Market share is not directly relevant to the assessment of whether vertical agreements or conduct are in contravention of the Act. However, market share is usually taken into account in considering whether a firm has substantial market power for the purposes of the misuse of market power prohibition and in assessing whether the effect of the vertical agreements or conduct is likely to substantially lessen competition.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is often used in determining whether a vertical agreement or conduct substantially lessens competition. This includes market definition issues, market power issues and the state of competition in the market with and without the relevant agreement or conduct.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies may be taken into account in assessing whether a vertical agreement or vertical conduct has the effect or likely effect of substantially lessening competition in a market. For instance, if the vertical agreement or conduct enhances a firm's efficiency, leading to more competitive outcomes in the market, the agreement or conduct may be unlikely to contravene the Act. Efficiencies will also be considered if a party is seeking authorisation or notification (immunity) from the ACCC for a vertical agreement or conduct.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

At present, the Act provides for an exemption for vertical arrangements and other general anti-competitive arrangements in relation to certain intellectual property rights (**IPR**) (such as patents, registered designs or copyrights) but only to the extent that the relevant arrangement relates to particular aspects of IPR (for example, the invention to which the patent relates). However, from 12 November 2019 this exemption will be repealed.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Not necessarily – other than RPM, the vertical agreement and vertical conduct provisions under the Act require proof of either the purpose, effect or likely effect of a substantial lessening of competition in a market. Accordingly, the ACCC could demonstrate anti-competitive purpose but not effect to successfully prosecute a case.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The ACCC will only weigh public benefits including efficiencies against anti-competitive harm if the party proposing to enter the vertical agreement or engage in the vertical conduct seeks authorisation or notification from the ACCC. Authorisation or notification is a form of immunity granted for agreements or conduct that would otherwise be in contravention of the Act, where the public benefits outweigh the public detriments or, for some types of conduct, there is no substantial lessening of competition.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

A "related bodies" defence is available to allegations of anti-competitive vertical agreements or conduct. There is also a limited defence to RPM conduct that involves withholding supply from re-suppliers but only if certain requirements are met.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes – the ACCC has issued guidelines with respect to exclusive dealing, misuse of market power and concerted practices.

2.16 How is resale price maintenance treated under the law?

RPM is a *per se* contravention of the Act but a party can seek authorisation or notification from the ACCC for RPM which provides immunity from prosecution if the public benefits of the conduct outweigh the public detriments.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing is prohibited by the Act if it has the purpose, effect or likely effect of substantially lessening competition in a market.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligations are prohibited if they have the purpose, effect or likely effect of substantially lessening competition in a market.

2.19 How do enforcers and courts examine price discrimination claims?

There is no specific prohibition against price discrimination. Such conduct would be prohibited if it fell within the elements of the vertical agreement/conduct or dominant firm conduct provisions of the Act.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discounts are prohibited if they fall within the vertical agreement/conduct or dominant firm conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or bundled discounts are prohibited if they fall within the vertical agreement/conduct or dominant firm conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Any other type of vertical restraint that has the purpose, effect or likely effect of substantially lessening competition in a market is prohibited.

2.23 How are MFNs treated under the law?

The Act does not include a specific prohibition on MFN clauses. However, MFNs are prohibited if they fall within the vertical agreement/conduct provisions of the Act (i.e. if they have the purpose, effect or likely effect of substantially lessening competition in a market).

2.24 Describe any notable case developments concerning vertical merger analysis.

In May 2019, the Court dismissed the ACCC's case relating to the acquisition of Acacia Ridge Terminal by Pacific National (**PN**). PN is a dominant supplier of intermodal rail services and the ACCC alleged that a post-acquisition vertically integrated PN would have the ability to limit or deny access to competing rail operators, thereby increasing barriers to entry and deterring new entrants to the intermodal rail services market. Had PN not offered an unconditional undertaking which removed any significant ability to discriminate, the Court would have found that the proposed arrangement would substantially lessen competition in breach of the Act. The ACCC has criticised the Court's decision and maintains the view that the undertakings will not be effective in enabling competition in the relevant market. The case is notable because the ACCC blocked the deal as part of its merger review process, only to be overturned by the Court. It also shows that courts are willing to accept merger remedies to alleviate foreclosure concerns arising from vertical mergers, something for which the ACCC is usually responsible in the merger review context.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Unilateral conduct, called misuse of market power in Australia, is considered to be serious conduct by the ACCC. Misuse of market power is a key enforcement priority for the ACCC and the penalties for engaging in misuse of market power are significant (and the same for vertical agreements and vertical conduct).

3.2 What are the laws governing dominant firms?

It is not illegal to have market power or to use it. However, a firm with a substantial degree of market power will be in breach of the Act if it engages in conduct that has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

3.3 What is the analytical framework for defining a market in dominant firm cases?

Identifying the relevant market is an important step in determining whether a party has substantial market power in that market and whether a firm's conduct has the purpose, effect or likely effect of substantially lessening competition in a market. In defining a market, it is necessary to look at the product, geographic, functional and temporal aspects of a market in the context of substitution possibilities.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no market share threshold that determines whether a firm is dominant or a monopolist or, in the language of the Act, has a substantial degree of market power. Market share will be taken into account as a factor of market power but it is not determinative.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

While parties with a dominant or monopolist position in a market are likely to receive closer scrutiny by the ACCC than other parties, being a dominant firm or monopolist is not itself a contravention of the Act. A firm with a substantial degree of market power will only contravene the Act if it engages in conduct that has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis can be used to assess whether a firm has a substantial degree of market power in a market by taking into account a number of matters, including barriers to entry and economies of scale and scope. It can also be used to examine whether conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

3.7 What is the role of market share in assessing market dominance?

Although not determinative, market share can be taken into account in assessing whether a firm has a substantial degree of power in a market.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

There are no legislative defences to a misuse of market power allegation. However, a corporation with a substantial degree of power in the trans-Tasman market will not contravene the misuse of market power prohibition by reason that it acquires only plant or equipment.

A party can seek authorisation (immunity) from the ACCC for conduct that would otherwise be in breach of the misuse of market power prohibition. The party would need to demonstrate that the public benefits from the conduct outweigh any public detriments.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are often used by parties alleged to have engaged in a misuse of market power to show that the purpose of the conduct was legitimate rather than anti-competitive.

Efficiencies will also be considered by the ACCC if a party seeks authorisation for conduct that would otherwise contravene the misuse of market power prohibition of the Act.

3.10 Do the governing laws apply to "collective" dominance?

The Act does not prohibit collective dominance by independent entities. In determining whether a corporation has "substantial market power", however, the Act provides for the aggregation of power held by the corporation and its related bodies corporate, as well as by a corporation through its agreements with third parties.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The misuse of market power laws apply equally to purchasers as well as to suppliers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

While there are no prescribed types of conduct that constitute misuse of market power, the following types of conduct are often claimed or held to be a misuse of market power: refusals to supply or acquire; bundling; predatory pricing; exclusivity arrangements; and exclusionary conduct.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

IPRs may be a source of market power. In each case, it will be necessary to assess whether the IPRs in question give rise to substantial market power and whether the relevant conduct gives rise to a misuse of that power.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Whilst not determinative to an analysis of whether a dominant firm has contravened the Act, the direct evidence of abusive behaviour, being the actual harm caused by the contravening conduct, is one of the factors that the ACCC will take into account when pursuing an action for misuse of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

The ACCC assesses a firm's dominance in a particular platform in the same way it would assess any firm's substantial market power in any market. However, the ACCC is currently considering the dominance and competitive effects of digital platforms, algorithms and consumer data.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to deal are anti-competitive if engaged in by a firm with substantial market power for the purpose, effect or likely effect of substantially lessening competition in a market.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Australia remains one of the only jurisdictions in the world with prescriptive exclusive dealing prohibitions and a RPM law that is a *per se* contravention rather than being subject to a competition test. However, in recent years, there has been a trend for provisions in the Act having a competition test to be breached (most recently, misuse of market power and concerted practices).

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Chapter 2

Brazil

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The main authority responsible for enforcing the laws governing vertical restraints of trade and dominant firm conduct in Brazil is the Administrative Council for Economic Defence (CADE).

Under the terms of the 2011 Brazilian Competition Act (Law 12529/11), CADE is an autonomous administrative agency that has three main bodies: (i) the Administrative Tribunal, composed of one president and six commissioners who are in charge of rendering final decisions on investigations related to vertical restraints of trade and abuse of dominance; (ii) the General Superintendence, responsible for conducting investigations against companies and individuals; and (iii) the Economic Studies Department, headed by a Chief Economist, who is in charge of preparing economic opinions and studies, which may help both the General Superintendence and Administrative Tribunal in their decision-making processes.

1.2 What investigative powers do the responsible competition authorities have?

CADE's General Superintendence has the following powers:

a) to request information, documents and depositions from any individuals or legal entities, as well as from public or private bodies, authorities and entities;

b) to make inspections at the principal place of business, establishment, office, branch or main branch of a company under investigation, as well as of inventories, papers of any kind, commercial records, computers and electronic files;

c) to conduct dawn raids, with authorisation from the Judiciary Branch, through the Federal Attorney's Office at CADE, for search and seizure warrants concerning papers of any kind, commercial records, computers and magnetic files of an individual or legal entity, to the extent required for an administrative inquiry or administrative enforcement proceeding; and

d) to request access to and copies of police investigations, lawsuits of any kind, inquiries and administrative proceedings instated by other government entities.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

In relation to vertical restraints of trade and other forms of abuse of dominance, the 2011 Competition Act sets forth that CADE's General Superintendence can conduct: (i) a preparatory administrative inquiry into anticompetitive conduct; (ii) an administrative inquiry into anticompetitive conduct; and (iii) formal administrative proceedings for imposition of sanctions due to anticompetitive conduct.

The General Superintendent may conduct a preparatory administrative inquiry in order to determine (within 30 days) whether the conduct of the economic agents is under CADE's jurisdiction and should be subject to further scrutiny by CADE.

An administrative inquiry is commenced on the General Superintendent's own initiative or based on grounded complaints filed by any interested party, whenever signs of anticompetitive conduct are insufficient for the General Superintendent to open formal administrative proceedings.

The General Superintendent will have 180 days to resolve on closing the administrative inquiry or opening formal administrative proceedings against the investigated companies and individuals. This term may be extended. Should the General Superintendent decide to shelve the administrative inquiry, the interested party may appeal to the General Superintendent. The General Superintendent's decision in this regard will be final in the administrative sphere.

The formal administrative proceeding for imposition of penalties due to anticompetitive conduct is subject to due process and the General Superintendent should ensure that the accused party will be able to exercise its full right of defence. After completion of the discovery phase, the General Superintendent will notify the respondent to file closing remarks.

The last step in the review happens when the General Superintendent sends the case records to the Administrative Tribunal for final judgment. The case records should contain the General Superintendent's recommendation for the closing of the formal administrative proceeding or for imposition of sanctions against defendant(s). At the Administrative Tribunal, the case will be assigned to one of the commissioners who will be responsible for preparing a report on the investigation and submitting the case for a decision by the Administrative Tribunal. The decision is taken in a formal open-to-the-public judgment session. The decision rendered by the Administrative Tribunal is final in the administrative sphere.

It should be noted that at any time prior to the decision by the Administrative Tribunal, the defendants may request to negotiate a settlement agreement with CADE.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

CADE may impose fines from zero point one per cent (0.1%) to twenty per cent (20%) of the gross revenues the company, group or conglomerate obtained in the financial year immediately before the administrative proceeding is initiated, in the field of business affected by the anticompetitive practice. The fine should not be lower than the advantage obtained from the underlying offence, if ascertainable. Managers directly or indirectly liable for the offence may have to pay a fine from one per cent (1%) to twenty per cent (20%) of that imposed on the company.

Other sanctions include: (i) publication of the summary of the decision in relevant newspapers; (ii) a declaration of ineligibility to take finance from official financial institutions or to participate in bidding proceedings; (iii) the offender's inclusion in the Brazilian Consumer Protection Register; (iv) loss of right to instalment payment of federal overdue debts, or full or partial cancellation of tax incentives or public subsidies; (v) the company's spin-off, transfer of corporate control, sale of assets, or partial discontinuance of activities; (vi) prohibition from doing business in its own name or as a representative of a legal entity for up to five years; and (vii) any other act or measure necessary to eliminate the harmful effects to competition.

Although those remedies are imposed after the conclusion of formal administrative proceedings, CADE is allowed to adopt interim measures that could cause cessation of the anticompetitive conduct, setting a term for its compliance as well as the value of the daily fine for contempt.

1.5 How are those remedies determined and/or calculated?

In imposing the sanctions described above, CADE should take into account: (i) the severity of the offence; (ii) the offender's good faith; (iii) the advantages obtained or envisaged by the offender; (iv) actual or threatened occurrence of the offence; (v) the extent of damages or threatened damages to open competition, the Brazilian economy, consumers, or third parties; (vi) the negative economic effects on the market; (vii) the offender's economic status; and (viii) recidivism.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

CADE may agree on a commitment by the respondent to cease the acts under investigation or their harmful effects. If CADE understands that a settlement agreement is appropriate, it must: (a) specify the respondent's obligations to cease the action under investigation or its harmful effects; (b) set a daily fine for full or partial contempt of the obligations undertaken; and (c) set the value of the cash contribution to the Diffuse Rights Protection Fund, whenever applicable. The administrative proceeding will be on hold while the cease-and-desist commitment is duly complied with.

If a respondent wants to settle with CADE, it must formally request to engage in negotiations. If the negotiations fail, the respondent may not re-apply for engaging in settlement discussions. The request to engage in negotiations does not stay the investigation. CADE may grant confidentiality to the request and to the entire negotiation, upon request of the respondent. The negotiation is an informal process. Once it is concluded, the settlement must be approved by the Administrative Tribunal.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

CADE's decisions are self-enforceable. If the offender does not comply with CADE's decision within the timeframe defined by the authority, CADE may file an enforcement action before the federal courts.

CADE, however, has to defend the legality of its decisions, whenever offenders decide to challenge CADE's decisions before federal courts. In general, Federal Courts are allowed to look, and have already looked, into the merits of CADE's decisions.

1.8 What is the appeals process?

CADE's decisions are final in the administrative sphere, but offenders may try to annul CADE's decisions by filing lawsuits before federal courts.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes. Private rights of action are available, although the number of private claims is still immaterial. The Brazilian Civil Code provides that any party that causes losses to others shall compensate its victims. The 2011 Competition Act also provides that "injured parties may defend their individual or diffuse interests in court by way of measures intended to cease anticompetitive practices and seek redress for losses and damages suffered, irrespective of an administrative proceeding or inquiry to that effect, which will not be stayed in view of the lawsuit thus filed". Access to information regarding the offender's conduct and the statute of limitations (three years, counting from the date of knowledge of the offence) for private actions are perceived to be obstacles. Plaintiffs that seek damages in private claims must prove such damages. In order for CADE to apply a penalty, it is sufficient that CADE proves that the practice had the potential to cause harm to the market.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

No exemptions are available. The 2011 Competition Act applies to individuals, public or private companies, as well as to any individual or corporate associations, established *de facto* or *de jure* – even on a provisional basis – irrespective of separate legal identity, and notwithstanding the exercise of activities regarded as a legal monopoly (article 31).

1.11 Does enforcement vary between industries or businesses?

No, it does not. However, industries that are also regulated (e.g. telecommunications, power, oil and gas, financial sector, transportation) may face dual scrutiny from CADE and from specific regulatory agencies.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The laws providing for the powers of the main sector regulators (e.g. telecommunications, power, oil and gas, financial sector and transportation) describe the necessary interaction by and between such authorities and CADE in the investigation of anticompetitive conduct. Although CADE should have the final say on anticompetitive conduct, CADE normally takes into account opinions rendered by such sector regulators on the investigated conduct. Moreover, when reviewing the regulatory framework, the regulators may take into consideration competition issues in the decision-making process of a policy or of a specific matter.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

CADE is an autonomous *de jure* agency and has been making efforts to maintain its independence and increase transparency in its decision-making process. All relevant decisions are made during open-to-the-public judgment sessions and are then published. Federal courts are normally asked to review CADE's decisions imposing sanctions and CADE has a good record in the appeals process. Administrative Tribunal members are nominated by the President of the Republic and the nominees must be approved by the Senate. The business community has the legitimate expectation that political nominations to CADE will not jeopardise the institution's very good reputation built over the last 25 years. Moreover, CADE has a strong and well-prepared technical body, which helps ensure CADE's autonomy. Finally, CADE's decisions are ordinarily taken by majority opinion of the Administrative Tribunal, whose members are generally appointed by different Presidents of the Republic. In 2019, Brazil's President will appoint four new Commissioners.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

After seven years, since the entry into full force and effect of the Competition Act (in May 2012), CADE's priorities seem to be the fight against national and international cartels (especially bid-rigging cases), as well as the expeditious review of mergers, acquisitions and joint ventures. In recent years, CADE has tried to focus more of its efforts towards investigations into vertical restraints and abuse of dominance. Given that the Brazilian market is highly concentrated, we believe that CADE's efforts will soon result in the launch of more investigations and more expeditious decisions for such investigations.

1.15 Describe any notable case law developments in the past year.

CADE rendered important decisions on investigations concerning dominant position and vertical agreements in 2018/2019. In the *Itaú/Redecard* case, CADE reviewed the alleged practices of refusal to deal and discrimination against smaller card-processing companies in the market of banking services. Both parties settled with CADE. Another relevant ruling was rendered on two Administrative Proceedings in which CADE investigated Rodrimar's and Tecon Rio Grande's alleged abuse of dominant position in the port terminals of Santos and Rio Grande do Sul respectively. Rodrimar would allegedly charge an abusive fee – known as Terminal Handling Charge 2 – to segregate containers originating in, or returning from, international waters. In turn, Tecon would charge a "faithful deposit" fee for imported goods. CADE concluded that this practice would arbitrarily increase costs for competitors and decrease the consumer's welfare.

CADE has also condemned practices of purported abuse of dominant position carried out by Unilever in the ice cream market. According to CADE, Unilever created barriers to the development of competitors, by imposing exclusivity arrangements for sales and merchandising on the points of sale.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

With the enactment of CADE's Resolution 17 in 2016, CADE decided to stop reviewing vertical agreements under its pre-deal mechanism. CADE continues its efforts to investigate vertical trade restraints in various sectors.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

CADE considers vertical restraint practices to be restrictions imposed by producers/suppliers of goods and services in a given market on vertically-related markets – "upstream" or "downstream" – along the production or distribution chain ("target" market). Less focus seems to be placed by CADE on whether or not there is a formal agreement.

2.3 What are the laws governing vertical agreements?

The most important law governing vertical agreements is the 2011 Competition Act, which prohibits any acts intended or otherwise able to produce the following effects: (a) to limit, restrain or in any way harm open competition or free enterprise; (b) to control a relevant market of a certain product or service; (c) to increase profits arbitrarily; and (d) to abuse a dominant position.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No, there are not.

2.5 What is the analytical framework for assessing vertical agreements?

After confirming the occurrence of the investigated conduct, CADE normally defines the relevant market, assesses whether the involved companies have market power, and examines the negative effects and whether there are pro-competitive effects associated with the conduct. CADE also looks into: (i) the proportion of the relevant markets affected by the vertical agreements investigated; (ii) the duration of the restrictive practice; (iii) the barriers to entry into the markets involved; (iv) the interbrand competition level; (v) the level of substitutability between competing brands; (vi) the price difference between equivalent products of different brands; (vii) previous conduct of companies acting on the relevant market in terms of coordinated behaviour; and (viii) the level of consumption before and after the vertical agreement.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

CADE generally defines the relevant market by using the "SSNIP test", which seeks to identify the smallest relevant market within which a hypothetical monopolist is able to impose a significant, normally between five and ten per cent (5–10%), non-transitory increase in price. The suppliers' substitutability may also be considered when defining the market. CADE's analysis is generally qualitative, i.e., CADE performs a market test and defines the market based on the input provided by the market participants. In some instances, CADE also performs quantitative analysis, especially elasticity and demand tests.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

CADE has no express/fixed guidelines for dealing with such cases. It should be noted, however, that manufacturers and distributors that act in the same public tender are generally considered to be competitors.

2.8 What is the role of market share in reviewing a vertical agreement?

From an investigation perspective, considering that the 2011 Competition Act sets forth that a dominant position is deemed to occur when a company or group of companies is capable of altering, in a unilateral and concerted manner, the market conditions or when it controls twenty per cent (20%) or more of the relevant market; CADE normally does not pursue investigations into vertical restraints of trade when the companies involved hold a market share below twenty per cent (20%). However, CADE is aware of the potential difficulties in calculating market share and defining dominance. In a number of cases, the fact that the companies could unilaterally dictate the behaviour of the market has been sufficient for CADE to consider that such companies had a dominant position.

2.9 What is the role of economic analysis in assessing vertical agreements?

Due to the efforts from CADE's Economic Studies Department, CADE has been increasingly relying on economic analysis in assessing vertical agreements. Economic analyses are not binding, but they assist the General Superintendence and CADE's Tribunal in understanding: (i) the scope of specific practices; and (ii) the effects of such practices in the market.

The economic analysis was important, for example, in CADE's investigation into the beer company Ambev's loyalty programme (the "*Tô Contigo*" case), where CADE relied on the economic study to impose fines against Ambev for abusive use of its dominant position. There are a number of ongoing cases related to vertical agreements in which CADE has requested specific economic analysis.

2.10 What is the role of efficiencies in analysing vertical agreements?

CADE will review the efficiencies alleged whenever submitted by the parties. The trend seems to be that CADE will be less sceptical about the efficiencies presented by the investigated parties, while transferring to the parties the burden to prove the alleged efficiencies.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no special rules for vertical agreements relating to intellectual property.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

CADE has to demonstrate potential effects of the practice, but is not required to show actual effects of the practice.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes, CADE will weigh the harm against potential benefits or efficiencies (whenever available).

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

CADE will review all defences submitted by the parties. Generally, such defences include: (i) absence of market foreclosure due to existing rivalry and/or imports; (ii) indication that the barriers to entry are low; (iii) presentation of the benefits/efficiencies of the vertical agreement (e.g. economies of scale, economies of scope, brand protection, price reductions, product safety, reduction in transaction costs, etc.); and (iv) demonstration that vertical agreements aim at preventing "free-riders".

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No. There are no formal guidelines regarding vertical agreements after the enactment of the 2011 Competition Act.

2.16 How is resale price maintenance treated under the law?

In the 2014 *SKF* case, CADE decided that minimum RPM practices are presumed to be illegal. However, companies may prove the economic efficiencies of the practice, in which case they would be cleared by CADE. The burden lies with the companies.

2.17 How do enforcers and courts examine exclusive dealing claims?

There are no specific rules for examining exclusive dealing claims. As in other vertical restraint cases, CADE will generally investigate: (i) the materiality of the practice; (ii) whether the defendant holds a dominant position in the market; (iii) the scope of the practice and the potential for foreclosure; (iv) the potential effects of the practice, mainly to consumers, including the increase in market power; (v) the risk of implementation of collusive conduct; and (vi) the efficiencies and commercial justifications for the practice.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

In previous cases, CADE has used the following test for tying conduct: (i) the existence of two products and/or separate products; (ii) the existence of any coercion element; (iii) the existence of dominant position in the conditioning market; and (iv) anticompetitive effects in the conditioning or in the conditioned markets. If characterised, the positive and negative effects of the practice must be weighted.

2.19 How do enforcers and courts examine price discrimination claims?

There are no specific tests for examining price discrimination claims. CADE will generally investigate whether the price discrimination claim results in exploitative or exclusionary effects. As in other practices, CADE will generally review: (i) the materiality of the practice; (ii) whether the defendant holds a dominant position in the market; (iii) the potential effects of the practice; and (iv) the efficiencies and commercial justifications for the practice. Even though there are ongoing cases in which the applicability of the "as efficient competitor" test is being reviewed, there is no consistent decision indicating that this test should apply.

2.20 How do enforcers and courts examine loyalty discount claims?

There are no specific tests for examining loyalty discount claims. CADE has already stated that its concern is related to non-linear loyalty discounts. As in other practices, CADE will generally review: (i) the materiality of the practice; (ii) whether the defendant holds a dominant position in the market; (iii) the potential effects of the practice; and (iv) the efficiencies and commercial justifications for the practice. This was the analysis carried out by CADE in the Ambev "*Tô Contigo*" case, in which the beer company Ambev's loyalty programme was disapproved.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

There are no specific tests for examining multi-product or "bundled" discount claims. As in other practices, CADE will generally review: (i) the materiality of the practice; (ii) whether the defendant holds a dominant position in the market; (iii) the potential effects of the practice; and (iv) the efficiencies and commercial justifications for the practice.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

All vertical restraints able to produce the following effects will be prohibited in Brazil: (a) to limit, restrain or in any way harm open competition or free enterprise; (b) to control a relevant market of a certain product or service; (c) to increase profits arbitrarily; and (d) to abuse a dominant position.

2.23 How are MFNs treated under the law?

CADE has not, as yet, rendered any final decision on most-favoured-nation (MFN) cases. According to the 2011 Competition Act, CADE should apply a rule of reason approach with respect to MFN clauses and should definitely examine: (i) whether a company imposing such clauses holds a dominant position in the market; (ii) the potential effects of the practice in the Brazilian market place; as well as (iii) the efficiencies and commercial justifications for the practice in view of the situation of the Brazilian market.

In one important matter, CADE investigated hotel price parity clauses applied by Booking.com, Decolar.com and Expedia to ensure that these companies would show more advantageous conditions to the consumers in comparison to the conditions of the sales channels of their own hotels or of competing platforms. The three companies settled with CADE in order to cease the use of hotel price parity clauses in relation to offline sales channels and competing online platforms. However, CADE understood that the use of such clauses in relation to the online website of the own hotel would be justified to avoid a "free-rider" effect.

2.24 Describe any notable case developments concerning vertical merger analysis.

In the last few years, CADE has ruled on significant vertical merger cases, such as *AT&T/Time Warner*, in which the integration between pay-TV services and media programming was remedied with a Merger Control Agreement in which the parties agreed to keep Sky Brasil (AT&T's Brazilian pay-TV operator) separate from Time Warner's programming services, as two different legal entities with distinct personnel. Furthermore, Time Warner's programming services were obliged to offer non-discriminatory conditions to Sky's competitors. Sky must also not unfairly refuse to broadcast programmes from companies not affiliated to AT&T.

The deal between Petrotemex and Petrobrás is another significant vertical merger ruled by CADE. The transaction comprised Petrotemex's acquisition of PET resin maker CITEPE and raw material supplier SUAPE – both owned by Petrobrás – resulting in an integration between the PTA and PET resin markets. The antitrust concerns were also dealt with in a Merger Control Agreement, in which the parties agreed to offer non-discriminatory conditions to CITEPE's only competitor in the Brazilian market, M&G.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Despite the challenges in terms of evidence and examination of efficiency defences, CADE's General Superintendence seems to be working hard to be in a good position to commence new investigations on abuse of dominance cases based on complaints filed by third parties or on its own initiative. The cases opened recently and investigations underway before CADE's General Superintendence in some key sectors are good news for those advocating that strong competition policy can only be implemented if appropriate measures are taken against illegal unilateral conduct.

3.2 What are the laws governing dominant firms?

Dominant firms are governed by the 2011 Competition Act, which provides that a dominant position is held to occur when a company or group of companies is capable of altering, in a unilateral and concerted manner, the market conditions or when it controls twenty per cent (20%) or more of the relevant market.

3.3 What is the analytical framework for defining a market in dominant firm cases?

CADE normally examines the two dimensions of the relevant market in which the commercial conduct takes place: (i) the relevant goods or services; and (ii) the geographic extent of the market. The hypothetical monopolist test is usually employed by CADE. The substitutes of the product under examination are included in the same relevant market, as the customers would switch to them in response to the hypothetical situation where the price of the product under examination is raised and maintained above competitive levels. CADE understands that the alternative products do not need to be perfect substitutes. CADE also considers businesses not currently supplying the product under examination but which could, in a short period of time, supply close substitutes of the product under examination in response to price increases. This means that supply-side substitutes may also be included in the definition of the relevant market by CADE, which also takes into account the area in which the product under examination is being sold and whether customers have the option to switch to products sold in other areas. CADE tends to examine the Brazilian or even regional markets, and eventually a worldwide relevant market.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Under the 2011 Competition Act, an undertaking with more than a twenty per cent (20%) market share is presumed to be dominant by CADE. Dominance can eventually be established by CADE below or above that figure. Please note that, in practice, CADE rarely relies solely on the twenty per cent (20%) threshold. Instead, it investigates whether the company has the power to independently set or modify the market conditions. This is especially true in tech markets.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

It is not illegal *per se* to be dominant or monopolist. The 2011 Competition Act expressly says that the achievement of market control as a natural result of greater competitive efficiency by a market player *vis-à-vis* its competitors does not entail an occurrence of an offence. The 2011 Competition Act only considers an abuse of the dominant position to be an infringement.

3.6 What is the role of economic analysis in assessing market dominance?

CADE's analysis is generally qualitative, at least as a first step. In the qualitative analysis, CADE seeks input from market participants, as well as data available in public sources and economic reports. If there is reasonable doubt about the company's dominance, CADE may also perform quantitative tests. In this sense, the Economic Studies Department (DEE), as part of CADE's structure, is solely dedicated to providing the Commissioners or CADE's General Superintendence with economic analysis of complex cases. DEE will typically analyse the market structure and specificities, its main players and barriers to entry, and will put to the test the parties' economic allegations, such as the creation of efficiencies or the lack of market concentration.

3.7 What is the role of market share in assessing market dominance?

CADE's precedents indicate that it acknowledges the fact that market shares alone are not sufficient to determine whether a given company is dominant, and that it should also consider the market shares during other years and the position of other companies doing business in the same market. Nevertheless, CADE tends to look primarily into the market shares given the legal presumption set forth in the 2011 Competition Act (the twenty per cent (20%) threshold).

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

CADE normally examines whether possible justifications and efficiencies of the conduct outweigh its anticompetitive effects. Therefore, the efficiencies argument is the most common.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Under a rule of reason approach normally used by CADE in unilateral conduct cases, conduct that has anticompetitive effects which cannot be sufficiently offset by possible compensatory benefits/efficiencies should be disapproved. In any event, CADE normally undertakes the analysis of the efficiencies in order to reach a decision in relation to the investigated conduct. CADE seems to be aware that empirical assessment of efficiencies can improve the quality of its decisions in unilateral conduct cases.

3.10 Do the governing laws apply to "collective" dominance?

Yes. See question 2.2.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Dominant purchasers can also be sanctioned provided that their conduct amounts to the following effects or potential effects: (a) to limit, restrain or in any way harm open competition or free enterprise; (b) to control the relevant market of a certain product or service; (c) to increase profits arbitrarily; and (d) to abuse a dominant position.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

CADE considers that the effect – or the potential effect – of a dominant company's conduct on the market should be the focus for the determination of an abuse of dominance, regardless of how the abuse takes place. The 2011 Competition Act contains a list of the types of conduct that may amount to abuse. CADE acknowledges that conduct may be abusive when it artificially affects the intensity of existing or potential competition. In this context, dominant firms should not allow their conduct to impair competition.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The 2011 Competition Act expressly states that exercising or exploiting industrial or intellectual property rights, technology or brands in an abusive manner may constitute anticompetitive conduct.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Yes. CADE normally looks into the "direct effects" evidence of market power to determine whether a company has abused its dominant position.

3.15 How is "platform dominance" assessed in your jurisdiction?

The CADE Tribunal has recently decided to shelve three probes against Google. In June 2019, CADE did not find evidence that Google created illegal restrictions for Brazilian advertisers to "multi-home", i.e., to use competing platforms such as Bing and Google to create ads that are shown in the search engine results page in Brazil. CADE understood that there was not sufficient evidence of scraping/copying of content created by third parties in the results pages shown to Brazilian users. CADE also found, by a majority vote, that Google's strategies to favour its Google Shopping service could not be considered an abuse of its dominant position in Brazil, due to the lack of evidence of damaging effects on the Brazilian market.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

After examining CADE's case law, it seems fair to state that refusals to sell goods or services within the payment conditions usually applying to regular business practices and policies may be considered anticompetitive by CADE, provided that the investigated company has market power and the refusal: (i) involves essential input; (ii) is related to access to the input by a competitor; or (iii) is in connection with a product or service whose duplication is impossible (for various reasons).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Especially in the last two decades, CADE has been praised for its "high standards of integrity, autonomy, sound policy, and fair procedure" (OECD, 2005). Since 2012, CADE has demonstrated its intention to intensify investigations into unilateral conduct of dominant firms, which are perhaps more common in Brazil than in other jurisdictions. Despite the challenges in terms of evidence and examination of efficiency defences, CADE's General Superintendence has been working hard on important and difficult cases related to the tech industry, and has been trying to build up reliable substantive standards to evaluate vertical restraints based on solid economic theory.

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PINHEIRONETO
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Pinheiro Neto Advogados' Competition Law Practice Group is involved in the most important unilateral conduct investigations underway at CADE. The experienced team has in-depth knowledge of the industries involved in the investigations and has participated in various and complex negotiations of settlement agreements. Pinheiro Neto has equity partners and complete teams of associates with expertise in competition law not only in São Paulo but also in Brasília, where the authorities conduct the investigations and judgments. The team has recently been very active in helping clients in the review and/or implementation of internal investigations and compliance training programmes. The team members have published various articles in the field and have been consistently recognised by *Who's Who*, *Chambers & Partners*, *Best Lawyers*, *LACCA Approved* and other institutions as leading practitioners in Brazil.

China

DeHeng Law Offices

Ding Liang

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The State Administration for Market Regulation ("SAMR"), a consolidated anti-monopoly enforcement agency, investigates and enforces the *Anti-monopoly Law of China* ("AML"), which regulates vertical agreements and dominant firm conduct.

Before April 2018, the National Development and Reform Commission ("NDRC") was responsible for law enforcement against price-related vertical agreements and abusive conduct, and the State Administration for Industry and Commerce ("SAIC") was responsible for investigations into non-price-related vertical agreements and abusive conduct.

According to the *Institutional Reform Plan of the State Council*, released by the National People's Congress on March 18, 2018, "the duties of the SAIC, the duty of the NDRC in price supervision and antitrust law enforcement, the duty of the Ministry of Commerce in antitrust law enforcement for concentration of undertakings and the duty of the Office of Anti-monopoly Committee of the State Council shall be consolidated to form the SAMR as an organization directly under the State Council".

The Anti-monopoly Bureau under the SAMR carries out antitrust investigations into vertical agreements and dominant firm conduct. More specifically, the Division of Monopoly Agreement Investigation is in charge of vertical agreement investigation and the Division of Abusive Conduct Investigation is in charge of investigations into abuse of market dominance.

According to the *Circular of the SAMR on the Authority for the AML Enforcement* issued on December 28, 2018, "market regulatory departments of people's governments of all provinces, autonomous regions, and municipalities directly under the Central Government (the 'Provincial Market Regulatory Departments' or 'PMRD') are hereby authorized, according to the work needs and in accordance with the relevant provisions of the Anti-monopoly Law of the People's Republic of China, to be responsible for antitrust law enforcement work within their respective administrative areas". This means both the central-level SAMR and the provincial-level PMRD have the authority to investigate vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

When investigating monopolistic conduct, the SAMR may take the following measures:

1. enter the business premises of undertakings which are under investigation or any other relevant place to inspect;
2. conduct interrogations of undertakings which are under investigation, interested parties, or other relevant entities or individuals, requiring them to disclose relevant information;
3. review and duplicate the relevant business documents, agreements, accounting books, business correspondence, electronic data, files, or documentation of undertakings which are under investigation, interested parties, and other relevant entities and individuals;
4. seize and detain the relevant evidence; and
5. check the bank accounts of undertakings which are under investigation.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

1. Pre-investigation

   At this stage, the SAMR or local PMRD will conduct the external investigation to understand the background and verify the evidence obtained to determine whether to formally initiate the antitrust investigation. The local PMRD may communicate with the SAMR before initiating the investigation.

2. The initiation of the investigation

   A local PMRD shall, within seven working days after the initiation of an antitrust investigation, report the case to the SAMR for its records. No notice of investigation can be obtained by the entity under investigation.

3. Fact-finding and dawn raid

   After the initiation of the investigation, the SAMR may carry out a dawn raid on the undertaking under investigation by conducting an on-site inspection to collect and fix evidence, conducting interrogations, and requesting the undertaking under investigation to provide documents.

   Undertakings which are under investigation and interested parties have the right to voice their views. The SAMR shall verify the facts, reasons and evidence presented by undertakings under investigation or interested parties.

   The SAMR will ask undertakings under investigation to submit documents or provide explanations for certain conduct.

The fact-finding process may last for several months, even years, and the scope of the investigation may be upstream, downstream or involve competitors of the undertaking under investigation.

4. Decision on cancellation, suspension of investigation, resumption of investigation or termination of investigation

   The investigation can be cancelled if no violation can be found. The investigation can be suspended if the undertaking which submits an application agrees to undertake certain specific measures that will lead to the elimination of the effect of suspicious practices within a time limit designated by the SAMR. If such measures are well implemented in the agreed period of time, the SAMR may terminate the investigation. The investigation could be resumed if the measures are not implemented as promised.

5. Expert argumentation meeting

   There is an Expert Committee under the Anti-monopoly Commission of the State Council. 17 experts in the Expert Committee can be called on by the SAMR to attend an expert argumentation meeting to give an expert opinion on the findings and preliminary decisions of the SAMR.

6. Oral notice for the finding of the case

   After the expert argumentation meeting, the SAMR will release its findings and preliminary decision to the undertaking under investigation orally. The oral notice will not include the fine base or the rate of fine. The undertaking under investigation can provide the SAMR with a statement or argument to challenge the facts and the law's application.

7. Prior notice for the administrative penalty

   After communication between the SAMR and the undertaking under investigation, the SAMR will issue the Prior Notice for the Administrative Penalty. This is a notice in written form stating the fact, the violation found, the fine base and the rate of fine. It will state the right for the undertaking under investigation to make a statement, argument or apply for a hearing. The undertaking under investigation may challenge the decision, the fine base and the rate of fine to reduce the penalty.

8. Final decision on the administrative penalty

   After the undertaking under investigation provides the statement, argument and/or attends the hearing, the SAMR will issue the final decision on the administrative penalty. The wording of the decision could be negotiated if it contains the trade secret of the undertaking under investigation.

9. Publication

   A decision on the administrate penalty or a decision on suspension or termination of investigation, will be released to public through the website of SAMR at http://www.samr.gov.cn/fldj/tzgg/xzcf/.

10. Administrative review or administrative lawsuit

   If the undertaking under investigation does not accept a decision made by the SAMR, it may apply for administrative review or file an administrative lawsuit.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the case where an undertaking violates the AML by entering into and implementing a vertical monopoly agreement, the SAMR shall order a halt to illegal activities, confiscate illegal earnings, and impose a fine of between 1% and 10% of the preceding year's sales revenue; if the monopoly agreement had been entered into but not yet been implemented, a fine of no more than RMB 500,000 shall be imposed.

Where an undertaking reports, on its own initiative, a monopoly agreement entered into by said undertaking to the SAMR as well as providing key evidence, the SAMR may consider a lighter fine, or forgo the fine altogether.

Where an undertaking violates the AML by abusing its dominant market position, the SAMR shall order a halt to the offending conduct, confiscate the illegal earnings, and impose a fine of between 1% and 10% of the preceding year's sales revenue.

1.5 How are those remedies determined and/or calculated?

To determine the specific amount of a fine, the SAMR shall consider factors such as the nature, extent and duration of the monopolistic conduct.

Step 1: The fine base

The fine will be imposed on the basis of the preceding year's sales revenue. In general, the "preceding year" shall be the year prior to the initiation of the investigation. In some cases, the "preceding year" is the year prior to the decision of imposing the fine.

The scope of the fine may be narrowed to the relevant products under the investigation and the geographical area covered by the monopolistic conduct. If the geographical area concerned is beyond the territory of China, the SAMR generally takes the China-wide domestic sales revenue of relevant products as the basis for calculating fines, but it may take worldwide sales as the basis for calculating fines. However, since the establishment of the SAMR, it has used the total sales revenue of the undertaking under investigation as the base to impose a fine, in order to increase deterrence and unify the standard of antitrust enforcement.

The undertaking subject to the fine could be narrowed down to the undertaking which directly implements the monopolistic conduct. However, the SAMR may impose fines on a parent company, provided that the parent company can exercise decisive influence over the undertaking which has engaged in the monopolistic conduct.

Step 2: The ratio of fine

In general, the initial proportion of the fine against vertical agreements will be 1% according to the Draft Guidelines on the Determination of Illegal Gains and Fines in Relation to Undertakings' Monopolistic Conduct ("Draft Guidelines on Fines"). The initial proportion of the fine against abusive conduct will be 2% or 3%.

Step 3: Adjust the ratio according to aggravating or mitigating circumstances

1. Adjustments due to aggravating circumstances

Aggravating circumstances	Adjustment
Playing a leading role or coercing other undertakings to implement the monopolistic conduct or preventing other undertakings from discontinuing the monopolistic conduct.	+1%
Committing multiple monopolistic conduct in the same case or having violated the AML in the past.	+1%
As to the duration, one year shall be taken as the base; the proportion of fines will increase by 1% for each additional year; by 0.5% for addition of a period less than six months; and by 1% for addition of a period more than six months but less than one year.	+0.5% up to a total of 10%
Continuing the monopolistic conduct after being ordered to stop by anti-monopoly enforcement agency.	+0.5%
Other aggravating circumstances.	+0.5%

2. Adjustments due to mitigating circumstances

Mitigating circumstances	Adjustment
Being coerced by other undertakings to implement the monopolistic conduct.	-1%
Being forced or coerced by administrative authorities to implement the monopolistic conduct.	-1%
Cooperating with the anti-monopoly enforcement agency and making meritorious performance.	-1%
Taking the initiative to eliminate the harm and consequences of illegal activities.	-1%
Taking the initiative to mitigate the harm and consequences of illegal activities.	-0.5%
Voluntarily providing relevant evidence of other undertakings' violation of the AML.	-0.5%
Other aggravating circumstances.	-0.5%

The SAMR has full discretion to adjust the initial ratio of fines by considering the above aggravating or mitigating circumstances.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

In general, the leniency policy and the commitment negotiation do not apply to vertical monopoly agreements. However, according to the *Interim Provisions on the Prohibition of Monopoly Agreements* to be effective on September 1, 2019, the commitment negotiation is applicable to vertical monopoly agreements.

The investigation against abusive conduct may be suspended through commitment negotiation. The process is as follows:

1. timely filing of the application to suspend the investigation, together with the initial commitment to establish the foundation of the negotiation between undertakings and the SAMR;
2. the undertaking may negotiate with the SAMR regarding the content of commitments; and
3. if the SAMR holds that (1) the facts are clear, and (2) the committed measures are sufficient to eliminate the effects caused by the suspicious monopolistic conduct, the SAMR may decide to suspend the investigation.

Not all antitrust investigation can be ended with commitment. It should be evaluated and negotiated on a case-by-case basis. After the SAMR investigates and verifies the suspected monopoly agreement, if the monopoly agreement is constituted, the SAMR no longer accepts the application for suspension of the investigation proposed by the undertaking.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The SAMR, as the anti-monopoly law enforcement agency designated by the State Council, is responsible for the AML's enforcement. In general, it does not need to defend its claims in front of a legal tribunal or in other judicial proceedings before issuing a decision.

However, in some cases the Anti-monopoly Commission could be involved in the final decision-making process if the proposed decision by the SAMR is controversial. Article 9 of the AML provides that the State Council establishes the Anti-monopoly Commission to take charge of organising, coordinating, and directing anti-monopoly activities and to fulfil its duties; *inter alia*, to coordinate anti-monopoly administrative law enforcement.

1.8 What is the appeals process?

Where any party concerned is dissatisfied with any decision made by the SAMR about vertical monopoly agreement or abusive conduct, it may apply for an administrative review or file an administrative lawsuit according to law.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes. Parties and non-parties to a vertical agreement can bring damages claims if they have suffered losses due to an anticompetitive clause contained in a vertical agreement. Anyone who suffered from the abusive conduct can file an antitrust suit against the undertaking which holds dominant market position to claim damages.

The differences between private and public enforcement are as follows:

1. The SAMR treats resale price maintenance ("RPM") as a *per se* violation, but allows the undertaking to justify its conduct under Article 15 of the AML. In private enforcement, however, the RPM is reviewed by the People's Court under the rule of reason.
2. In a private litigation against abusive conduct, the plaintiff has to establish a *prima facie* case. It is will be very difficult to find evidence to prove dominance and illegal conduct. However, in a public enforcement case, the SAMR has the authority to request documents from the undertaking under investigation and can carry out a dawn raid on the target to obtain a large volume of materials. It is comparatively easier for the SAMR to prove abusive conduct.
3. The plaintiff of a private action can withdraw the complaint, which means it has a certain control over the proceeding. However, after the SAMR has initiated the antitrust investigation based on the report of the whistleblower, the whistleblower cannot stop the public enforcement by withdrawing the report.
4. The SAMR can confiscate the illegal earnings, which could be higher than the damage claimed by the plaintiff, assuming the illegal conduct lasts for years and there are many victims similar to the plaintiff. In addition, the fine imposed by the SAMR could be 10% of all sales revenues of the target, which may be much higher than the damage ruled by the People's Court.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

1. Safe harbour

There are no safe harbours available under the AML and relevant antitrust regulations of China.

2. Exemptions

Article 15 of the AML lists the circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition under the AML. These circumstances are:

1. advancing technology, or researching and developing new products;
2. improving product quality, lowering cost, increasing efficiency, unifying specifications and standards, or implementing a division of labour based on specialisation;

3. improving the operational efficiency and competitiveness of small and medium-sized undertakings;
4. realising public interests such as energy conservation, environmental protection, and rescue and relief efforts;
5. alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;
6. protecting legitimate interests during foreign trade or foreign economic cooperation; or
7. other circumstances specified by laws or the State Council.

If the undertaking claims that one of the first five circumstances exists, it must also prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

1.11 Does enforcement vary between industries or businesses?

In general, the AML does not contain any provisions on vertical agreement and abusive conduct that apply to specific sectors. Based on the current laws and regulations, the anti-monopoly enforcement does not vary between industries or businesses.

However, an *Anti-monopoly Guideline in the Automobile Sector* (draft for comments) was released in April 2016. If the Guideline can be released as scheduled in 2019, it will be the first industry-specific guideline to regulate anti-monopoly enforcement and compliance.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The SAMR and the People's Court will consider the regulatory context of the industries of vital economic or national security importance in which the state-owed sector of the economy holds the position of control or industries which implement monopolisation legally. Article 7 of the AML provides that "the state protects the lawful business activities of the undertakings from industries of vital economic or national security importance in which the state-owned sector of the economy holds the position of control or industries which implement monopolization legally…".

According to Article 22 of the *Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position* to be effective on September 1, 2019, "undertakings in public utility domains such as water supply, power supply, gas supply, heat supply, telecommunications, cable TV, postal services and transportation shall operate according to the law, and shall not abuse their dominant market position to harm consumers' interests".

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

In general, the SAMR shall only consider competition issues when making the decision. The political environment does not affect anti-monopoly enforcement.

Article 4 of the *Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position* provides, "when investigating and dealing with acts of abuse of a dominant market position, anti-monopoly law enforcement agencies shall treat all undertakings equally". Similarly, Article 4 of the *Interim Provisions on the Prohibition of Monopoly Agreements* provides, "an anti-monopoly law enforcement agency shall treat all undertakings equally when investigating and punishing monopoly agreements".

However, the industrial policy may be considered by the SAMR. For instance, when an undertaking applies for exemption under Article 15 of the AML, most circumstances listed in that provision are related to industrial policy. The exemption is to find a balance between the competition policy and the industrial policy.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

In 2018, the SAMR investigated 32 monopoly and abuse-of-dominance cases, 15 of which were closed. The investigations mainly targeted the pharmaceutical, utilities and transportation sectors.

In December 2018, two chlorpheniramine maleate API (active pharmaceutical ingredient) manufacturers were fined RMB 10.04 million (USD 1.46 million) for abuse of dominance. There are pending antitrust investigations against API suppliers as of early 2019. In 2019, antitrust enforcement towards API producers is a high priority for the SAMR.

The SAMR has publicly expressed that in 2019 it will focus on anti-competitive conduct in sectors including utilities, pharmaceuticals (especially API), construction, and consumer products, which directly relate to people's livelihoods.

1.15 Describe any notable case law developments in the past year.

1. Chlorpheniramine maleate APIs

In December 2018, the SAMR imposed RMB 10.04 million (USD 1.46 million) in cumulative fines on Hunan Er-Kang Medical Operation and Henan Jiushi Pharmaceutical for abuse of dominance in the domestic market for chlorpheniramine maleate APIs. The SAMR held that the two companies had a dominant position in the Chinese market for chlorpheniramine maleate APIs and engaged in the following activities involving abuse of market dominance:

(1) selling chlorpheniramine maleate APIs to downstream operators at unfair high prices;
(2) refusing to provide chlorpheniramine maleate APIs to downstream operators without justification; and
(3) forcing downstream operators to buy other pharmaceutical excipients.

The SAMR determined that both companies hiked the price of chlorpheniramine maleate APIs and caused a supply shortage, severely impaired fair competition in the market, infringed on the interests of downstream undertakings, and caused adverse effects on society. The SAMR determined that their conduct violated Article 17 of the AML and amounted to an abuse of dominance in the relevant market.

2. Chang'an Ford RPM

In June 2019, the SAMR fined Chang'an Ford, Ford Motor Co's local joint venture, RMB 162.8 million for setting a minimum resale price for its cars in the Chinese municipality of Chongqing since 2013. The SAMR determined that Chang'an Ford's actions deprived downstream dealers of their pricing autonomy, eliminated and restricted intra-brand competition, as well as impairing fair competition in the market and consumers' legal interests.

The fine is equivalent to 4% of Chang'an Ford's sales in Chongqing in 2014, the year before the investigation was formally initiated.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Article 14 of the AML states that RPM is prohibited. The wording of Article 14 is strong and the SAMR treats RPM as *per se* illegal. In addition, Article 46 of the AML authorises the SAMR to impose a fine of 1% to 10% of sales revenue of the preceding year, which is no different from that imposed on cartels. The explicit wording of the AML and the practice of the SAMR indicate that China takes a high level of concern over RPM.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Article 13 of the AML defines a monopoly agreement as an "agreement, decision or other concerted practice which eliminates or restricts competition". The agreement does not need to be in written form.

Vertical agreement is a kind of agreement made by undertakings in different markets, which have upstream and downstream relationships.

2.3 What are the laws governing vertical agreements?

The laws governing vertical agreements are Articles 14, 15 and 46 of the AML. Currently, there are no antitrust regulations which provide more detailed rules beyond the scope of the above provisions.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

There are no laws and regulations to state that any type of vertical agreements or restraints are a *per se* violation. The People's Court will evaluate a vertical agreement under the rule of reason. However, the SAMR treats RPM as a *per se* violation, but allows the undertaking under investigation to submit an application for exemption under Article 15 of the AML.

The rule of reason approach to RPM litigation was first introduced in *Rainbow v. Johnson & Johnson* heard by the Shanghai Higher People's Court in 2013. In 2018, the Guangdong Higher People's Court reconfirmed the rule of reason approach in *Dongguan Guochang v. Dongguan Shengshi & Dongguan Heshi* when judging RPM. The judge held that whether RPM violates the AML depends on the purpose and effect of eliminating and restricting competition.

2.5 What is the analytical framework for assessing vertical agreements?

The general analytical framework underpinning the assessment of vertical agreements under the AML is as follows: if the SAMR finds that an agreement fixes resale prices or sets minimum resale prices, it is likely to conclude that entering such vertical agreement violates Article 14 of the AML. However, the undertakings can still argue that the prohibition in Article 14 should be exempted on the grounds that the agreement fulfils one of the circumstances listed in Article 15 of the AML and the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Because a vertical agreement is concluded between undertakings in two different markets, it may involve at least two relevant markets. However, as a vertical agreement will only affect competition on one relevant market, the market definition may only focus on the market affected.

The analytical framework for defining a relevant market in a vertical agreement case will be no different to any other antitrust case. The relevant product market and the geographic market will be defined. In defining the relevant market, demand substitution may be analysed based on the characteristics, purpose, and price of product. Supply substitution may, when necessary, also be analysed. If the scope of the market in which undertakings compete is unclear or difficult to define, the relevant market may be defined according to the SSNIP (Small but Significant Non-transitory Increase in Price) test.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

When dealing with the dual distribution, both vertical issues and horizontal issues may be considered.

1. Vertical agreement

   If the following conditions are met, the dual distribution is likely to be considered a vertical agreement:

   a) the agreement is non-reciprocal; and

   b) the supplier is a manufacturer/service provider and distributor, while the purchaser is just a distributor.

2. Horizontal cooperation

   If parties are competing at both the manufacture/service level and the distribution level and the agreement is reciprocal, the agreement is more likely to be considered a horizontal arrangement. Exchange of sensitive information between the parties is prohibited.

2.8 What is the role of market share in reviewing a vertical agreement?

In practice, if the relevant market share of the undertakings participating in a vertical agreement does not exceed 25%, it may be assumed that the agreement will not eliminate or restrict competition. According to the *Interim Provisions on the Applicable Standards for Cases of Concentration of Operators Subject to Simplified Procedure*, if both upstream and downstream operators participating in concentration hold less than 25% of market share in the upstream and downstream market, the transaction is subject to the simplified procedure.

If the undertaking in a vertical agreement has a market share of 25% or more, it is likely that the vertical restraint will have a negative effect on competition. More importantly, the vertical restraint could be considered abusive conduct if the undertaking holds a market share of more than 50%.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is inevitable in every antitrust case, including cases involving vertical agreement. According to Article 10 of the

Provisions of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes arising from Monopolistic Practices, the parties may apply to the People's Court for permission to engage professional organisations or personnel to conduct market research or make economic analysis reports with respect to the relevant professional issues.

In addition, according to Article 7 of the *Guidelines of the Anti-monopoly Commission under the State Council Concerning the Definition of Relevant Markets*, the SAMR shall encourage undertakings to define relevant markets according to the specific circumstances of each case by using objective, genuine data and adopting economic analysis methods.

In *Rainbow v. Johnson & Johnson*, both parties retained economists to provide expert reports regarding RPM to the People's Court.

2.10 What is the role of efficiencies in analysing vertical agreements?

According to Article 1 of the AML, said law pursues multiple objectives, which include promoting efficiency of economic operations. The objective of promoting efficiency would also apply to vertical agreements.

In addition, if the vertical agreement can result in a higher quality of product/service, lower price, easing of market entry, or promoting innovation, the undertaking may apply for an efficiency exemption under Article 15 of the AML.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

The SAIC issued the *Rules on Prohibition of Restriction or Elimination of Competition through Abuse of Intellectual Property Right* in 2015, which address the issue of exclusive grant-back of technology improvement, prohibition of challenging the validity of the IPR, etc. The Rules do not change the analysis framework of vertical agreements under the AML.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

When the SAMR decides whether a vertical agreement is illegal, it only needs to determine whether the agreement falls under the circumstances described in Article 14 of the AML. The anticompetitive effects may be evaluated only when the undertaking under investigation files an application for exemption under Article 15 of the AML.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The People's Court will weigh the harm against potential benefits or efficiencies in a litigation regarding vertical agreement. The SAMR may not consider benefits or efficiencies unless there is an application for exemption under Article 15 of the AML. In addition, according to Article 46 of the AML, where the monopoly agreement has not been implemented, a fine of less than RMB 500,000 may be imposed.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

A possible defence is to argue that there is no vertical agreement under the AML. An agent-principal arrangement in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment shall not be considered a vertical monopoly agreement under the AML.

Since the People's Court will consider the anti-competitive effect of the vertical agreement, undertakings may prepare evidence regarding the market share of the parties, the competition situation on the relevant market, the ability of the undertaking to control the market, the financial and technical ability of undertaking, the degree of reliance of the trading counterpart, and market entry, to formulate possible defences.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

There are no formal guidelines regarding vertical agreements.

2.16 How is resale price maintenance treated under the law?

The AML mainly stipulates resale price maintenance in Articles 14, 15 and 46. Article 14 (1) and (2) respectively prohibit fixing the price of commodities for resale to a third party and restricting the minimum price of commodities for resale to a third party.

The SAMR treats RPM as *per se* illegal. The People's Court will evaluate the anticompetitive effect. In *Rainbow v. Johnson & Johnson*, the Higher People's Court of Shanghai held that when analysing the nature of the RPM, there are four prongs that should be considered, and that constitute the basic method for the Shanghai Higher People's Court to analyse and evaluate the RPM. They are:

1. whether the relevant market competition is sufficient;
2. whether the defendant has a very strong market position;
3. the motive of the defendant to impose the RPM; and
4. the competition effect of the RPM.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing could be considered abusive conduct under Article 17 of the AML.

In an antitrust investigation, the SAMR can presume an undertaking holds dominance if its market share is above 50%. The SAMR could determine that exclusive dealing by a dominant firm violates Article 17 of the AML, unless there is an acceptable justification.

Justifications for exclusive dealing include:

1. it is essential for meeting the product safety requirements;
2. it is essential for protecting intellectual property rights;
3. it is essential for protecting particular investments undertaken for transactions.

In an antitrust lawsuit, because it is not sufficient for the plaintiff to presume dominance solely on the basis of high market share, and it is hard to prove the anticompetitive effect of exclusive dealing, it is very hard for the plaintiff to challenge exclusive dealing.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying could be considered abusive conduct under Article 17 of the AML.

In several antitrust investigations against tobacco companies, the local anti-monopoly enforcement agencies found the tobacco companies bundled the sale of popular cigarette brands with unpopular ones by restricting the supply of popular brands.

In the *Qualcomm* antitrust investigation, the anti-monopoly enforcement agency found Qualcomm abused its dominant market position in the wireless standard essential patent ("SEP") licensing market by tying non-SEP licensing with SEP licensing without justification.

In the retrial of *Wu Xiaoqin v. Shaanxi Radio and Television Network Media (Group) Co., Ltd.*, the Supreme People's Court ruled that the undertaking with a market-dominant position bundled sales of separate services or products, constituting a tie-in sale prohibited by the AML.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination is an abusive conduct regulated under Article 17 of the AML. Price discrimination is not a target of vertical agreement investigation unless the undertaking holds a dominant market position in the relevant market.

It is very difficult for the SAMR and the People's Court to identify price discrimination. First, it is normal for a firm to provide different prices to different trading counterparts. The price difference within a reasonable range will be legal under the AML, even for dominant firms. Second, it is very hard for enforcers or judges to draw a line as to what price difference constitutes discrimination, because the markets vary from one to another, and as the markets are changing, the enforcers and courts cannot set up a benchmark that is forever correct.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discount is an abusive conduct regulated under Article 17 of the AML. Loyalty discount is not a target of vertical agreement investigation unless the undertaking holds dominant market position in the relevant market.

In the antitrust investigation against Tetra, the anti-monopoly enforcement agency concluded that from 2009 to 2013, Tetra abused its dominant market position in three relevant markets in China, and concluded that the company had no legitimate reason to carry out loyalty discounts. In the penalty decision, the anti-monopoly enforcement agency recognised that discount is a common commercial behaviour, which can promote market competition and benefit consumers. In the meantime, the authority believes the loyalty discount implemented by undertakings with dominant market position should be regulated when it combines with specific market conditions and has obvious anticompetitive effect.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount is an abusive conduct regulated under Article 17 of the AML. It is not a target of vertical agreement investigation unless the undertaking holds a dominant market position in the relevant market.

Multi-product or "bundled" discount may be determined illegal if the bundle is priced below cost, or a competitor providing a competitive product cannot match the discount without pricing below cost on that product. The bundled discount is very popular in the Chinese online and offline markets. However, there is no antitrust investigation or litigation against bundled discount in China.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

1. Prohibiting distributors from passive sale

To restrict passive sale under the territory allocation in a vertical arrangement could be determined by the SAMR to be a violation of the AML.

According to the *Guidelines on Anti-Monopoly in the Automobile Industry (Draft for Comment)*, manufacturers could restrict the distributor to provide goods within a certain region and not to carry out sales in any other distribution region. However, manufacturers may not restrict passive sales by a distributor.

Passive sales mean that distributors do not actively market the goods or services to consumers but deliver the goods or services upon their request. The following are passive sales, which cannot be prohibited by manufacturers:

a) Where a consumer from region A buys goods in region B, this is a passive sale for distributors designated within region B.

b) Where a consumer contacts the distributor after visiting the website of either such distributor or a third party and such contact contributes to a deal, such deal is regarded as a passive sale.

c) Where distributors publish relevant information for indefinite consumers on their own website or the website of a third party and consumers contact the distributors, the deals made therefrom shall be deemed as passive sales of distributors.

2. Prohibiting distributors from cross-supply among themselves

To restrict distributors from cross-supply among themselves under the territory allocation in a vertical arrangement could be determined by the SAMR as a violation of the AML.

2.23 How are MFNs treated under the law?

Most-favoured-nation ("MFN") clauses in the context of vertical agreements are most-favoured-customer clauses, where the supplier grants the distributor a price that will not be less favourable than the prices granted to its other customers. MFN clauses may reduce the incentive to lower the resale price. In addition, since the undertakings are prevented from applying differing prices in different distribution channels, MFN clauses may facilitate RPM.

The anti-monopoly enforcement agencies investigated the hotel reservation sector, but no fines were imposed in relation to MFN.

2.24 Describe any notable case developments concerning vertical merger analysis.

In April 2014, the China anti-monopoly enforcement agency approved Microsoft's acquisition of Nokia's mobile handset business under conditions. The anti-monopoly enforcement agency found that the parties had vertical relationships in several markets. Its review focused on three product categories: (1) smartphones; (2) mobile operating systems; and (3) patent licensing related to smartphones.

The anti-monopoly enforcement agency concluded that, post-acquisition, Microsoft would have the capability to restrict competition in the upstream patent licence market for smartphones, particularly with respect to Microsoft's package licence for Android phones. It stated that Microsoft's patents covered by the Android program licence include technology that is "essential" for the production and manufacture of Android phones, which make up more than 80% of the Chinese smartphone market, including many standard-essential patents as well as 26 families of non-essential patents. The anti-monopoly enforcement agency found that Microsoft has the motivation to increase competitors' costs by raising its patent royalty rates. By contrast, it stated that the majority of Chinese smartphone manufacturers lack the "strength" to engage in effective cross-licensing; that patent licensing is a key barrier to entry for smartphone manufacturing; and that any increase in royalty fees would endanger the ability of Chinese smartphone manufacturers to compete, thereby reducing competition and injuring consumers.

The anti-monopoly enforcement agency also found that, post-acquisition, Nokia will have the incentive and ability to increase its own patent licensing royalty rates for smartphone-related patents. It noted that Nokia has "thousands" of standard-essential patents relevant to telecommunications and was a "leader" in that area "in terms of patent quantity and quality", and that its patents are needed by smartphone manufacturers to conduct production activities. The anti-monopoly enforcement agency posited that, because Nokia is exiting the downstream device and service market through the transaction, it will have reduced motivation to maintain lower patent royalty fees for the mobile industry.

As a result, the anti-monopoly enforcement agency imposed conditions on both Microsoft and Nokia:

1. With regard to its standard-essential patents ("SEPs"), Microsoft is required:
   - to honour its FRAND (fair, reasonable and non-discriminatory) commitments for SEPs;
   - not to seek injunctions or exclusion orders based on its SEPs against smartphones made in China;
   - not to require reciprocal licensing from licensees unless the licensee holds SEPs for the same industry; and
   - to transfer its SEPs only to third parties that agree to abide by these conditions.
2. For its non-essential patents, Microsoft is required:
   - to continue to provide non-exclusive licences to smartphone manufacturers within China;
   - to license such patents (a) for fees not exceeding those it charged prior to the concentration or contained in current licence agreements, and (b) on the same (in substance) non-price terms and conditions as prior to the concentration; and
   - for five years, not to transfer these patents to any third party, and thereafter to transfer them only to third parties that agree to abide by these conditions.

   The conditions on Microsoft generally are imposed for eight years, with some exceptions.
3. Nokia is required:
   - to continue to honour its existing FRAND commitments for SEPs;
   - to confirm its support for the principle that, subject to reciprocity, injunctions should not be enforced based on SEPs to prevent implementation of a standard subject to FRAND undertakings unless the prospective licensee is unwilling to enter into or comply with a FRAND licence;
   - not to require licensees also to license Nokia's patents not subject to FRAND undertakings;
   - to transfer its SEPs to a new owner only subject to existing FRAND undertakings and its commitments to the Ministry of Commerce ("MOFCOM"); and
   - not to depart from its current generally offered FRAND per-unit running royalty rates for its current portfolios of cellular communication SEPs.

The conditions on Nokia are subject to a reporting duty for five years, but there does not appear to be a specific time limit on the conditions themselves.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Abuse of dominance is the major claim in both antitrust litigation and antitrust investigation in China.

In 2018, 66 antitrust lawsuits were adjudicated by People's Courts at all levels in China; *inter alia*, 36 were abuse-of-dominance cases, 25 were monopoly agreement cases, and five were antitrust administrative lawsuits. Abuse-of-dominance litigation accounts for more than 50% of all antitrust lawsuits in China.

In 2017, the SAIC conducted nine antitrust investigations, seven of them related to the abuse of dominant market position. The statistics show that the big companies holding dominance are more likely to be targeted by the AML.

3.2 What are the laws governing dominant firms?

Articles 6, 17–19, and 47 of the AML regulate abusive conduct by dominant firms.

1. Definition of dominance

   Article 17 of the AML provides, "dominant market position refers to a market position where an undertaking can control the prices or volume of commodities or other trades in a relevant market, or can obstruct or affect other undertakings' capability to enter into a relevant market".
2. Sanctions

   According to Article 47 of the AML, "where an undertaking violates the provisions of this Law by abusing their dominant market position, the anti-monopoly law enforcement authorities shall order a halt to the offending behavior, confiscate the illegal earnings, and impose a fine of between 1% and 10% of the preceding year's sales revenue".

The *Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position* to be effective on September 1, 2019 provide more detailed regulation to guide enforcement by the SAMR against abusive conduct.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework for defining a relevant market in a dominant firm case will be no different to any other antitrust case. The relevant product market and the geographic market will be defined. In defining the relevant market, demand substitution may be analysed based on the characteristics, purpose, and price of a product. Supply substitution may, when necessary, also be analysed. If the scope of the market in which undertakings compete is unclear or difficult to define, the relevant market may be defined according to the SSNIP test.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Market share is the first factor to be considered when determining dominance.

According to Article 19 of the AML, it may be assumed that one or more undertakings have a dominant market position if:

1. an undertaking has one half or a higher market share in a relevant market;
2. two undertakings have a two-thirds or higher market share in a relevant market; or
3. three undertakings have a three-quarters or higher market share in a relevant market.

If one of the undertakings under the circumstances of Item 2 or 3 of the preceding paragraph has a market share of less than 10%, the undertaking shall not be assumed to have a dominant market position.

Where there is evidence showing that an undertaking which has been assumed to hold a dominant market position does not hold such a position, the undertaking shall not be determined to hold a dominant market position.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

The AML does not prohibit market dominance, only the abuse of dominant market position.

No abusive conduct by the dominant firm is *per se* illegal. Article 17 of the AML provides, "an undertaking who holds a dominant market position is prohibited from engaging in the following practices of abuse of the said position:

1) Selling commodities at unfairly high prices or buying commodities at unfairly low prices;
2) Selling commodities at a price lower than cost without justified reasons;
3) Refusing to trade with relevant trading counterparts without justified reasons;
4) Restricting trading counterparts to the trading only with the said undertaking or its designated undertaking without justified reasons;
5) Conducing tie-in sales without justified reasons, or adding other unreasonable conditions to the trading;
6) Discriminating against trading counterparts of the same qualifications with regard to transaction price, etc., without justified reasons; and
7) Other practices determined by the anti-monopoly law enforcement authorities as abuse of dominant market position".

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is crucial in assessing market dominance. In determining the dominant market position of an undertaking, the following factors should be taken into consideration:

1. the market share of the undertaking and the competitive conditions in the relevant market;
2. the ability of the undertaking to control the retail market or procurement market for raw materials;
3. the financial status and technical conditions or capabilities of the undertaking;
4. the extent of dependence on the undertaking by other undertakings in transactions;
5. the level of difficulty for other undertakings to enter the relevant market; and
6. other factors relating to the determination of the dominant market position of the undertaking.

None of the above factors is decisive.

3.7 What is the role of market share in assessing market dominance?

Market share is a very important factor to be considered in assessing market dominance, but it is not decisive. The market dominance should be determined on a case-by-case basis.

In *Qihoo 360 v. Tencent*, even though QQ has had a market share of over 70% in the instant message market in China for more than seven years, the Supreme Court did not determine that Tencent holds a dominant market position in the relevant market because the market competition on the internet is dynamic.

In *Shuqing Xu v. Tencent*, an abuse-of-dominance litigation, the Intellectual Property Tribunal in the Supreme People's Court held that competition in internet environment has highly dynamic characteristics, and the role of market share cannot be overestimated. The Court did not determine that Tencent holds a dominant market position in the relevant market, and stated that internet platform operators have the right to set reasonable platform management and disciplinary rules in order to achieve good platform management.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The most frequently used defences in a private enforcement case against abusive conduct are:

1. the market definition is incorrect;
2. the market share data is inaccurate;
3. there is no dominant market position of the undertaking, because (1) the market share is under 50%, (2) the undertaking has no ability to control the retail market or procurement market for raw materials, (3) there is no substantial difference between the undertaking and other competitors on financial status and technical capabilities, (4) the trading partners are not dependent on the undertaking, and (5) there is no barrier for other undertakings to enter into the relevant market;
4. there is no abusive conduct under Article 17 of the AML;
5. there is no anticompetitive effect derived from the abusive conduct;
6. there are justifications for the conduct;
7. the plaintiff has no standing to file the lawsuit;
8. there is no damage to the plaintiff by the alleged conduct; and
9. there is no causation between the conduct and the alleged damage.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

In general, the AML pursues multiple objectives, which include both micro-economic efficiency and macro-economic development.

These objectives would also apply to the regulation of vertical agreements. Specifically, these objectives are:

1. preventing and prohibiting monopolistic conduct;
2. protecting market competition;
3. promoting efficiency of economic operations;
4. safeguarding the interests of consumers and the general public; and
5. promoting the healthy development of the socialist market economy.

Normally, the economic analysis will be aimed at specific economic issues, such as defining the relevant product market and geographic market, to prove dominance, to evaluate the anticompetitive effect, calculate damages, and to prove the causation. In some cases, economic models will be established and calculation is involved. Efficiencies will be touched on in the above economic analysis.

3.10 Do the governing laws apply to "collective" dominance?

Article 19 of the AML does apply to collective dominance. If two undertakings have a two-thirds or higher market share in a relevant market, or three undertakings have a three-quarters or higher market share in a relevant market, they could be presumed to hold dominance in the relevant market.

Since the application of collective dominance in a case must meet many conditions, collective dominance is rarely used in China. The *Isoniazid* API investigation in 2017 is the first time collective dominance has been used by the anti-monopoly enforcement agency.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Dominant purchasers are subject to the AML. Article 17 of the AML expressly prohibits undertakings with dominant market positions from purchasing goods at unfairly low prices.

According to the *Administrative Measures on Fair Trade Between Retailers and Suppliers 2006*, retailers may not abuse their advanced position to conduct the following unfair dealing:

1. to refuse to accept the products after entering into a supply contract, unless the refusal may be attributed to suppliers, or upon the consent of suppliers, unless the retailers are willing to bear the incurred loss;
2. to request suppliers to bear the liabilities for the loss of the products unstipulated in advance;
3. retailers have no justifiable reasons to remove the products of suppliers, unless retailers remove the products of suppliers in accordance with the laws and regulations or the administrative decisions made by administrative authorities under law;
4. to impel suppliers to unconditionally return sales profits, or stipulate the return of sales profit based on a certain sales amount, or request return sales profits without accomplishment of the agreed sales amount; or
5. to impel suppliers to purchase the designated products or accept the designated service.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 17 of the AML provides, "an undertaking who holds a dominant market position is prohibited from engaging in the following practices of abuse of the said position:

1. Selling commodities at unfairly high prices or buying commodities at unfairly low prices;
2. Selling commodities at a price lower than cost without justified reasons;
3. Refusing to trade with relevant trading counterparts without justified reasons;
4. Restricting trading counterparts to the trading only with the said undertaking or its designated undertaking without justified reasons;
5. Conducing tie-in sales without justified reasons, or adding other unreasonable conditions to the trading;
6. Discriminating against trading counterparts of the same qualifications with regard to transaction price, etc., without justified reasons; and
7. Other practices determined by the anti-monopoly law enforcement authorities as abuse of dominant market position".

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Article 55 of the AML provides that "this Law is not applicable to the undertakings' conduct in exercise of intellectual property rights pursuant to provisions of laws or administrative regulations on intellectual property rights; but this Law is applicable to undertakings' conduct that eliminate or restrict market competition by abusing its intellectual property rights".

According to the *Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition*, undertakings with dominant market position are prohibited from engaging in certain types of conduct in exercising their IP rights that are deemed to constitute abusive conduct, which includes:

1. refusal to license IP rights that amount to "essential facilities";
2. imposing certain exclusivity restrictions;
3. imposing unjustified tying and bundling requirements;
4. attaching unreasonable trading conditions to an IP agreement, including inserting no-challenge clauses;
5. engaging in discriminatory treatment; and
6. engaging in practices that are inconsistent with FRAND principles in relation to the licensing of standard essential patents.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Direct effects analysis has been used in several antitrust litigation cases, through the submission of an expert report by economists. However, the judges are inclined to follow the traditional way to prove dominant market position. In practice, it is hard to let enforcers and judges consider direct effects evidence of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

Platform dominance is very difficult to prove in China, because it involves a two-sided market, and the data are all in hands of the defendant and cannot be obtained by the plaintiff. The concept of the platform market is introduced by the defendant in several civil antitrust litigations. The aim of the defendant is to make it more difficult for the plaintiff to define the relevant market and to establish dominance. Without the tool of discovery under the common law, it will be difficult to evaluate platform dominance. It is possible for the SAMR to collect data in a public enforcement case, but to prove platform dominance will still be a big challenge.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Article 17 (3) of the AML stipulates that an undertaking who holds a dominant market position is prohibited from "refusing to trade with relevant trading counterparts without justified reasons".

According to the *Guideline to the Price Conduct of undertakings of shortage drugs and API* ("API Guideline"), undertakings of drugs and APIs with dominant market position may not, without justified reason, refuse to deal with the relative party in disguise by setting an excessively high selling price or an excessively low purchase price. In analysing whether refusal to deal is justified, the API Guideline explicitly considers its impact on competition in the downstream market, namely that "the undertaking's existing capacity cannot meet the market supply, or the product needs to be produced for its own use, and its supply or self-use conduct has not seriously excluded competition in the downstream market".

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Aftermarket dominance is addressed in several pending antitrust litigations. In addition, according to the *Guidelines on Anti-Monopoly in the Automobile Industry (Draft for Comment)*, original equipment manufacturers ("OEMs") without the dominant position in the sales market of new automobiles may be identified to have the dominant position in the automobile aftermarket of their respective brand. Aftermarket dominance could be a shortcut to establish dominance in China.

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- JAC and Volkswagen joint venture – merger filing in China and Chile;
- Shandong Gold's acquisition of a 50% share of Minera Argentina Gold from the Barrick Gold merger filing in China and Argentina;
- Naning Sugar Fund's acquisition of a share of four sugar companies from AB Sugar;
- *Qihoo 360 v. Tencent*;
- *Hytera v. Motorola*;
- *Ningbo Magnet Companies v. Hitachi Metals*;
- *Emiage v. Qihoo 360*;
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- "Top Antitrust Lawyer in China" and "Top International Trade Lawyer in China" by *Legal Band* 2015, 2016, 2017 & 2018; and
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DeHeng Law Offices

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With rich experience in antitrust litigation and a strong antitrust litigator team, the DeHeng antitrust team has served the best interests of its clients in a number of high-profile antitrust civil litigations, e.g. *Huawei v. InterDigital*, *Qihoo 360 v. Tencent* and *Ningbo Magnet Companies v. Hitachi Metals*.

The DeHeng antitrust team has dealt with many antitrust investigations regarding telecommunications, shipping, pharmaceuticals, automobiles, online hotel bookings, tobacco, etc., on behalf of multinational or domestic companies.

Denmark

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

In Denmark, the Danish Competition and Consumer Authority (the 'DCCA') is the primary authority responsible for the administrative enforcement of the Danish Act on Competition and the EU competition rules. Five divisions handle different sectors and one handles investigations and cartels. At the outset, the individual divisions render decisions themselves; however, the Danish Competition Council will render decisions of principle or of particular importance.

The Danish Public Prosecutor for Serious Economic and International Crime (the 'Danish Public Prosecutor') is responsible for the criminal enforcement of the competition rules.

1.2 What investigative powers do the responsible competition authorities have?

The DCCA may request information, carry out surprise inspections (dawn raids), and make sector inquiries. If the DCCA has a suspicion of an infringement, it cannot compel an undertaking to provide information or subject itself to a dawn raid, but only to volunteer information (see the Danish Act on Legal Protection in Relation to Coercive Measures).

The Danish Public Prosecutor investigates cases as any other type of criminal prosecution and can, e.g., carry out searches and conduct interrogations.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The DCCA will conduct a preliminary investigation and, e.g., request information or conduct a dawn raid. If the DCCA wishes to continue the case and issue an order, it will prepare a brief memorandum of concerns followed by a statement of objections (basically a draft decision). After this, the DCCA will render the decision.

The Danish Public Prosecutor will conduct a preliminary investigation and may then decide to bring charges against the undertaking and/or individuals. If the undertaking/individual will not accept a fixed penalty notice, the Public Prosecutor will litigate the case before the ordinary courts.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The DCCA can render administrative decisions, but does not have competence to levy fines. In certain instances, the DCCA may enter into a fixed penalty notice with the undertaking and/or individuals.

The DCCA can issue orders; e.g., order the parties to cease the practice. In certain instances, the DCCA can also order interim measures.

Infringements of the Danish Act on Competition can lead to fines for both undertakings and individuals. There is a prison sentence for cartels.

1.5 How are those remedies determined and/or calculated?

The base amount is below EUR 538,000 for less serious infringements, between EUR 538,000 and EUR 2,689,000 for serious infringements, and above EUR 2,689,000 for very serious infringements. For individuals, the amounts are EUR 6,700, EUR 13,400, and EUR 26,900.

The base amount is subject to adjustment for the duration of the infringement: no increase for less than one year; up to 50 per cent of the base amount for one to five years; and up to 10 per cent per year for more than five years.

Further adjustments may take place considering the worldwide turnover of the undertaking and any aggravating/mitigating circumstances.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The DCCA may accept commitments. There is no formalised procedure for this, but it generally requires that the infringement is of a type that is suitable for commitments, and that it will save resources for the authorities.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Only if the parties appeal the decision by the DCCA; see the answer to question 1.8 below.

The Danish Public Prosecutor will need to litigate criminal cases before the ordinary courts if the parties will not accept a fixed penalty notice.

1.8 What is the appeals process?

Decisions by the DCCA are subject to appeal to the Danish Competition Appeals Tribunal within a period of four weeks. If the parties do not appeal, the decision is final and the parties cannot subsequently challenge it, including in subsequent private damages cases. Decisions by the Competition Appeals Tribunal are subject to appeal to the ordinary courts of law – normally the Danish Maritime and Commercial Court. Judgments by the Maritime and Commercial Court are subject to appeal to either the Danish Supreme Court or the Danish High Court.

The Danish Public Prosecutor litigates criminal cases before the ordinary courts of law, normally starting at the City Court level.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Such actions are available. The primary difference is that private parties do not have the same means of obtaining information as the DCCA or the Danish Public Prosecutor.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Please refer to the answers to questions 2.3, 2.10, 2.14, 3.2, and 3.8 below.

1.11 Does enforcement vary between industries or businesses?

The DCCA does have enforcement priorities and, from time to time, gives a sector particular focus. However, the enforcement does not, as such, vary between industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

If an anti-competitive practice is a direct or necessary consequence of public regulation, the Danish Act on Competition does not apply to it.

When considering whether a practice has an anti-competitive object, the DCCA will take the regulatory context into account (when assessing the legal and economic context).

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The DCCA is a completely independent authority and not subject to any political whims.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The DCCA and the Danish Public Prosecutor are very harsh on resale price maintenance. The DCCA has also stated that it will be focusing on abuse-of-dominance cases.

1.15 Describe any notable case law developments in the past year.

In January 2019, the Danish Competition Council found that a Danish ambulance services provider had abused its dominant position by engaging in a strategy to exclude its competitor from the market. The object of the strategy was to create uncertainty and concern about the competitor as a supplier of ambulance services and as an employer, and to make it difficult for the competitor to recruit paramedics. The competitor later went bankrupt.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The DCCA and the Danish Public Prosecutor quite actively enforce the rules against anti-competitive vertical agreements. Since certain vertical agreements – particularly concerning resale price maintenance – do not require any considerable resources, the number of enforcement decisions and particularly fines is relatively high.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

An agreement is a very broad concept under Danish competition law. An agreement may exist either as an agreement requiring a concurrence of wills (encompassing consent by contract or consent by conduct) or as a concerted practice (however, this is seen very rarely, if ever at all, in vertical arrangements).

A vertical agreement means an agreement between two independent undertakings which, for the purposes of the agreement, are active at two different levels of trade, e.g. a manufacturer and a distributor. A vertical agreement may include both horizontal and vertical aspects, e.g. if two competitors enter into a distribution agreement.

2.3 What are the laws governing vertical agreements?

Section 6 of the Danish Act on Competition and Article 101 of the Treaty on the Functioning of the European Union prohibit anti-competitive practices.

There are three block exemptions which exempt certain types of vertical agreements. These are almost verbatim incorporations of their EU equivalents. See Executive Order no. 739 of 23 June 2010 on block exemption of categories of vertical agreements and concerted practices, Executive Order no. 760 of 23 June 2010 on block exemption of categories of vertical agreements and concerted practices in the motor vehicle sector, and Executive Order no. 417 of 28 April 2014 on block exemption of categories of technology transfer agreements.

The vertical block exemption in particular is of great practical relevance. It exempts vertical agreements if certain criteria are met, including that the parties are not competitors (see the answer to question 2.7 below for the two exceptions), the supplier has a market share below 30 per cent on the selling market, the buyer has a market share below 30 per cent on the buying market, and the agreement does not contain black-listed provisions (e.g. resale price maintenance). If the agreement contains grey-listed provisions (e.g. certain non-competition clauses), this clause will fall outside the protection of the block exemption and require assessment under the normal competition rules.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

Danish competition law does not, as such, award *per se* protection to any agreements. However, purely group-internal agreements fall outside the prohibition. Please also refer to questions 2.3, 2.10, and 2.14 for exceptions and exemptions.

Danish law does not contain any *per se* restrictions. However, e.g., resale price maintenance and restrictions of passive sales will normally have as their object to restrict competition, and will only in exceptional circumstances be legal.

2.5 What is the analytical framework for assessing vertical agreements?

It is necessary to assess whether (1) there is an agreement or concerted practice between two or more independent undertakings, (2) it has as its object or effect the restriction of competition, (3) the restriction is a direct or necessary consequence of public regulation, (4) it appreciably affects competition (quantitatively and qualitatively), (5) a block exemption applies, and (6) it entails efficiencies.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The relevant market consists of a relevant product market and a relevant geographic market (see section 5a of the Danish Act on Competition). The definition of the relevant product market under Danish law follows the methodology for defining the relevant product market under EU competition law. The definition of the relevant market depends on substitutability from the demand side but also from the supply side. Although section 5a of the Act refers to potential competition, this does not form part of the market definition but only when assessing whether there is an infringement.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

For such agreements, it is necessary to consider both the horizontal aspects and the vertical aspects. The vertical block exemption covers such arrangement if – in case of products – the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level and – in case of services – the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

There are several cases concerning services where the DCCA has rejected the application of the block exemption and considered the agreement to be of a horizontal nature and problematic.

2.8 What is the role of market share in reviewing a vertical agreement?

Market shares play an important role. They may cause an agreement to fall outside the prohibition due to being *de minimis* or because a block exemption applies. Outside the block exemptions, market shares also form part of the assessment of whether different restrictions (e.g. exclusive dealing, non-competition obligations, tying/bundling, etc.) are in fact anti-competitive or can qualify for an individual exemption.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis forms an important part in defining relevant markets, establishing whether a restriction has as an anti-competitive effect, and assessing whether the agreement brings about efficiencies.

2.10 What is the role of efficiencies in analysing vertical agreements?

If an agreement is anti-competitive, the parties may raise an efficiency defence. There are four cumulative criteria under Section 8 of the Danish Act on Competition and it is the parties who have the burden of proof. In order for an efficiency defence to be successful, the agreement must:

- Contribute to improving the production or distribution of goods or to promoting technical or economic progress.
- Allow consumers a fair share of the resulting benefit, i.e. the agreement must at least be neutral to the consumers.
- Not impose restrictions which are dispensable to the attainment of these objectives.
- Not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There is a block exemption for certain technology transfer agreements. See the answer to question 2.3 above. The European Commission has also issued guidelines – which the DCCA will use as a reference point – for technology transfer agreements.

Generally, the possibilities of restricting active and passive sales are greater for technology transfer agreements than for distribution agreements. Danish practice within this area is quite limited.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Danish competition law draws a distinction between agreements having as their object the restriction of competition (e.g. resale price maintenance) and those having as their effect the restriction of competition (e.g. exclusivity clauses). For agreements in the former category, the DCCA does not have to demonstrate anti-competitive effects. For agreements in the latter category, the DCCA will have to demonstrate actual or potential anti-competitive effects.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The weighing of pro- and anti-competitive effects will not form part of the assessment of whether the agreement is anti-competitive.

If the agreement is anti-competitive, the parties may raise an efficiency defence. The authorities will then have to consider such defence. Please refer to the answer to question 2.10 above.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

The parties may claim that (1) the conduct is a direct or necessary consequence of public regulation, (2) the conduct does not appreciably affect competition (quantitatively or qualitatively), (3) the agreement benefits from a block exemption, or (4) the agreement entails efficiencies.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The European Commission has issued guidelines – which the DCCA will use as a reference point – for vertical agreements and technology transfer agreements. Special Danish guidelines exist for voluntary chains, although under revision and removed from the website of the DCCA. The DCCA also, from time to time, issues written guidance on specific questions – in addition to general guidance on the Danish Act on Competition – which the DCCA publishes on its website. The DCCA is generally quite approachable for informal guidance in specific cases.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is generally illegal.

2.17 How do enforcers and courts examine exclusive dealing claims?

If the vertical block exemption applies, it will exempt certain exclusive dealing arrangements. This generally requires that the supplier appoints a sole distributor for a given territory and/or a given customer group, and stipulates that no other group-external distributor(s) may make active sales into this area, i.e. actively approach customers. It is usually not possible to restrict passive sales, i.e. responding to unsolicited requests from customers.

Outside the vertical block exemption, it is necessary to conduct a case-specific examination, taking into account, e.g., the market position of the supplier, the number and size of competitors, barriers to entry, buyer power, maturity of the market, level of trade, and combination with other restrictions.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

If the vertical block exemption applies, it will generally exempt tying/supplementary obligations.

Outside the vertical block exemption, it is necessary to conduct a case-specific examination, taking into account, e.g., the market position of the supplier, the number and size of competitors, barriers to entry, and buyer power.

2.19 How do enforcers and courts examine price discrimination claims?

If the vertical block exemption applies, it will exempt price discrimination between different distributors. Outside the block exemption, price discrimination is generally not an issue for non-dominant undertakings.

If the supplier charges different prices depending on where or to whom the distributor resells the products, this will amount to an indirect sales restriction, which normally is anti-competitive.

2.20 How do enforcers and courts examine loyalty discount claims?

If the vertical block exemption applies, it will exempt loyalty discounts. This assumes that the discounts do not amount to an indirect non-competition clause exceeding five years or underly an otherwise anti-competitive practice, e.g. requiring that the distributor follows recommended resale prices.

Outside the vertical block exemption, loyalty discounts are generally permissible for non-dominant undertakings, provided they do not constitute an anti-competitive non-competition clause or underly an otherwise anti-competitive practice, as per the above.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Please refer to the answers to questions 2.18 and 2.20 above.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Danish competition law does not provide an exhaustive list of potentially anti-competitive vertical restraints. In addition to the above, there is often significant focus on non-competition clauses. The vertical block exemption applies to these for a period of up to five years. Practice is very restrictive when it comes to post-term non-competition obligations; the Supreme Court, in a 1997 judgment, invalidated such a clause.

2.23 How are MFNs treated under the law?

Danish practice has generally been negative towards MFN clauses. In 2015, the DCCA closed an investigation into the use of MFN clauses by hotel booking portals after the undertakings had changed their agreements.

2.24 Describe any notable case developments concerning vertical merger analysis.

The DCCA analyses both horizontal and non-horizontal effects as part of its merger analysis. There is great focus on potential vertical effects. Even in cases where no concerns are apparent, the DCCA requires the parties to provide a large amount of information. The DCCA closely follows the methodology of the European Commission when analysing vertical mergers. The DCCA has identified concerns in a number of recent cases; however, in such cases the parties offered remedies.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The DCCA actively enforces the rules against abuse of dominance. Since abuse-of-dominance cases require considerable resources, the number of enforcement decisions tends to be fairly low. To date, there has only been one fine for abuse of dominance.

3.2 What are the laws governing dominant firms?

Section 11 of the Danish Act on Competition and Article 102 of the Treaty on the Functioning of the European Union prohibit the abuse of a dominant position by one or more undertakings. There are no block exemptions covering unilateral conduct.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework is the same as for vertical agreements. Please refer to the response to question 2.6 above.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There are no market share thresholds. The establishment of a dominant position is an overall legal and economic assessment of whether an undertaking holds such a strong market position that it can behave independently of its competitors, customers, suppliers, and, ultimately, consumers. In this assessment, market shares do play an important role as evidentiary starting points, but are not in themselves decisive (despite the *travaux préparatoires* referring to them as presumptions):

- 50 per cent and more: Can in itself be evidence of dominance.
- 40–50 per cent: Not in itself sufficient to establish dominance, but requires additional factors.
- 25–40 per cent: Indication that the undertaking is not dominant, but not altogether possible to exclude (there is one Danish case indicating that the undertaking in question could be dominant with only 30 per cent).
- Below 25 per cent: Rarely sufficient to establish dominance (there is no known Danish practice finding dominance at this level).

Additional elements include competitors' market shares, the development in market shares, barriers to entry and expansion (e.g. legal barriers, IP rights, investments, spare capacity, economies of scale, vertical integration, and switching costs), and buyer power.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

It is not illegal to hold a dominant position. It is the abuse of a dominant position that is illegal.

Danish competition law does not contain any *per se* infringements, although there is a distinction between abuses capable of affecting competition in themselves and abuses where the anti-competitive effects must be probable.

The prohibition applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition. It is an objective concept, although it is possible to take subjective matters into account. An abuse can generally be exclusionary (harming competitors), exploitative (harming customers or suppliers), or discriminatory (harming trading partners in their relations with each other). There is no *de minimis* exception.

Examples of abuses include:

- Too high prices (excessive pricing).
- Too low prices (predatory pricing).
- Selectively low prices.
- Margin squeeze.
- Exclusivity.
- Certain rebates (exclusivity rebates and other loyalty-inducing rebates).
- Refusal to supply.
- Discrimination (placing trading partners at a competitive disadvantage with each other, on the basis of nationality or geography, or directly harming consumers).
- Bundling, tying, and mixed bundling.
- Unfair business terms (e.g. payment for services not delivered, unreasonable payment terms, too long notice periods, and English clauses).
- Other abuses (e.g. structural abuses, vexatious litigation, abuse of public processes, and cross-subsidies).

3.6 What is the role of economic analysis in assessing market dominance?

Please refer to the answer to question 3.4 above.

3.7 What is the role of market share in assessing market dominance?

Please refer to the answer to question 3.4 above.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The prohibition in Section 11 of the Danish Act on Competition does not apply if the conduct is a direct or necessary consequence of public regulation.

The dominant undertaking also has the possibility of objectively justifying its conduct. First, the conduct may be objectively necessary, e.g. refusal to supply if the undertaking cannot obtain the necessary raw materials itself. Second, the conduct may be necessary for the dominant undertaking to defend its interests when these are being attacked, e.g. under the 'meeting competition' defence. Third, conduct may be justified by efficiencies; please refer to the answer to question 3.9 below.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Neither Section 11 of the Danish Act on Competition nor the *travaux préparatoires* make any reference to efficiencies. However, Danish practice has since 1998 recognised efficiencies as a defence. Following recent case law from the European Court of Justice under Article 102, there is no doubt that this is a legitimate defence. The criteria are the same as under EU competition law:

- Efficiency gains counteract any likely negative effects.
- Those gains have been, or are likely to be, brought about as a result of that conduct.
- Such conduct is necessary for the achievement of those gains in efficiency.

- It does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

3.10 Do the governing laws apply to "collective" dominance?

Yes, Section 11 of the Danish Act on Competition extends to any abuse of a dominant position by 'one or more undertakings'. It is necessary to establish:

- A collective unit: This requires that the undertakings can reach terms of coordination, that they can monitor deviations, that they can put deterrent mechanisms in place, and that outsiders cannot jeopardise the coordination.
- Collective dominance: Please refer to the answer to question 3.4 above.
- Collective abuse: The abuse does not have to be the action of all the undertakings being collectively dominant. However, it must be possible to identify the abuse as one of the manifestations of the undertakings holding such a joint dominant position.

There are a few Danish decisions considering collective dominance, including decisions finding an infringement.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

At the outset, the rules apply both to dominant suppliers and dominant purchasers. There are Danish cases concerning dominant purchasers, e.g. unfair trading terms, too high purchase prices (a form of predatory pricing), and too low purchase prices (a form of excessive pricing).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Please refer to the answer to question 3.5 above.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

IP rights may enter into the overall assessment of whether an undertaking holds a dominant position; please refer to the answer to question 3.4 above.

Refusing to license intellectual property may constitute an abuse of dominance; please refer to the answer to question 3.16 below. The right to bring an action for infringement forms part of the rights of the proprietor of an IP right, with the result that the exercise of such a right, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position; however, it may do so in extraordinary circumstances, e.g. if the dominant undertaking has offered to license on fair, reasonable and non-discriminatory ('FRAND') terms (see, e.g., Case C-170/13, *Huawei Technologies*).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

It follows from the *travaux préparatoires* that it is possible to use the conduct of an undertaking as evidence of that undertaking having a dominant position. In a 1998 decision, the DCCA found that a market share of 25–40 per cent likely was not sufficient to establish a dominant position, but nonetheless found that the undertaking was dominant, citing its conduct on the market.

3.15 How is "platform dominance" assessed in your jurisdiction?

There have not been any platform dominance cases in Denmark yet.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

The starting point is that an undertaking – including a dominant one – is free to choose its own trading partners. There may, however, be an obligation to supply in particular circumstances, as follows:

- There is a refusal to supply: This includes constructive refusals, e.g. only offering to supply under unreasonable terms.
- It is possible to define two separate markets: One market constituted by the product or service and for which the undertaking refusing to supply holds a dominant position; and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service.
- The refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market.
- The refusal is of such a kind as to exclude any effective competition on that neighbouring market.

These criteria apply to all types of refusal to supply, but there are a few peculiarities within certain areas:

- IP rights: It is an additional criterion that the refusal prevents the appearance of a new product for which there is potential consumer demand (see, e.g., case T-201/04, *Microsoft*).
- The customer wishes to simply resell the products: Under EU competition law, it is not entirely clear whether it will constitute an abuse to refuse to supply a product which the customer will simply resell without adding any value. Old Danish practice has found an abuse in such circumstances, but it is questionable whether it is possible to uphold this practice today. When the DCCA faced the question in a 2013 case, it sidestepped the issue by saying that the buyer did in fact add value to the products.
- Restricting parallel trade: If a dominant undertaking refuses to supply products or services in order to restrict parallel trade within the European Union, the DCCA has found that this constitutes an abuse.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Under the Danish Act on Competition, it is still – if there is no effect on trade between EU Member States – possible to get a negative clearance (i.e. that there is no infringement of Section 6 or 11 of the Danish Act on Competition), an individual exemption (i.e. that there is no infringement of Section 6 of the Danish Act on Competition due to the existence of efficiencies), and a statement of non-dominance. Such requests are, however, quite rare.

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Chapter 5

European Union

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The European Commission (Commission) plays a central role in the enforcement of the EU competition rules and has taken high-profile enforcement action to protect competition within the Single Market. Competition enforcement in the EU is decentralised, as national competition authorities and courts also have jurisdiction to enforce the EU competition rules if there is an effect on trade between EU Member States. Coordination with national authorities is undertaken by the Commission through the network of European competition authorities (ECN).

1.2 What investigative powers do the responsible competition authorities have?

The Commission has extensive investigative powers. It has the power to carry out unannounced inspections at the premises of companies (undertakings) and, in certain circumstances, at other premises, including private premises. It can also order – through written requests – undertakings and associations to provide all necessary information that is relevant to an investigation. In addition, the Commission can interview natural or legal persons with their consent to obtain relevant information. The Commission can also exchange information with members of the ECN. The Commission's powers of investigation are subject to certain limitations (e.g. privilege against self-incrimination and the protection of legal professional privilege).

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

An investigation may be opened following a complaint or at the Commission's own initiative (a cartel investigation may be initiated following a leniency application, but such procedures are outside the scope of this guide). The Commission will carry out an initial assessment and determine whether to conduct a preliminary investigation, refer the case to a national authority or decide that the case does not merit investigation.

If the Commission decides after a preliminary investigation that a case should be subject to further investigation, it will open formal proceedings (this step is often publicised). The Commission will carry out further fact-finding and will normally hold meetings with the parties under investigation, complainant(s) and other interested third parties. It will also hold state-of-play meetings with the parties under investigation at critical stages of the proceedings.

Once the Commission has concluded its investigation, it will determine how to proceed with a case. In particular, it may (i) proceed towards issuing a statement of objections (which sets out the accusations) with the aim of adopting a prohibition decision, (ii) engage in discussions with the parties under investigation with a view to adopting a commitment decision (see question 1.6), or (iii) decide to close the proceedings in relation to all or some of the parties under investigation.

There are a number of important procedural steps that the Commission must follow before it can adopt a prohibition decision. This includes providing the parties under investigation with a statement of objections in order that they can make written and (as part of an oral hearing) oral representations. The Commission also provides the parties with access to a non-confidential version of the investigation file.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The Commission has broad discretion when deciding how to address anticompetitive conduct. It typically orders the parties to cease their anticompetitive conduct and imposes substantial fines (see question 1.5). However, it can craft remedies that will help to restore the competitive process (see question 1.5). The Commission can also achieve a resolution of the case by adopting a commitment decision (see question 1.6). Unlike some national competition authorities, the Commission can neither impose criminal sanctions nor seek director disqualification orders.

1.5 How are those remedies determined and/or calculated?

The Commission can impose any remedy, whether behavioural or structural, that is necessary to bring an infringement of the EU competition rules to an end, provided such remedies are effective and proportionate. The type of remedy that is applied is closely connected to the nature of the anticompetitive practices or conduct. The Commission will also monitor the proper implementation of remedies by the parties.

However, it will impose fines if it considers that an antitrust infringement is sufficiently harmful that it should be punished. Fines are calculated in accordance with a formula that takes into account the seriousness of the infringement and the undertaking's turnover generated with the products concerned by the infringement, the duration of the infringement and any aggravating or mitigating factors (e.g. cooperation, repeat offender, etc.). The fine is capped at 10% of the worldwide annual turnover of the undertaking concerned (i.e. the economic entity, which may be the corporate group).

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Parties under investigation can inform the Commission at any stage of the investigation (preferably at an early stage) that they are prepared to offer commitments to address possible competition concerns. They do not need to make any admission of guilt and no fines are imposed if a commitment decision is adopted. If the Commission is interested in pursuing a commitment decision (since it believes such a procedure is appropriate and the parties have a genuine interest in achieving such an outcome), it will generally hold a state-of-play meeting with the parties under investigation, where it will set out its preliminary competition concerns and give a timeframe for concluding the process. It will subsequently provide them with a preliminary assessment, which will assist the parties to formulate appropriate commitments. The Commission must carry out a market test of the commitments if it wishes to formally adopt them through a decision. The Commission has broad discretion as to whether to proceed with a commitment decision.

In addition, recently, the Commission has increasingly relied on an informal cooperation procedure for non-cartel conduct; in particular, in vertical restraints and abuse of dominance cases. As part of this procedure, parties may receive a fine reduction (which represented between 10% and 50% in recent cases) in exchange for acknowledging their liability for the infringement and further cooperating by providing evidence and/or proposing suitable remedies.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Decisions made by the Commission can be appealed to the General Court of the Court of Justice of the EU and subsequently on points of law to the Court of Justice. The General Court does not carry out a reassessment of the case on the merits (i.e. a full appeal), but instead undertakes a form of judicial review. Factual and legal issues are generally subject to a comprehensive and thorough review by the General Court. However, the Commission retains a wider margin of discretion in specific areas; in particular, as regards complex economic assessments.

1.8 What is the appeals process?

See question 1.7.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Parties who have suffered injury as a result of anticompetitive practices or conduct can bring a claim for damages before the national courts in accordance with domestic court procedures. The Commission adopted a directive on antitrust damages actions in 2014 in order to make it easier for claimants to pursue claims. Such damages actions are separate from the Commission's enforcement activity.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

There are a number of exemptions and safe harbours that are available under the EU competition rules. In particular, the Commission has adopted a vertical block exemption regulation that exempts the majority of vertical agreements provided the criteria set out in the regulation are met (see section 2). It is also possible for a dominant undertaking to argue that its abusive conduct is objectively necessary or produces substantial efficiencies which outweigh any anticompetitive effects (see section 3).

1.11 Does enforcement vary between industries or businesses?

Given its limited resources, the Commission prioritises enforcement in areas where its actions will produce the greatest economic benefit for the EU and for consumers. This will include focusing on particular sectors or conduct (e.g., historically, cartels). It is currently particularly active in applying the competition rules in digital markets. The Commission also continues to take action against anticompetitive practices and conduct that impede the functioning of the Single Market.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Court of Justice of the EU has consistently tried to ensure the broadest application of the competition rules and has considerably limited the opportunity for parties to invoke a "regulatory defence" on the grounds of concurrent and conflicting application of sector-specific regulations and competition rules. In the *Deutsche Telekom* case (2010), the Court of Justice ruled that the company was liable under Article 102 of the Treaty on the Functioning of the European Union (TFEU) despite national regulatory approval, as it had sufficient scope to end or reduce the abusive conduct (margin squeeze) within the limits imposed by regulation. Direct conflict between the EU competition rules and national regulations is increasingly rare due to increased convergence between the rules and improved coordination between authorities.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The Commission's enforcement action in the area of antitrust is not influenced in individual cases by political considerations. Generally, the Commission's goals and priorities are influenced by policy considerations; in particular, ensuring a competitive Single Market.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

See question 1.11.

1.15 Describe any notable case law developments in the past year.

The Commission has been particularly active in enforcing the competition rules in digital and technology markets. Following its enforcement action against Google in 2017 in relation to abuses concerning its comparison shopping services, it adopted two further prohibition decisions against the company in 2018 and 2019 for abusive practices relating to Android mobile devices and its online search advertising intermediary service, AdSense (see also question 3.1). The Commission is also investigating the conduct of other major tech companies, including Amazon and Apple.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The Commission put in place a framework for assessing vertical agreements under the EU competition rules (see questions 2.3 and 2.5) and largely left enforcement to national competition authorities and courts. However, this changed following the e-commerce sector enquiry conducted by the Commission between 2015 and 2017. This led to a string of investigations, some of which resulted in decisions with substantial fines. As a result, the Commission has become increasingly active in investigating vertical restraints, particularly those concerning online sales.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The key criterion to determine whether there is an agreement within the meaning of Article 101 TFEU (Article 101) is the existence of a concurrence of wills between two or more independent economic entities (undertakings), which typically excludes intra-group agreements and certain agency agreements. A concurrence of wills typically supposes an invitation to adopt certain conduct by one party and an acquiescence by another party, both of which may be implicit. Article 101 also captures concerted practices, i.e. a form of coordinated conduct that falls short of an agreement, although this type of conduct is generally less relevant to vertical agreements. An agreement is of a vertical nature where (i) it is entered into between undertakings operating at different levels of the production or distribution chain, and (ii) it relates to the conditions under which either party may purchase, sell or resell certain goods or services.

2.3 What are the laws governing vertical agreements?

Under EU competition rules, vertical agreements are governed primarily by Article 101. In addition, the Commission has developed a framework for the assessment of the prohibition on anticompetitive vertical agreements, which includes, in particular, the Vertical Block Exemption Regulation (VBER) and the Commission's Guidelines on Vertical Restraints. There are also certain other specific block exemption regulations (and guidelines), namely those relating to motor vehicles and technology transfer agreements. However, this section focuses on the general rules set out in the VBER. Article 102 TFEU (Article 102), which may also apply to vertical agreements, is covered in section 3.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

Agreements that can be regarded as, by their very nature, harmful to competition are considered "by object" restrictions within the meaning of Article 101(1). The classification as a "by object" restriction means that it is unnecessary to demonstrate that these agreements produce anticompetitive effects. Examples of vertical restraints generally considered as "by object" restrictions include resale price maintenance and certain forms of market partitioning by territory and/or customer group. While "by object" restrictions are not, strictly speaking, prohibited *per se*, in practice the Commission considers that it is unlikely that such restrictions meet the conditions for an exemption under Article 101(3) (see questions 2.10 and 2.13).

2.5 What is the analytical framework for assessing vertical agreements?

The VBER creates a safe harbour for certain vertical agreements (see question 2.8). It is therefore important to first determine whether an agreement meets the conditions for exemption under the VBER. If so, it is generally unnecessary to undertake further analysis. If not, it is necessary to assess on a case-by-case basis (i) whether the agreement appreciably restricts competition within the meaning of Article 101(1) either by its object or its effects and (ii) if so, whether the agreement meets the conditions for an individual exemption under Article 101(3) (see questions 2.10 and 2.13). Additionally, Article 101 only applies to agreements that are capable of appreciably affecting trade between EU Member States, although this condition is applied broadly and generally is easily met.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Markets in vertical agreement cases are defined in the same manner as in other EU competition law cases, i.e. in light of competitive constraints such as demand substitutability and supply substitutability.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

In the event of an agreement involving undertakings which (i) are actual or potential competitors, and (ii) also operate at different levels of the value chain, it is generally necessary to distinguish between the horizontal and the vertical aspects of the agreement. Horizontal aspects are assessed under the (stricter) rules governing cartels and horizontal agreements, whereas vertical aspects are assessed under the rules governing vertical agreements; in particular, the Commission's Guidelines on Vertical Restraints. The VBER generally does not apply to vertical agreements between competitors, except as regards non-reciprocal agreements in certain situations of dual distribution.

2.8 What is the role of market share in reviewing a vertical agreement?

Market shares are particularly important in determining whether a vertical agreement falls within the scope of the VBER. Indeed, an agreement is exempted under the VBER where (i) the supplier's and the buyer's market share in the relevant markets each do not exceed 30%, and (ii) the agreement meets the other criteria of the VBER and, in particular, does not contain "hardcore" restrictions of competition, i.e. restrictions which are generally treated as "by object" restrictions. The inclusion of so-called "excluded restrictions" (e.g. non-compete obligations exceeding five years) disapplies the benefit of the VBER with regard to those restrictions. Below the 30% market share threshold, the VBER exempts the vertical agreement, which avoids the need for further analysis.

2.9 What is the role of economic analysis in assessing vertical agreements?

To ascertain whether a vertical agreement is exempted under the VBER, it is necessary to define the relevant markets and to conduct a market share assessment, which may involve economic analysis. Outside the scope of the VBER, unless the vertical restraint is classified as a "by object" restriction (which does not require an assessment of anticompetitive effects), economic analysis may be relevant to determine whether the agreement appreciably restricts competition (see question 2.12).

2.10 What is the role of efficiencies in analysing vertical agreements?

Where an agreement is considered to appreciably restrict competition within the meaning of Article 101(1), it may nevertheless be individually exempted under Article 101(3) if the undertaking establishes that four cumulative criteria are met: (i) there are efficiency gains (e.g. technical progress); (ii) a fair share of the benefit is reserved for consumers; (iii) the restriction is indispensable; and (iv) there is no possibility to eliminate competition. The threshold for such an individual exemption is thus high and, as noted (see question 2.4), if the agreement includes a "by object" restriction, the Commission considers it unlikely that the conditions for an exemption will be met.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Where vertical agreements contain provisions relating to the assignment to the buyer or use by the buyer of intellectual property rights and those provisions (i) do not constitute the primary object of such agreements, and (ii) are directly related to the use, sale or resale of goods or services by the buyer or its customers, the VBER applies in principle in the same way as to other types of agreements. Where those conditions are not met, vertical agreements fall outside the VBER, but may still fall within the scope of the Commission's Technology Transfer Block Exemption Regulation (TTBER). The TTBER covers technology transfer agreements, through which a licensor permits a licensee and/or its sub-contractor to exploit technology rights such as patents, know-how, or software, for the production of goods and services. Similar to the VBER, vertical agreements benefit from a safe harbour under the TTBER provided that they do not include certain hardcore restrictions of competition and that certain market share thresholds are not exceeded.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

No such demonstration is required for "by object" restrictions. In other cases, the Commission has to demonstrate that the vertical agreement has the effect of appreciably restricting competition, which typically involves a counterfactual assessment, i.e. a comparison of the actual or likely future situation in the relevant market with the vertical restraints in place, with the situation that would prevail in the absence of the vertical restraints in the agreement.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Efficiencies are typically taken into account within the framework of Article 101(3). While the Commission bears the burden of proof that the vertical agreement restricts competition within the meaning of Article 101(1), it is for the undertaking to establish that the conditions for an exemption under Article 101(3) are met (see question 2.10).

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

See questions 2.5 and 2.10 above.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes, the Commission's Guidelines on Vertical Restraints set out the framework for the assessment of vertical agreements. See also question 2.3.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance (RPM) is considered a hardcore restriction, which prevents the agreement from being exempted under the VBER. As such, it is presumed that the agreement is unlikely to meet the conditions of Article 101(3). Nevertheless, undertakings still have the theoretical possibility to rely on an efficiency defence under Article 101(3) in an individual case. The Commission's Guidelines on Vertical Restraints acknowledge that RPM may lead to efficiencies in certain specific cases; in particular, where it is supplier-driven, such as in the context of the introduction of a new product. However, the conditions for an exemption under Article 101(3) are very strictly applied.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements, i.e. single branding obligations which prevent or restrict the buyer's ability to purchase competing goods or services, are exempted under the VBER where both the supplier's and buyer's market share each do not exceed 30% in the relevant markets and the duration of the obligation does not exceed five years. Outside the VBER, exclusive dealing obligations are assessed on a case-by-case basis, particularly in light of their capability to result in anticompetitive foreclosure.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying is exempted under the VBER if the market share of the supplier, in both the market of the tied product and the market of the tying product, and the market share of the buyer, in the relevant upstream markets, each do not exceed 30%. Outside the VBER, tying is assessed on a case-by-case basis. The Commission considers, in particular, that tying may lead to anticompetitive foreclosure effects and/or may directly lead to supra-competitive prices. The market position of the supplier in the market of the tying product is of particular importance in the assessment of possible anticompetitive effects.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination is typically examined under Article 102. It is exempted under the VBER if both the supplier's and buyer's market share each do not exceed 30% (provided the other criteria for the application of the VBER are met).

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discounts are typically examined under Article 102. They are exempted under the VBER if both the supplier's and buyer's market share each do not exceed 30% (provided the other criteria for the application of the VBER are met).

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

See questions 2.18 and 2.20.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

There is no exhaustive list of vertical restraints that are prohibited by Article 101. However, the VBER provides useful guidance by listing a number of hardcore restrictions which give rise to the presumption that the agreement is anticompetitive. In summary, these hardcore restrictions are the following: (i) RPM; (ii) certain forms of market partitioning by territory and/or customer group; (iii) the restriction of active or passive sales to end-users by members of a selective distribution network; (iv) the restriction of cross-supplies between appointed distributors within a selective distribution network; and (v) agreements that prevent or restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. Outside the VBER, vertical restraints have to be assessed on a case-by-case basis.

2.23 How are MFNs treated under the law?

In the context of the e-commerce sector inquiry, the Commission considered that (i) most-favoured-nation clauses (MFNs) are exempted under the VBER if both the supplier's and buyer's market share each do not exceed 30%, and (ii) outside the VBER, an individual assessment of their anticompetitive effects is required. However, in recent years, enforcement action against MFNs in the EU has primarily taken place at the national level, with various national competition authorities having initiated investigations against MFNs in digital markets. National competition authorities and courts have taken partly diverging approaches. Moreover, some of the investigations or court cases are still pending. As a result, there remains some uncertainty as to the legal assessment of MFNs under Article 101.

2.24 Describe any notable case developments concerning vertical merger analysis.

While the Commission's concerns and interventions in merger cases have traditionally focused on horizontal issues, there are a number of recent cases in which the Commission has raised significant vertical concerns. For example, in 2018, the Commission conducted an in-depth investigation in relation to the *Apple/Shazam* merger although the parties primarily offered complementary services and did not compete with each other. Eventually, the Commission cleared the transaction unconditionally. In 2017, vertical concerns played a role in the Commission's prohibition decision involving two of the principal European stock exchanges (*Deutsche Börse/LSE*).

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The Commission has actively enforced high-profile abuse of dominance cases in recent years, as illustrated by several decisions leading to significant fines or commitments, as well as the opening of new formal investigations. Recent examples include the trio of Google infringement decisions (i.e. *Google Search (Shopping)* in 2017, *Google Android* in 2018 and *Google Search (AdSense)* in 2019) involving multi-billion euro fines, infringement decisions in the *Qualcomm (Exclusivity Payments)* (EUR 997 million fine, 2018) and *AB InBev Beer Trade Restrictions* (EUR 200 million fine, 2019) cases, as well as the commitment decision in the *Upstream gas supplies in Central and Eastern Europe* ("*Gazprom*") case (2018).

3.2 What are the laws governing dominant firms?

Under EU competition law, abuse of dominance is governed by Article 102. The Commission also issued a guidance document which sets out its enforcement priorities in applying Article 102; in particular, in respect of exclusionary conduct (Guidance on the Commission's enforcement priorities in applying Article 102).

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework is the same as in relation to vertical agreements (see question 2.6).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

A market share of 50% or more gives rise to a rebuttable presumption of dominance. Conversely, the Commission considers that dominance is not likely below a market share of 40%. However, the Commission's practice is to conduct an overall assessment of market power taking into account all relevant circumstances, and market shares serve in this context as a useful first indication (see also question 3.6).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Holding a dominant position does not in itself constitute an infringement of Article 102. However, dominant companies have a special responsibility not to abuse their market power by harming competition, either in the market where they are dominant or in separate related markets (see question 3.12).

3.6 What is the role of economic analysis in assessing market dominance?

The role of economic analysis in assessing dominance within the meaning of Article 102 is important, as the concept of dominance itself is an economic one. It has been defined by EU courts as a position of economic strength which confers on an undertaking the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of consumers. This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. The assessment of dominance takes into account the competitive structure of the market; in particular, the market position of the dominant undertaking and its competitors, constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors, and countervailing buyer power. Economic analysis may assist in the assessment of each of these factors.

3.7 What is the role of market share in assessing market dominance?

As noted (see question 3.4), market shares typically constitute the starting point of the Commission's assessment of market power and may form the basis of a presumption of dominance (above 50%) or instead be indicative of a lack of substantial market power (below 40%). However, the Commission will typically reach a conclusion only after having conducted an overall assessment.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The main defences include the following: (i) the undertaking does not hold a dominant position in the relevant market (see questions 3.4, 3.6 and 3.7); (ii) the alleged conduct is not abusive within the meaning of Article 102 (see question 3.12); and (iii) the conduct is objectively necessary or produces substantial efficiencies which outweigh any anticompetitive effects (see question 3.9).

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Undertakings may claim that their conduct is justified because it produces substantial efficiencies which outweigh any anticompetitive effects (although such defences are rarely successful). According to the Guidance on the Commission's enforcement priorities in applying Article 102, the dominant undertaking is generally expected to demonstrate that the following cumulative conditions are met: (i) the efficiencies have been, or are likely to be, achieved as a result of the conduct; (ii) the conduct is indispensable to achieve those efficiencies; (iii) the likely efficiencies generated by the conduct outweigh any likely negative effects; and (iv) the conduct does not eliminate effective competition.

3.10 Do the governing laws apply to "collective" dominance?

Yes, under Article 102, a group of undertakings may be considered collectively dominant where, from an economic point of view, they present themselves or act together in a particular market as a collective entity. However, such cases are very rare.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Article 102 is equally applicable to all dominant undertakings, irrespective of their position in the supply chain, which therefore includes dominant purchasers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 102 prohibits any abuse of a dominant position. Abusive conduct has been defined by the Court of Justice of the EU as conduct which, through recourse to methods different from those governing normal competition (i.e. conduct which is not competition on the merits), has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Specific conditions may apply to particular categories of abuse. Examples of conduct that may be abusive include predatory pricing, exclusivity obligations and loyalty rebates, tying and bundling, refusal to supply, the application of dissimilar conditions to equivalent transactions with other trading parties, and the imposition of unfair prices or other trading conditions. Certain types of conduct have been categorised by the case-law as abusive by their very nature, whereas others require a comprehensive analysis of actual or potential anticompetitive effects. However, this distinction has become less relevant in recent years, particularly under the influence of the 2017 *Intel* judgment, which has marked a shift towards an effects-based approach in the assessment of abusive conduct.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

While the exercise of an exclusive right linked to an intellectual property right by a dominant undertaking does not in itself constitute an infringement of Article 102, it may constitute an abuse in exceptional circumstances. For example, a refusal to license intellectual property rights may infringe Article 102 where the conditions for an anticompetitive refusal to supply are met, or in the specific context of standard essential patents (see also question 3.16).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The Commission typically assesses dominance within the meaning of Article 102 with regard to the structure and characteristics of the relevant markets (see question 3.6). Therefore, direct effects, i.e. inferences which are not drawn from market definition and market concentration, are generally less relevant. However, they may be taken into account if they contribute to establishing a position of economic strength.

3.15 How is "platform dominance" assessed in your jurisdiction?

Platform dominance is, in principle, assessed in light of the same test as for other businesses (see questions 3.4, 3.6 and 3.7). In the three recent Google decisions (see question 3.1), dominance was primarily established with regard to the classical criterion of market shares, although other criteria, including the existence of barriers to entry due to, for example, network effects, were also taken into account. Other investigations by the Commission into platforms are ongoing, including Amazon and Apple, and it is not yet clear whether/how dominance will be established. In a report on "Competition Policy for the digital era" published in April 2019, a panel of academic advisers to the Commission suggested that the assessment of market power should take into account, *inter alia*, (i) the intermediation power that platforms may have, and (ii) data which is not available to market entrants and provides a strong competitive advantage.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

A refusal to supply only constitutes an abuse within the meaning of Article 102 under strict conditions. While the precise terminology used in the case-law is not always consistent, the following cumulative conditions must typically be met: (i) the goods or services are indispensable for the supply of a product or service in a downstream market; (ii) the refusal is likely to eliminate all effective competition in the market; (iii) the refusal prevents the emergence of a new product (in cases relating to intellectual property rights); and (iv) there is no objective justification for the refusal.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The Commission started a review of the VBER (and guidelines) in October 2018 to determine whether the regulation needs to be updated, and carried out a public consultation in February and March 2019. The review is not expected to lead to substantial changes to the VBER, but there may be changes to the guidelines. The current VBER expires on 31 May 2022.

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The French Competition Authority (*l'Autorité de la concurrence* or "ADLC") is an independent administrative authority empowered to investigate and enforce French competition law, including the rules governing vertical agreements and abuse of dominance.

It is worth noting that the Minister for Economic Affairs has authority to impose injunction remedies and settlements for practices affecting local markets when the turnover generated in France by each undertaking concerned (during the last audited financial year) does not exceed 50 million euros and their combined turnover does not exceed 200 million euros. Under the authority of the Minister, the amount of the settlement shall not exceed 150,000 euros or 5% of the turnover of the undertakings if this figure is lower.

Commercial litigation in relation to the application of rules governing vertical agreements and abuse of dominance (namely Articles L. 420-1 to L. 420-5 of the Commercial Code ("CC")) is entrusted to eight French commercial courts (Marseille, Bordeaux, Lille, Fort de France, Lyon, Nancy, Paris, and Rennes). The Paris Court of Appeals ("PCA") has exclusive jurisdiction to adjudicate all the appeals from the decisions rendered by the aforementioned eight commercial courts.

1.2 What investigative powers do the responsible competition authorities have?

In France, two types of investigation (ordinary or judicial) may occur. Investigations may be conducted either by the ADLC itself or by the agents of the Directorate General for Competition, Consumer Affairs and the Prevention of Fraud ("DGCCRF").

During an ordinary investigation, officials of the ADLC or the DGCCRF may access any place used as professional offices or professional means of transport, and are empowered to request delivery and copies of professional documents, and to interview employees provided the latter have been informed of the purpose of the investigation.

During a judicial investigation (dawn raid), officials investigate under the control of the judge and usually in the presence of police officers. Under this procedure, officials shall be entitled to access private and business premises to conduct searches and seizure operations. They can obtain or take copies of any documents that may be useful for the purpose of the investigation (either hard or electronic copies), including electronic mailboxes, except if the documents are legally privileged (e.g. legal opinions from external lawyers). They are entitled to request statements from employees.

A European Directive (2019/1) enacted on December 11, 2018 increased the investigative powers of the ADLC. However, this Directive shall not be effective until it is transposed into national law. The deadline for transposition is February 4, 2021.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

During a preliminary phase (non-adversary proceedings), the ADLC studies the evidence available. If the preliminary investigation leads it to consider that the practices may be anti-competitive, the ADLC's head of investigation services (*Rapporteur Général* or "RG") shall issue a statement of objections ("SO"). From this issuance, the notified parties shall be entitled to study the ADLC's file (including all evidence available) and provide a statement of defence within two months.

Then, an investigative report shall be sent by the investigation services to the notified parties. The parties then have two additional months to reply to this report.

Finally, the parties are entitled to express their views and positions during a hearing before the ADLC ("the College").

The ADLC then issues a decision either:

- to dismiss the case (no grounds to follow the proceedings);
- to settle the proceedings with a moderated fine due to the settlement; or
- to impose fines on the parties, as well as injunctions, and/or to demand commitments to modify their behaviour or to comply with law. The ADLC may also order the publication (or an extract) of the decision.

Finally, in very few cases (hard-core conduct involving natural persons), the ADLC can refer the case to criminal courts.

It is to be noted that, after the preliminary phase, the ADLC may also decide not to open the adversary phase for different reasons:

- lack of legal interest;
- the case being time-barred; or
- lack of relevant evidence.

Interim measures may also be adopted at the beginning of the proceedings under specific conditions.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The ADLC is entitled to adopt interim measures to stop the practices or suspend an illicit action. Those measures must be strictly limited to what is necessary.

In addition, as mentioned in question 1.3, the ADLC:

- shall request the cessation of the anti-competitive practices and/or the modification, through injunctions or commitments, of the illicit behaviour, as well as compliance with competition law in future;
- shall impose a fine of up to 10% of the highest worldwide turnover achieved by the group of companies concerned in any financial year during the period the illicit practices took place;
- shall impose fines of up to 5% of the daily average turnover achieved by the party concerned, per day of delay in implementing an injunction or a commitment; and
- shall order the publication of the decision in a well-known newspaper and sometimes on the website of the parties concerned.

The ADLC is not entitled to award damages to the plaintiffs or the victims of the anticompetitive practices.

1.5 How are those remedies determined and/or calculated?

The criteria used to determine the financial penalties are set out by law and were specified by the ADLC in 2011. Thus, the fine must be proportionate to the seriousness of the violation and to the damage caused to the economy. The financial situation of the undertaking sanctioned shall also be taken into consideration, as well as the reiteration, if any, of an anticompetitive practice. Fines are determined and justified individually for each undertaking sanctioned.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Commitment proceedings are an efficient tool for the regulation of commercial practices and enforcement of competition law. The implementation of commitment proceedings assumes that no SO has been issued by the RG. The RG shall issue its preliminary assessment of the alleged practices to the undertakings concerned which, then, have to formalise and submit their commitments within a minimum period of one month. Then, the RG shall transfer the commitments to the plaintiff, if any, and to the public ministry and shall publish a summary of the case with the proposed commitments to allow third parties to provide their observations, if any. All the observations must be communicated to the RG within a minimum period of one month. Undertakings concerned shall also have the opportunity to present observations during an oral hearing. Then, the ADLC shall adopt a binding decision of acceptance.

The ADLC shall monitor the implementation of the commitments regularly during a specified period and reporting documents from the undertakings concerned must be provided on a regular basis.

Settlement proceedings may be enforced after the communication of an SO, providing the parties agree not to challenge the grounds on which the SO is based. The settlement shall fix the minimum and the maximum amount of the potential fines to be adopted by the College in its sentencing decision. The parties may also offer to modify their behaviours and to comply with competition law in the settlement.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No, they do not.

1.8 What is the appeals process?

The parties and the Minister of Economic Affairs may appeal the decision of the ADLC before the PCA, within one month after the notification of the decision to the parties.

After the notification of the judgment of the PCA, the judgment may be referred before the *Cour de Cassation* (Higher Civil Court) within one month.

Interim measures may also be challenged before the First President of the PCA within 10 days following the notification of the interim measures. The PCA may suspend interim measures until the appeal is adjudicated on the merits when it finds that the interim measures are likely to have clearly excessive consequences should the ADLC decision be subsequently completely or partially reversed.

Decisions to appeal are not suspensive. However, upon specific request, the president of the PCA may suspend the implementation of a decision if it is likely that the decision of the ADLC will have manifestly excessive consequences or where new facts of excessive gravity are raised.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

As mentioned in question 1.1, paragraph 3, any entity demonstrating a legal interest has the possibility to bring a case before the commercial court to obtain the ending of the illicit practices, the payment of civil damages and eventually the nullity of an agreement in relation to anticompetitive practices. Appeals of those judgments are also dealt with by the PCA.

Public entities (the State and territorial authorities) may also bring a case before the administrative court if they have the standing to do so. Most of these cases are brought against companies involved in bid-rigging.

A class action regime is also available under French law. It allows certain authorised consumers' associations to launch collective actions before civil and commercial courts for damages suffered by individuals as a result of the application of an anticompetitive practice.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Under Article L. 464-6-1 of the CC, the ADLC shall decide not to pursue the procedure concerning anticompetitive practices when the combined market share of the undertakings concerned does not exceed:

- 10%, when the parties to the agreement are actual or potential competitors in the concerned market; or
- 15%, when the parties to the agreement are not actual or potential competitors in the concerned market.

The "*de minimis*" exemption shall not apply to hard-core restrictions such as price-fixing, limitation of production or sales, etc.

Regarding vertical agreements, European Regulation No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the

Functioning of the European Union to categories of vertical agreements and concerted practices (the "EU vertical block exemption"), which sets forth a safe harbour for vertical agreements, providing that the supplier and the buyer have a market share below 30%, shall also be used as guidance. Hard-core restrictions are not covered by the exemption.

Leniency programmes are available to companies that have infringed Article L. 420-1 of the CC, which prohibits anticompetitive practices. However, this procedure applies mainly to cartels between competitors involving hard-core restrictions such as price-fixing, market sharing, and bid-rigging.

1.11 Does enforcement vary between industries or businesses?

The ADLC does mention variation of enforcement between industries or businesses. In 2018 and early 2019, the sectors involved in a decision, commitments or ongoing proceedings are varied (agriculture, publicity, the healthcare industry, wine and spirits, taxis, luxury watch retail, household appliance manufacture, etc.).

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The ADLC shall duly take into consideration regulatory constraints when assessing practices. In any event, in France, regulatory rules do not prevent the application of competition law.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The ADLC is an independent administrative authority and its actions should not be influenced by the political environment or changes in government.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Potentially all sectors and industries are under the scrutiny of the ADLC. However, in a press release dated January 11, 2019, the ADLC announced that it would particularly focus on the following sectors: digital economy; health; food retail; energy; regulated professions; as well as all anticompetitive practices occurring in French overseas departments.

1.15 Describe any notable case law developments in the past year.

Regarding abuses of dominant positions, the company Amadeus brought a complaint before the ADLC against Google. In its decision 19-MC-01 of January 31, 2019, the ADLC considered that Google (i) held a dominant position on the French market for search-related online advertising, and (ii) abused its dominant position by discriminatorily suspending some of Amadeus's accounts with Google AdWords (now Google Ads) and by refusing most of its ads since January 2018. As a result, the ADLC imposed interim measures on Google. Interestingly, the ADLC defined the market of search-related online advertising, holding that it differs significantly from other forms of online adverting. Also, the ADLC stated that the substantial investments and time required to develop a competing platform constitute barriers to entry into this market.

Regarding vertical agreements, the ADLC fined the company Stihl France SAS for prohibiting the sale of certain products such as chainsaws, brushcutters, pole-saws or electric pruners on its distributors' websites. The ADLC found that requiring hand-delivery of this type of product by the distributor to the buyer removed any interest in online retail and was therefore anticompetitive. The ADLC also prescribed interim measures which Stihl France SAS appealed before the PCA. While an appeal decision on the merits is still awaited, the PCA decided to suspend the interim measures, as it found that implementing these measures would mean that Stihl would need to change its whole distribution network and incur substantial expenses.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Vertical agreements shall be actively scrutinised by the ADLC and competent jurisdictions. The ADLC has a strong knowledge of the distribution and retail sectors in France and shall monitor them regularly.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

In this respect, the ADLC shall follow the European Commission's practice and shall examine if the undertakings concerned have mutually exchanged their consent, whether in oral or written form, tacitly or expressly.

Then, the ADLC identifies whether the parties to an agreement are active at different stages of the production chain of a product or a service (by opposition to a competitor which competes at the same level of the chain) to classify the agreement as vertical.

2.3 What are the laws governing vertical agreements?

The law governing vertical agreements is covered by Article L. 420-1 of the Commercial Code, which prohibits express or implied agreements and concerted practices and coalitions which – as their object or effect – prevent, restrict or distort competition. Articles 101 and 101-3 of the Treaty on the Functioning of the EU ("TFEU") are also enforceable when the vertical agreements restrict competition within the common market or a substantial part of it and affect trade between the EU Member States.

Article L. 420-4 of the CC provides for specific conditions where a vertical agreement considered as anticompetitive under Article L. 420-1 may benefit from an exemption pursuant to Article L. 420-4 (see question 2.5). Specific regulations may exempt certain types of agreements. In addition, an anticompetitive agreement can be exempted if the undertakings concerned are able to demonstrate that the agreement (i) enables economic progress, (ii) ensures that the profitability is fairly passed on to the end-user, and (iii) does not eliminate the competition for a substantial part of the products/services concerned. Finally, restrictions on competition must be limited to what is strictly indispensable to implement the agreement in the context of economic progress.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

See question 1.10.

2.5 What is the analytical framework for assessing vertical agreements?

As a rule of thumb, the ADLC follows the common practice of the European Commission for assessing vertical restraints.

After having defined the market(s) concerned, the ADLC uses – as guidance – the EU vertical block exemption to assess a vertical agreement. The ADLC examines whether each of the parties' respective market share(s) on the relevant market(s) exceeds 30% and whether the vertical agreement includes a hard-core restriction listed under the EU vertical block exemption. Providing the parties' markets shares do not exceed 30% and the agreement does not contain hard-core restrictions (except in very specific situations, such as penetration of a new market (new entrant)), the agreement will be exempted. By contrast, if market shares are over 30%, the ADLC shall assess whether the vertical agreement has an anticompetitive object or effect.

However, an agreement considered anticompetitive may benefit from an exemption (see question 2.3).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The ADLC uses the analytical framework of the European Commission. The product market and the geographical market must be identified, in order to define the relevant market.

The relevant product market is defined as any goods or service regarded by consumers as interchangeable, by reasons of characteristics, prices or intended uses. The geographical market is defined as the area in which the companies are involved in the supply or demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from the neighbouring geographical area.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Following EU law, dual distribution is treated as a vertical agreement when: (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; and (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

2.8 What is the role of market share in reviewing a vertical agreement?

Under French law, the calculation of market share is crucial and indispensable when assessing a vertical agreement and determining whether it shall fall under the EU vertical block exemption regime. It also provides for the market power of the undertaking concerned, which is a key element in assessing an anticompetitive practice.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis may be used by the ADLC, notably to compare the effects of the vertical agreement with a scenario which would have arisen if the agreement had not been concluded. The undertaking concerned may also use economic studies to demonstrate the efficiencies of the vertical agreement or the absence of damage to the economy.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies are notably used to demonstrate that although a vertical agreement restrains competition, it can benefit from an individual exemption.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

No, there are not.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The ADLC does not have to demonstrate anticompetitive effects of a restriction which is considered as having an anticompetitive object (for example, retail price maintenance). Otherwise, the anticompetitive effects must be demonstrated.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

As mentioned in question 2.3, the ADLC will determine if the four conditions, including efficiencies, are met in order to determine the application of an individual exemption.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

See questions 2.3, 2.5 and 2.10.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The ADLC relies on the formal guidelines issued by the European Commission for the implementation of the EU vertical block exemption.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is considered an anticompetitive restriction by object and, as such, is seen as a hard-core restriction preventing the application of the EU vertical block exemption and Article L. 464-6-1 of the CC.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing clauses in vertical agreements are not forbidden *per se* (except for French overseas territories where those practices are regulated). The ADLC and courts shall examine if those clauses have an anticompetitive effect, following several criteria: the market power of the parties; the nature and proportion of products involved in the agreement; the duration of the exclusivity; the presence or not of other similar contracts; the existence of justifications and the economic counterpart obtained by the party bound by the exclusivity, etc. If a sale, transfer or lease agreement contains an exclusivity supply provision, the contract term shall be limited to 10 years, pursuant to Article L. 330-1 of the CC.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying obligations are only examined under the potential abuse of a dominant position, except in case of evidenced unfair trading practices.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims are mainly examined under the law regarding potential abuse of a dominant position.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discount claims are mainly examined under the prohibition of the abuse of a dominant position.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount claims are mainly examined under the prohibition of the abuse of a dominant position.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

The ADLC closely scrutinises all vertical restraints which have as their object or effect the possibility of monitoring the consumer prices, the various channels of distribution (resale) (including Internet) of the distributor, the sharing of customers, etc.

2.23 How are MFNs treated under the law?

Under Article L. 442-6 II d) of the CC, clauses or contracts allowing a party to benefit automatically from more advantageous terms granted to competing undertakings by the co-contracting party are null and void. Thus, most-favoured-nation ("MFN") clauses are prohibited under French law.

2.24 Describe any notable case developments concerning vertical merger analysis.

On May 25, 2018, TF1 (a French television channel) notified the ADLC of its acquisition of sole control of Newen (a company which produces programmes broadcast on television). The ADLC dismissed the risk of vertical effects. The ADLC held that any effect on the market for broadcast stock (fiction, documentaries, etc.), including fiction programmes in original French language and "flow" programmes (entertainment), was unlikely since the new entity will hold a limited position in these markets and TF1 will represent less than 30% of the total market purchase. This decision is in line with the established practice of the ADLC under which a vertical merger is not likely to produce vertical effects when the undertaking resulting from the merger does not hold more than 30% of the market shares on the concerned markets.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Abuse of dominant position is actively scrutinised by the ADLC and courts.

3.2 What are the laws governing dominant firms?

Article L. 420-2 of the CC prohibits the abuse of dominant position by an undertaking or group of undertakings when it has as its object of effect the prevention, restriction or distortion of competition. In the first paragraph, it provides a non-exhaustive list of examples, such as: refusal to sell; tying practices; discriminatory terms of sale; or the termination of established commercial relationships for the sole reason that the partner refuses to accept unjustified commercial terms.

Article L. 420-4 of the CC provides for individual exemptions, providing the undertaking concerned demonstrates the economic efficiency of the practice and the fair sharing of the benefits of the practice with the consumers.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The ADLC uses the analytical framework used by the European Commission and provided by EU law. See question 2.6.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Under French law, there is no market share threshold above which enforcers or a court have to consider a firm as dominant or a monopolist. However, the ADLC considers that market share gives a first substantial indication and a very large share – more than 50% – usually evidences dominance.

The ADLC may characterise dominance when market share is over 40%, depending on the nature of the market, the market shares of the other competitors, the constraints exerted by other competitors, the type of customers involved (countervailing purchasing power), and the maturity of the market.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being "dominant" is not illegal *per se* and does not have any consequences as long as the undertaking does not abuse its dominant position. However, certain practices must be monitored as soon as the undertaking has a significant market share, such as refusal to sell, tying practices, etc.; not only are effective effects scrutinised, but also potential effects.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is a useful and efficient tool to assess market dominance and notably to define the relevant product and geographical markets, to determine the methodology of calculation of market share, and to define the degree of actual competition, the potential competitors and the potential or actual countervailing buying power of the customers.

3.7 What is the role of market share in assessing market dominance?

Market share plays a key role in assessing market dominance, as discussed in question 3.4.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Article L. 420-4 of the CC provides for exemptions to the prohibition of abuse of dominant position, such as:

- practices resulting from the application of statute or regulation; and
- practices meeting the following cumulative criteria: i) the practices lead to economic progress including by creating or maintaining jobs; ii) they reserve a fair share of the resulting profit for end-users; iii) they do not eliminate competition for a substantial part of the products in question; and iv) they do not include restrictions which go beyond what is indispensable to achieve the economic progress targeted.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

See question 3.8.

3.10 Do the governing laws apply to "collective" dominance?

The law also applies to "collective" dominance under Article L. 420-2 of the CC. The ADLC examines three cumulative criteria provided by EU case law (e.g. TPICE, T-342/99, *Airtours v Commission*; Cons. Conc. decision n°06-D-02), i.e.: i) transparency of the market, meaning that each member of the group concerned must have the possibility to know the behaviour of the other members in order to determine whether they are following the same course of action; ii) the possibility of tacit and sustainable coordination; and iii) the absence of foreseeable contestability from competitors and customers to the expected results of the common policy.

The undertakings must be able to adopt a common policy on the market and to hinder the maintenance of effective competition on the relevant market by allowing them to act, to a considerable extent, independently from their competitors, their customers, and from consumers (CJCE, 16 March 2000, C-395/96 P, *Compagnie Maritime Belge Transports SA v Commission*). Collective dominance does not necessarily involve an absence of competition between parties (TPICE, 30 September 2003, T-191/98, *Atlantic Container Line v Commission*).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

French law applies similarly to both dominant purchasers and dominant suppliers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Potentially abusive conduct, which falls under the scope of Article L. 420-2 of the CC, includes, among others: rebate schemes; pricing discrimination; exclusive dealings; margin squeezes; disparagement; predatory pricing; tying and bundling practices; and use on a competitive market of advantages derived from a legal monopoly.

Furthermore, as per Article 102 TFEU, the following may constitute abusive conduct: "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*"; "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*"; "*limiting production, markets or technical development to the prejudice of consumers*"; and "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Intellectual property ("IP") can play a role in analysing dominant firm behaviours. The use of IP rights from an undertaking can be abusive when this one has a dominant position. For instance, the refusal to treat or to grant a licence can be considered abusive, in particular if the IP right is classified as an essential facility. Nevertheless, the possession of a patent or any other intellectual property rights does not necessarily give the firm a dominant position.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

"Direct effects" evidence is not really relevant under French law.

3.15 How is "platform dominance" assessed in your jurisdiction?

To date, no specific case law may be used to support the way platform dominance is analysed. However, it is certain that the multi-side markets in which an actor can play over the customers via a dominant platform may have an impact on the market power of the undertaking concerned. The judgment of the *Cour de Cassation* dated December 6, 2017, confirming the decision of the PCA dated May 12, 2016, illustrates the complexity of determining the platform's relevant market and thus platform dominance. The event-driven online sales market could not be identified since the actors are direct competitors with other suppliers, offline and online, who organise or also make flash sales. Therefore, the dominant position of "vente-privée.com" could not be evidenced.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to deal are not prohibited *per se*. Nevertheless, in certain circumstances, they may be considered anticompetitive when the undertaking concerned is in a dominant position. Concerning refusal to sell, three cumulative criteria have to be gathered in order to determine whether the refusal to access or to supply the product is abusive or not: i) the essential character of the product of which access is refused; ii) the effect on the competition; and iii) the innovative nature of the product (Aut. Conc. n° 12-D-01, January 10, 2012). Also, in a more recent decision (Aut. Conc. n° 17-D-24, December 10, 2017), the ADLC held that the burden is on the claimant to bring evidence that a request to deal was made or at least that the claimant tried to initiate discussions.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

In vertical franchise agreements, the franchisor has to provide its prospective franchisee with a pre-contractual information document at least 20 days before the signing of the contract, or before any payment related to it. The document shall disclose extensive information about the franchisor and the franchise organisation and is intended to give to the potential franchisee enough information for its decision-making process.

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HLG Avocats is a French independent law firm specialised in competition, distribution, consumer law and contract law, and advises clients throughout the development of their contractual relationships with suppliers or distributors.

HLG Avocats has extensive experience of the French and international legal environments, and is able to work with small businesses and larger companies, in terms of B2B and B2C relationships. In particular, the firm advises and assists clients in the drawing up and negotiation of business contracts (franchise agreements, commercial agency agreements, pre-contractual information documents, general conditions of sale, etc.). The firm also has extensive experience in French and European competition law, such as anti-competitive practices, merger filings, or unfair competition law.

HLG Avocats has developed specific skills in the health, retail distribution, food processing, sports and electronics industries.

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

In Germany, the Federal Cartel Office (*Bundeskartellamt* – "**FCO**") located in Bonn is the primary authority tasked with the enforcement of the rules concerning vertical agreements and dominant firms. The FCO consists of 12 independent decision divisions, of which nine are organised according to certain economic sectors (e.g., health care, financial services, media, telecommunications, etc.); three divisions exclusively deal with the cross-sector investigation of cartels. In 2017, the FCO added a decision division which has the exclusive competence for consumer protection.

Apart from the FCO, each of the 16 German Federal states has a state competition authority (*Landeskartellbehörde*). In practice, the role of these state authorities is limited as they only handle cases that affect merely the local or regional market within the respective Federal state. Against this backdrop, the following statements will, as far as powers and practice of governmental authorities are concerned, mainly refer to the FCO. Nevertheless, all statements also apply *mutatis mutandis* to the competition authorities of the Federal states, since the same legal basis applies.

1.2 What investigative powers do the responsible competition authorities have?

The competent competition authority – predominantly the FCO – has a variety of investigative powers at its disposal. In order to collect information and relevant evidence in particular, the FCO may informally request parties to voluntarily disclose information or, alternatively, send formal information requests. Further, subject to a prior court order, it may search premises of undertakings and individuals, seize documents (both hard and electronic copies), interrogate persons concerned, and hear witnesses and experts.

Further, the FCO may also conduct so-called sector inquiries if rigid prices or specific circumstances suggest that competition in Germany may be distorted. Such a sector inquiry may lead to the opening of individual procedures against undertakings, as described in the response to question 1.3 below. In recent years, the FCO has carried out sector inquiries in industries as diverse as food retail, domestic retail sale of petrol and diesel through gas stations, district heating, milk production and distribution, sub-metering of heating and water usage, cement and ready-mixed concrete, as well as online advertising. Since its inception, the new decision division for consumer protection has opened two sector inquiries. The first concerned online comparison portals and was concluded in April 2019. This investigation included an in-depth assessment of the 36 most relevant comparison websites from the travel, energy, insurance, telecommunications and finance sectors. The FCO reviewed, in particular, co-operation between the various websites, their market coverage, the forming of rankings, other factors influencing consumer choice, and the handling of user ratings. The second inquiry concerns the collection, use, and marketing of personal data by manufacturers of Smart TVs. In May 2019, the FCO launched a sector inquiry into operators of internet platforms which publish user reviews and/or offer user review services.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The FCO may open an investigation on its own initiative (e.g., as an outcome of a sector inquiry or merger control proceedings) or following a complaint by an affected third party, an anonymous tip-off or a leniency application by a participant in an antitrust infringement. Generally, the FCO may conduct an investigation in the form of an administrative procedure (*Verwaltungsverfahren*) as provided for by the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – "**ARC**") or, alternatively, as an administrative offence procedure which is additionally governed by the Act on Administrative Offences (*Ordnungswidrigkeitengesetz*) and the Code on Criminal Procedure (*Strafprozessordnung*).

The FCO usually opts for an administrative procedure if novel legal questions arise in connection with the suspected antitrust infringement, e.g. in the case of new business models, and if the main goal is to bring the suspected antitrust infringement to an end, thus setting a new precedent. Meanwhile, an administrative offence procedure would be chosen to investigate cases involving serious antitrust infringements, as in the case of cartels (restrictive agreements and concerted practices between competitors) or abusive market conduct on a large scale, for example. Further criteria applied in choosing the appropriate procedure are, *inter alia*, the structure of the affected market(s), gravity of the infringement, products concerned and the extent of the damage (potentially) caused by the infringement. Since the administrative offence procedure requires a higher standard of proof, the evidence that might potentially be used by the FCO may also serve as a deciding factor.

In all cases, the FCO will start its investigation by gathering relevant information and potential evidence, using its investigative powers described in the response to question 1.2 above. If the assessment of all information gathered, including information provided by third parties on their own accord or in the course of market tests, confirms the existence of an antitrust violation, the FCO will issue a statement of objections to the parties under investigation detailing its factual and legal findings. The parties concerned then have the opportunity (but no legal obligation) to respond to the statement of objections, refute legal findings and submit counterevidence. The parties under investigation may at all times, both before and after statements of objections have been issued, offer commitments to the FCO in order to address the potential competition concerns.

The last step is the adoption of a formal decision by the FCO.

At every step of both the administrative and the administrative offence procedure, the FCO may at its discretion discontinue its investigation, e.g., for lack of evidence, due to an intermediary change in statutory or case law or simply from a resources point of view. The same applies for initiating or refraining from initiating proceedings.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

Within the framework of an administrative procedure, the FCO may impose all remedies that are necessary and appropriate to effectively end an antitrust infringement (Sec. 32 *et seq.* ARC). This includes the issue of cease-and-desist orders, the imposition of structural remedies or, in exceptional cases, of behavioural remedies. In case of urgency, particularly if the suspected infringement threatens to cause serious and irreparable damage to competition, the FCO may also order interim measures *ex officio*. Such interim measures shall be effective only for a limited period of time which should not exceed more than one year (*cf.* Sec. 32a(2) ARC). Further, the FCO may also order the disgorgement of profits that have been gained as a result of the antitrust infringement (Sec. 34(1) ARC).

Furthermore, the FCO may fine undertakings as well as individuals for antitrust infringements (Sec. 81 ARC). Individuals that may be fined encompass all authorised representatives of an undertaking, e.g. executives and management, proxy holders, and general agents, who were actively involved in the infringement. Further, it has to be noted that authorised representatives of an undertaking as well as its owner may also be fined if they lack any personal knowledge of and involvement in the infringement. In the case of the latter, the sanction would be based on their apparent failure to undertake all measures necessary to prevent an antitrust infringement, e.g. providing proper guidance to employees, and ensuring appropriate training and supervision.

1.5 How are those remedies determined and/or calculated?

With regard to injunctive, structural or behavioural remedies, the FCO has wide discretion in determining the appropriate measures to bring the infringement to an end and to restore effective competition.

The maximum amount of administrative fines differs between individuals and undertakings. While individuals may be sanctioned with a fine of up to EUR 1 million, the administrative fine for undertakings may be up to 10% of the undertaking's worldwide turnover. With regard to the latter, the term "undertaking" encompasses all companies operating as a single economic entity.

In June 2013, the FCO issued a detailed guideline setting out its calculation method and the aspects to be taken into account for determining the final amount of the administrative fine. The calculation consists of four steps.

First, the FCO determines the statutory framework of the fine. The lower limit is a minimum fine of EUR 5.00, and the upper limit is an amount equivalent to 10% of worldwide group turnover. In the case of negligence, this upper limit is reduced to 5% of worldwide group turnover.

Second, the FCO then determines the case-specific framework of the fine, the so-called fining range. For this purpose, the potential of the antitrust infringement to provide the cartel participant with a profit and – inversely – to cause damage for third parties (profit and damage potential) is multiplied by the undertaking's sensitivity to punishment. This profit and damage potential is considered to equal 10% of the undertaking's turnover related to the offence and generated over the duration of the antitrust infringement. The FCO may estimate this infringement-related turnover if a precise calculation is not possible. In order to take account of the undertaking's sensitivity to punishment, the amount of the profit and damage potential is multiplied by a factor of between two and six or higher, depending on the size of the respective undertaking (a factor of two for undertakings with worldwide group turnover of less than EUR 100 million, and a factor of six for undertakings with worldwide group turnover of more than EUR 100 billion).

In a third step, the calculated fining range is compared with the statutory upper limit for administrative fines. If the fining range exceeds the statutory upper limit of 10% of worldwide group turnover, the latter prevails as the case-specific maximum fine. Otherwise, the upper limit will be set by the calculated maximum amount of the fining range.

As the fourth and last step, the FCO determines the actual amount of the fine by considering various infringement, as well as offender-related, criteria. The former encompasses, *inter alia*, the type and duration of the infringement, the geographical scope of the markets affected, the significance of the undertakings involved in the infringement on the affected market, the overall economic significance of the products affected and the degree of organisation among the parties involved in the infringement. Offender-related criteria are, for example, the role of the relevant undertaking in the infringement and the degree of culpability (intent/negligence). It is also taken into consideration whether the undertaking is a repeat offender. Further, the FCO will consider the undertaking's conduct subsequent to the infringement, e.g. its level of cooperation in the course of the investigation. Lastly, the FCO may grant a fine reduction of up to 10% if the proceedings can be concluded by way of a settlement.

Administrative fines may be waived in full or in part if an undertaking applies for leniency. Only the first applicant providing the FCO with sufficient information for uncovering the antitrust infringement may be granted full immunity from a fine, unless he qualifies as "ringleader" or coerced other undertakings to participate in the infringement. Further applicants may qualify for partial immunity of up to 50% of the fine amount if they provide decisive evidence for establishing an infringement.

It has to be noted, however, that the FCO established its leniency programme as an incentive for uncovering cartels, i.e. restrictive (horizontal) agreements and concerted practices between competitors. Consequently, the leniency programme is not directly applicable in cases of antitrust infringements caused by vertical agreements and, respectively, by abusing a market-dominant position.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Apart from the settlement procedure (as outlined in the above response to question 1.5), which generally expedites and shortens complex and resource-intensive proceedings and reduces the fine imposed by the FCO, different ways of voluntarily reaching a resolution exist in vertical cases as well as in dominance cases.

In administrative proceedings, undertakings may offer commitments to the FCO in order to conclude proceedings and avoid a full infringement decision. Usually, such commitments are offered after the affected undertaking has been informed by the FCO about its preliminary findings. If the offered commitments are found appropriate for rectifying the competition concerns, the FCO will issue a decision declaring the commitments binding upon the undertaking (Sec. 32b ARC). Depending on the specifics of the case, the FCO may also consult with market participants in order to test the appropriateness of the commitments offered.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No, the FCO may adopt all of its decisions, including but not limited to commitment decisions and decisions imposing administrative fines, without the need to obtain approval by a legal tribunal or in other judicial proceedings. Because of their quasi-criminal nature, administrative fine decisions have to abide by the legal standard applicable to criminal proceedings in general, i.e., the FCO must fully prove the existence of an antitrust infringement as well as culpability of the participating undertakings and individuals, respectively. In the case of decisions taken within the framework of administrative proceedings, the legal standard is lower insofar as individual culpability does not need to be shown and proven by the FCO.

1.8 What is the appeals process?

Decisions of the FCO are subject to judicial review by the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf; decisions of the Federal states' competition authorities may be appealed with the Higher Regional Court in whose district the authority resides. The appeals court may review a decision both on points of facts and law. Appeals shall be addressed to the respective authority and be brought within two weeks in administrative offence proceedings and, respectively, in administrative proceedings within one month after the decision has been received by the addressee.

As part of its decision on the appeal, the Higher Regional Court may grant and, respectively, deny leave to appeal to the Federal Court of Justice (*Bundesgerichtshof*). In the case of the latter, the affected party may appeal to the Federal Court of Justice against this denial of leave to appeal.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Germany has a long tradition of private enforcement of antitrust laws. Until mid-2017, the legal basis for private enforcement was formed by Sec. 33 ARC. However, the German legislature in the meantime adopted the so-called 9th Amendment Package to the ARC which, *inter alia*, served to transpose the European Antitrust Damages Directive 2014/104/EU into national law. The 9th Amendment Package entered into force on 9 June 2017 and has been the applicable law since then.

In the case of an antitrust infringement, e.g., a violation of Art. 101, 102 TFEU or the respective national provisions in the ARC, and, respectively, breach of a binding order by the FCO, anyone affected may claim for termination of the anti-competitive conduct, removal of its effects, and damages (Sec. 33(1), 33a(1) ARC). In the case of vertical agreements, claims are usually aimed at declaring clauses or the whole agreement as invalid, while claims for damages arising out of the alleged antitrust violation only have secondary importance. In dominance cases, the potential claims may range from seeking access to a certain service or product, e.g. in refusal-of-access and refusal-of-supply cases, invalidation of contractual clauses, to claims for damages including lost profits.

As mentioned above, the 9th Amendment Package of the ARC transposed the European Antitrust Damages Directive into German law. Only some provisions of this Directive have brought about significant changes to German law. These include, in particular, the provisions concerning access to the competition authority's files as well as documents held by the opposite party, an extension of the applicable limitation periods, limitation of the first leniency applicant's liability for damages, and certain details concerning the joint and several liability of the offending undertakings.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The provisions of the ARC concerning the prohibition of restrictive agreements and concerted practices, the prohibition on abuse of a market-dominant position, and the related procedural and sanctioning provisions must not be applied to the *Deutsche Bundesbank* and the *Kreditanstalt für Wiederaufbau* (Sec. 185(1)(3) ARC). Further, charges and dues under public law may not be scrutinised under the high standards of the prohibition on abuse of a market-dominant position (Sec. 185(1)(2) ARC).

An important exemption concerns the energy sector, namely electricity and gas networks. With respect to their operation, the establishment of network connections, and the grant of access to such networks, the provisions of the German Energy Sector Act (*Energiewirtschaftsgesetz*) and associated governmental decrees fully suppress the German prohibition on abusing a market-dominant position (Sec. 19, 20, and 29 ARC). Instead, the special provisions of Sec. 111 *et seq*. of the German Energy Sector Act are applied by the Federal Network Agency ("**FNetA**"). Still, the FCO retains its jurisdiction with respect to any other business activities of undertakings in the energy sector and, in particular, with respect to investigating and sanctioning restrictive agreements and concerted practices between competitors, as well as in relation to suppliers or customers.

Further, limited exemptions from the prohibition on restrictive agreements and concerted practices apply in the agricultural sector (Sec. 28 ARC). In relation to the distribution of newspapers and magazines, Sec. 30 ARC provides a statutory basis for Germany-wide fixed prices for such products. Furthermore, Sec. 31 ARC provides for a special set of rules – both with respect to restrictive agreements and concerted practices as well as the abuse of a market-dominant position – applicable only for the public supply of water.

Apart from the above sector-specific immunities and exemptions, the following general exemptions and safe harbours are provided for by European and German law, as well as associated case law:

The most relevant exemptions and safe harbours applicable to vertical agreements are provided for by European law; more precisely, the so-called block exemption regulations, which Sec. 2(2) ARC orders to be applied *mutatis mutandis* in cases that do not affect trade between Member States of the European Union.

In general, vertical agreements may profit from the safe harbour offered by Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("**VBER**"). The VBER applies to all vertical agreements regardless of industry or service sector. Provided that the supplier in the vertical relationship does not have a market share in excess of 30% and the purchaser's share of demand in the market for the respective goods and services does not exceed 30%, the vertical agreement is deemed to be exempted from the prohibition in Art. 101(1) TFEU. This block exemption does not apply to vertical agreements that contain the following so-called "hard core" restrictions as provided for in Art. 4 VBER:

- the restriction of the purchaser's ability to determine its sales price (except for the imposition of a maximum sales price and, respectively, the mere recommendation of sales prices which do not amount to fixed or minimum prices due to the exertion of pressure or the offering of incentives by the supplier);
- the restriction of the territory into which, or of the customers to whom, the purchaser may sell the goods or services procured from the supplier;
- the restriction of active or passive sales to end users by members of a selective distribution system operating on the retail level and the restriction of cross-supplies between distributors within a selective distribution system; and
- the restriction agreed between a supplier of components and a purchaser who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users, to repairers or to other service providers not entrusted by the purchaser with the repair or servicing of its goods.

It has to be noted that the VBER provides certain counter-exemptions to the aforementioned restrictions:

- the supplier is allowed to impose a maximum sales price and, respectively, merely recommend sales prices, if and to the extent these do not amount to fixed or minimum prices due to the exertion of pressure or the offering of incentives by the supplier;
- the supplier may reserve a territory or a customer group exclusively for himself or a third purchaser and prohibit the purchaser from making active sales into such territory or to such customer groups;
- a buyer operating on the wholesale level of trade may be prohibited from making direct sales to end customers;
- members of a selective distribution system may be prohibited from active and passive sales into a territory which the supplier has reserved for himself; and
- the purchaser may be prohibited from selling components that have been procured from the supplier for incorporation to customers who would use them for manufacturing similar goods as those produced by the supplier.

If the vertical agreement contains any of the above "hard core" restrictions, the agreement does not qualify for a block exemption from the prohibition on restrictive agreements. In this case, an individual exemption pursuant to Art. 101(3) TFEU would theoretically be possible. For this purpose, the parties to the vertical agreement would have to prove that the restriction:

- contributes to the improvement of production or distribution of goods or the promotion of technical or economic progress (efficiencies);
- allows consumers a fair share of the resulting benefit;
- does not impose restrictions upon the undertakings concerned which are not indispensable to the attainment of these objectives; and
- does not make it possible for the undertakings concerned to eliminate competition in respect of a substantial part of the products in question.

However, both the European Commission and the FCO generally consider that "hard core" restrictions fulfil the above conditions only under very exceptional circumstances, i.e., practically never.

Another general exemption from the prohibition on restrictive agreements and concerted practices results from the requirement that vertical restraints shall have an appreciable effect. The FCO detailed its understanding of this criterion in special guidelines published in March 2007 (*De Minimis* Notice). According to this, the FCO will not investigate vertical restraints if the market share of each party to the agreement does not exceed 15% on any affected market; while in relation to "hard core" restrictions the relevant threshold is 10%. Regardless of the parties' market share, the *De Minimis* exemption does not apply to the most serious forms of "hard core" restrictions, i.e. the fixing of resale prices and other trading conditions, the limitation or control of production, markets, technical development, or investment, and the allocation of markets or sources of supply.

1.11 Does enforcement vary between industries or businesses?

Generally, the FCO does not discriminate between industries or businesses. Although the FCO regularly promulgates on which industry sectors it will focus, public enforcement of competition law is exercised by the FCO's decision divisions which independently decide their enforcement agenda.

With respect to vertical agreements, the FCO's enforcement actions currently concentrate on the e-commerce sector, with a focus on "most favoured customer" clauses and provisions restricting the use of third-party distribution platforms.

In the area of dominant firms, the FCO recently focused on the review of utilities prices, e.g., for water and district heating, as well as the allocation of rights of way for the construction and operation of electricity and gas networks. A second focus in this area has been the e-commerce sector, namely online advertising and Facebook's business activities with regard to the collection and usage of data.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

Generally, the ARC is applied to regulated industries in the same way as to other industry sectors. As a matter of course, the regulatory context is taken into account in the legal assessment. In the case of vertical agreements, this may mean that decisions of sector-specific regulatory bodies may take precedence over and, respectively, exclude a separate assessment of the same question of law by the FCO. For example, in connection with the operation of and access to electricity and gas networks, the FNetA establishes a maximum volume for network access fees and the FCO is then barred from replacing the FNetA's assessment with its own (see also the response to question 1.10). In case the FCO's jurisdiction is not excluded or restricted by the jurisdiction of another regulatory authority, the FCO will still regularly consult with sector-specific regulators in order to obtain a better understanding of the market and its dynamics. Similar to the electricity and gas sector, the FNetA also has jurisdiction for the telecommunications, postal services and railways sectors, in particular for the *ex ante* or *ex post* determination of access fees for various services offered by market-dominant operators in the respective markets.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The FCO is an independent Federal authority under the jurisdiction of the Federal Ministry of Economics and Energy. However, the Ministry's jurisdiction encompasses only supervisory functions as to the legality of the FCO's operations and does not entail any right to issue instructions or orders to the President and decision divisions of the FCO, or to any of the FCO's public officials. Moreover, the decision divisions within the FCO are also independent of the President of the FCO in carrying out their enforcement mandate. Within the decision divisions, each case is decided upon by a collegiate body consisting of the division's chairman and two associate members. A decision requires a majority vote. Given the long-standing tradition of this independence, the FCO's officials are largely immune to outside political pressure.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

In recent years, the FCO has intensified its already strong interest in the digital economy and the e-commerce sector. With regard to vertical restraints, the FCO has investigated a number of cases dealing with online sales restrictions, resale price maintenance and most favoured nation clauses and imposed considerable fines, e.g. a fine for resale price maintenance of several beer companies that amounted to EUR 112 million in total. In particular, the FCO maintains its focus on restrictions of sales via online shops, auction platforms, internet marketplaces, and online comparison platforms.

The FCO intends to continue to take a lead in enforcing competition laws in the digital economy and e-commerce sector in the forthcoming years, and even to expand those activities. The fact that the digital economy remains an enforcement priority of the FCO is emphasised by the establishment of a task force within the FCO which shall tackle the issues arising from the enforcement of competition law in the internet sector.

1.15 Describe any notable case law developments in the past year.

In February 2019, the FCO concluded its administrative proceedings against Facebook after almost three years and imposed far-reaching restrictions on the processing of user data by Facebook. According to Facebook's terms and conditions, users have so far only been able to use the social network under the precondition that Facebook can collect user data also outside of the Facebook website in the internet or on smartphone apps and assign these data to the user's Facebook account. All data collected on the Facebook website, by Facebook-owned services such as WhatsApp and Instagram, and on third-party websites, can be combined and assigned to the Facebook user account.

The FCO's decision covers different data sources:

- Facebook-owned services such as WhatsApp and Instagram may continue to collect data. However, assigning the data to Facebook user accounts will only be possible subject to the users' voluntary consent. Where consent is not given, the data must remain with the respective service and cannot be processed in combination with Facebook user data.
- Collecting data from third-party websites and assigning them to a Facebook user account will also only be admissible if users voluntarily consent.

If consent is not given for data from Facebook-owned services and third-party websites, Facebook will have to substantially restrict its collection and combining of user data. Facebook is to develop proposals for solutions to this effect.

According to the FCO, Facebook's terms of service and the manner and extent to which it collects and uses data are in violation of the European data protection rules to the detriment of users. In the authority's assessment, Facebook's conduct represents a so-called exploitative abuse. Dominant companies must not exploit their market position to the detriment of the opposite market side; i.e., in Facebook's case, the consumers. This applies, above all, if the exploitative practice also impedes competitors that are not able to collect such a "treasure trove" of data. The FCO's assessment of Facebook's terms of service corresponds to decade-old case law of the Federal Court of Justice according to which not only excessive prices, but also exploitative terms and conditions, may amount to an illegal abuse of market power. Facebook has appealed the FCO's decision and has also requested the court to suspend the obligation to amend its terms of service until a final and binding ruling.

Further notable developments in connection with vertical restraints were, *inter alia*, the following:

- In April 2019, the Higher Regional Court of Düsseldorf rejected an appeal brought by CTS Eventim against a decision of the FCO prohibiting CTS Eventim from applying exclusivity clauses in its contracts with organisers of live entertainment events and advance booking offices. The FCO found in December 2017 that CTS Eventim, the operator of the largest ticketing system in Germany, held a dominant position in the market for operating ticketing systems with a market share in excess of 50%. Due to that, the FCO held that CTS Eventim must grant users of its ticketing system the possibility to sell at least 20% of their annual ticket volume via competitors' services.
- In January 2019, the FCO imposed fines totalling around EUR 13.4 million on the bicycle wholesale cooperative ZEG and its representatives for fixing prices with 47 bicycle retailers. ZEG and the retailers agreed not to undercut a certain minimum retail sales price for bicycles of the current season. The FCO found that adherence to the minimum sales prices came both at the request of a number of retailers as well as on the initiative of ZEG. Interestingly, the FCO decided not to pursue charges against the retailers, with the reasoning that their individual contribution to the infringement was of lesser significance than that of ZEG.
- In March 2019, the FCO and the FNetA started a consultation process on guidelines for the control of abusive practices in the markets for the generation and wholesale trade of electricity. The planned guidelines shall serve to inform the stakeholders about the authorities' stance in investigating potentially abusive practices that result in price peaks for electricity on the primary wholesale market. The FCO and the FNetA are currently reviewing the comments that stakeholders submitted on the draft guidelines. The final version of the guidelines is expected to be published within the next few months.
- In January 2015, the FCO prohibited online hotel reservation platform Booking.com from applying so-called "wide" best price clauses that required hotels to always offer their lowest prices on Booking.com. In another decision taken in 2016, the FCO then also prohibited "narrow" best price clauses that prohibited hotels from offering lower prices on their own websites than on Booking.com. While the former prohibition was upheld on appeal, the Higher Regional Court decided on 4 June 2019 that "narrow" best price clauses are not restricting competition and thus are admissible. In particular, on the basis of an extensive survey of hotels and platform users, the court found that "narrow" best price clauses are necessary to avoid "free riding". Without such a clause, hotels may use the booking platform only for advertising their hotel to the

platform's large user base, while trying to entice users to book directly on the hotel's website at lower rates. Thus, "narrow" best price clauses are justified since they ensure a fair and balanced exchange of services between booking platform operators and hotels.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Although vertical agreements are said to raise fewer competitive concerns than horizontal agreements and concerted practices, the FCO has initiated and concluded a vast amount of cases regarding vertical agreements, with a specific focus on vertical restraints in e-commerce and the digital economy.

In particular, online sales restrictions, resale price maintenance and best price clauses have been under intense scrutiny; with regard to the latter, the FCO has imposed stricter conditions on their legality, as national competition authorities have done in other European countries. However, the FCO's restrictive approach does not always survive scrutiny by courts. Just recently, for example, the Higher Regional Court of Düsseldorf struck down the FCO's prohibition of "narrow" best price clauses since it held that such a clause serves the purpose of preventing "free riding" and is thus justified (see also the response to question 1.15).

It can be understood from recent cases handled by the FCO that consumer harm is a major concern of the authority, i.e. the more customers, and end-consumers in particular, are affected, the more likely the authority will investigate specific clauses in vertical agreements.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The ARC does not provide for a definition of the terms "agreement" or "vertical agreement". In general terms, an "agreement" is considered to be a bilateral or multilateral understanding between independent undertakings, while the term "vertical" requires that these undertakings are active on different levels of trade (in the production and distribution chain) as far as the respective agreement is concerned. Further, the agreement needs to concern the conditions for the supply and resale of goods and services.

2.3 What are the laws governing vertical agreements?

Sec. 1 ARC provides for the general prohibition of (horizontal and/or vertical) agreements and concerted practices which have the purpose or the effect of restricting competition. The provision is essentially identical to Art. 101(1) TFEU (except that trade between Member States of the European Union does not need to be affected). Sec. 2 ARC stipulates the conditions under which restrictive agreements are exempt from the general prohibition. Similarly to the above, this provision is almost identical to Art. 101(3) TFEU (see also the response to question 1.10). It has to be noted that pursuant to European law, the FCO will be obliged to apply Art. 101 TFEU in parallel to similar national rules if trade between Member States of the European Union is affected.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No. Please also refer to the response to question 1.10.

2.5 What is the analytical framework for assessing vertical agreements?

First of all, it needs to be established that a vertical agreement triggers the applicability of Sec. 1 ARC. This is the case if the arrangement under scrutiny is an agreement, concerted practice between undertakings or a binding decision by an association of undertakings which have as their object or effect the prevention, restriction or distortion of competition. As set out above, certain exemptions apply for specific sectors. If the agreement has an appreciable effect on competition within the meaning of the FCO's *De Minimis* Notice, it may qualify for a block exemption under the VBER and, respectively, for an individual exemption pursuant to Art. 101(3) TFEU, Sec. 2 ARC (see the response to question 1.10 above).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The analytical framework for defining a market in vertical agreement cases is the same as applied in merger control and dominance cases, respectively. The FCO will assess the substitutability of the product governed by the vertical agreement from the viewpoint of the opposite market side. Since the applicability of the VBER depends on the market share of both the supplier as well as the purchaser, this analysis thus has to be conducted for both parties' opposing sides. The FCO also regularly applies the SSNIP test (Small but Significant Non-transitory Increase in Prices). The same applies for defining the relevant geographic market. In case of the latter, the FCO will review cross-border barriers for trade, entry of new participants, the homogeneity of market conditions, etc.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

In the case that one party to a vertical agreement is vertically integrated and active on the same level of trade as the other party to the agreement, one would typically assess the agreement both within the analytical framework for vertical agreements as well as from the viewpoint of horizontal cooperation between competitors.

In this respect, it has also to be noted that the possibility for a block exemption under the VBER will be restricted. Vertical agreements between competitors are only covered by the VBER if: (a) the agreement is non-reciprocal; (b) the supplier is a manufacturer and a distributor of goods, while the purchaser is a distributor and not a competing undertaking at the manufacturing level; or (c) the supplier is a provider of services at several levels of trade, while the purchaser provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contracted products (Art. 2(4) VBER). In the case that these conditions are not met, the vertical agreement may still qualify for an individual exemption pursuant to Art. 101(3) TFEU, Sec. 2 ARC. In addition, the agreement will have to be analysed from the viewpoint of horizontal cooperation. In general, this will often result in stricter provisions for the exchange of competitively relevant information (e.g. information on actual and projected sales, sales prices and margins, etc.).

2.8 What is the role of market share in reviewing a vertical agreement?

As mentioned before (see the response to question 1.10 above), the possibility for a block exemption under the VBER requires that the market share of both parties to the agreement does not exceed 30%, while the threshold for the appreciability criterion is 10/15%. Accordingly, determining the affected product and geographic market and identifying the parties' respective share (from supply- and demand-side, respectively) is of high importance for the overall legal analysis under European and German law. Moreover, the FCO also takes into account cumulative effects arising from a parallel series of vertical restraints which may result in market foreclosure effects.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis does not play a prominent role in assessing vertical restraints. This does not mean that the FCO would not take economic analysis into account. In the recent past, the FCO has entertained arguments concerning, for example, the admissibility of resale price maintenance. However, since both European and German law explicitly provide for a *per se* prohibition on restrictive agreements and concerted practices, the arguments developed in the US (and elsewhere) on the basis of the "rule of reason" approach are regularly refused, given this difference in the analytical framework. Nevertheless, other aspects in connection with the assessment of vertical restraints, e.g. the definition of the affected markets, the appreciable effect on competition, the identification of efficiencies, and justifying the scope of the vertical restraint, offer ample possibilities for and may certainly profit from introducing economic analysis into the assessment.

2.10 What is the role of efficiencies in analysing vertical agreements?

Identifying and quantifying efficiencies arising out of vertical restraints is one precondition for an individual exemption from the prohibition on restrictive agreements (*cf.* Art. 101(3)(a) TFEU). Accordingly, if the parties to a vertical agreement are unable to prove that the vertical restraint under review results in actual efficiencies, the FCO and the courts must not grant the individual exemption.

In their decision practice, the FCO and courts have accepted that vertical restraints may have positive results such as promoting non-price competition, resulting in a higher quality of service, solving "free rider" problems, easing the entry into new markets, etc.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

In the case that a vertical agreement concerning the supply and resale of goods or services also contains provisions on intellectual property rights relating to the contractual products (e.g. use of product's trademarks and brands for advertising purposes), the agreement will still be assessed within the same analytical framework (*cf.* Art. 2(3) VBER).

If intellectual property rights form the primary object of the agreement, the general prohibition on restrictive agreements as well as on the abuse of a dominant position remain applicable (Art. 101, 102 TFEU, Sec. 1, 18 *et seq*. ARC). However, as far as vertical aspects of the agreement are concerned, the VBER may not be applied for obtaining a block exemption. Instead, the European block exemption regulation concerning the transfer of technology rights might be applicable (Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements – "**TTBER**"). The TTBER covers vertical agreements concerning the licensing of technology rights, the latter term encompassing patent rights, utility models, design rights, software copyrights, etc. The TTBER generally has the same structure as the VBER, i.e. it provides for certain "hard core" restrictions which exclude the applicability of the block exemption for the entire agreement, and further provides for "grey clauses" which are individually qualified as inadmissible, while not affecting the remainder of the agreement. The TTBER will be applicable if and to the extent the combined market share of the parties does not exceed 20%, where the parties are competitors; and in the case that the contracting parties are not competitors, their respective share on the relevant market does not exceed 30%. Similarly to the VBER, the TTBER provides that restrictions on a party's ability to determine its prices when selling products, restrictions on the territory into and of customer groups to which a party may sell products, and restrictions on active and/or passive sales qualify as "hard core" restrictions. Again, counter-exemptions that are similar to the provisions of the VBER also apply.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

In the case of a vertical restraint that has as its object the restriction of competition, the FCO does not need to demonstrate actual anti-competitive effects. Generally, all contractual provisions that qualify as "hard core" restrictions within the meaning of the VBER are considered as having an anti-competitive object. In all other cases, the FCO will need to demonstrate that a given restraint has an anti-competitive effect, otherwise the restraint would not be covered by the prohibition on restrictive agreements.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Harm potentially caused by a vertical restraint will be weighed against potential benefits (efficiencies) if the vertical agreement does not qualify for a block exemption under the VBER and thus the preconditions for an individual exemption pursuant to Art. 101(3) TFEU, Sec. 2 ARC have to be assessed.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Generally, a vertical agreement needs first to qualify as a restrictive (anti-competitive) agreement within the meaning of Art. 101(1) TFEU, Sec. 1 ARC. In this respect, the following factors are taken into account in order to establish whether the agreements result in an appreciable restriction of competition: nature of the agreement; market position of the parties; competitors and buyers of the products subject to the vertical agreement; entry barriers; maturity of the market; level of trade; nature of the product; and other factors. Accordingly, the parties may use all of these aspects in order to refute allegations of anti-competitive effects caused by a vertical agreement.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The FCO has not issued formal general guidelines regarding vertical agreements. This is due to the fact that the relevant provisions of German law are modelled on Art. 101 TFEU and the FCO is obliged to apply European law in parallel to German law. Consequently, both the FCO as well as German courts use the guidelines issued by the European Commission, in particular its *Guidelines on Vertical Restraints.*

However, the FCO in July 2017 published its Guidance Note. The Guidance Note is intended to serve as a guideline to companies in the food retail sector and to inform them by means of practical examples about the background, purpose and scope of the prohibition on vertical price-fixing in the food retail sector. It is also explicitly directed at companies which have so far not been advised specifically on antitrust matters on an ongoing basis, especially small and medium-sized companies. The publication of the Guidance Note is the result of developments over the past few years which started in January 2010 with dawn raids at various leading retailers and brand manufacturers due to suspected illegal price agreements (known as the "vertical case"). The FCO closed its investigations on the vertical case only at the end of 2016, imposing fines against retailers and manufacturers in the food retail sector totalling EUR 260.5 million for vertical price-fixing agreements.

The FCO already made a first attempt to provide assistance in the (provisional) assessment of vertical practices in the food retail sector with a note in April 2010 (the so-called "*Handreichung*"). In practice, however, this note further contributed to the uncertainty as regards the scope of the prohibition on vertical price-fixing. With the completion of most proceedings regarding the vertical case and the publication of the more extensive Guidance Note, this note will now become obsolete anyway. The FCO obtained additional findings in its food retail Sector Inquiry in Germany which ran from 2011 until 2014. The Guidance Note now published combines the sum of these findings and is intended to serve as a guideline for industry retailers and manufacturers.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is considered a "hard core" vertical restraint, i.e. an agreement that has as its object the restriction of competition. As a consequence and in line with precedents of the European Court of Justice, the FCO and courts do not need to demonstrate that resale price maintenance actually has an anti-competitive effect, as the restraint is considered illegal *per se* (Art. 101(1) TFEU, Sec. 1 ARC). A contractual clause providing for or enabling resale price maintenance excludes the possibility that the respective contract may profit from the block exemption under the VBER. Thus, the relevant contract, including the clause on resale price maintenance, may survive only if the conditions for an individual exemption pursuant to Art. 101(3) TFEU, Sec. 2 ARC are met. As a general rule, however, "hard core" restrictions are usually seen as the most serious forms of restraint. Therefore, the parties would have to prove that resale price maintenance will lead to considerable efficiencies and, in particular, that there are no viable alternatives in order to attain the objectives of the restraint, while simultaneously leaving the parties sufficient possibilities to compete on the basis of other factors (e.g. quality of service, etc.). Although there have been cases where the imposition of minimum or fixed resale prices has been deemed admissible, this almost always resulted from a lack of appreciable effect on competition; not from fulfilling the requirements for an individual exemption (see also the responses to questions 1.15 and 2.15 above).

2.17 How do enforcers and courts examine exclusive dealing claims?

Although exclusivity agreements bear the risk of reducing intra-brand competition, fostering market partitioning and facilitating price discrimination, as well as collusion both at the supplier and distributor level, such an agreement may qualify for a block exemption under the VBER provided that the supplier's and the purchaser's market share does not exceed 30% each. Exclusive dealing arrangements may also be combined with further vertical restraints such as non-compete obligations, exclusive purchasing obligations and minimum purchase or supply volumes. If either party's market share exceeds 30%, the exclusive dealing arrangement may qualify for an individual exemption if the requirements of Art. 101(3) TFEU, Sec. 2 ARC are met.

2.18 How do enforcers and courts examine tying/ supplementary obligation claims?

Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying is exempted under the VBER when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30%.

Tying and supplementary obligations may also be combined with further vertical restraints. In the event that the market share thresholds are exceeded by either party, the tying arrangement/supplementary obligation may qualify for individual exemption if the requirements of Art. 101(3) TFEU, Sec. 2 ARC are met.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims are generally not evaluated in case of vertical agreements unless the supplier is a market-dominant undertaking or an undertaking with relative market power and thus making the abuse of dominance test applicable.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discount claims are also predominantly reviewed under the dominance abuse test. Loyalty discounts granted by the dominant supplier may pull customers towards it and thus reduce the potential demand volume that might be satisfied by competitors of the dominant supplier. Loyalty discounts can serve as an incentive for the customers to purchase goods or services simply in order to benefit from the loyalty discounts although there is no actual need for those products or services and competing suppliers, under normal market conditions, would have had the chance to compete in price and quality. Pricing below costs by the dominant suppliers may drive out smaller competitors.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discounts are examined similarly to loyalty discounts, i.e. the question of their admissibility basically arises only if the supplier has a dominant market position. The main aspect of the review is to determine whether the discounted "bundle" price is still sufficiently high to cover the aggregate cost of the bundled products. If this test is not met, the discount would regularly be qualified as inadmissible due to its pull effect.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

European and German law do not provide for an exhaustive list of prohibited vertical restraints. Even restraints that qualify as "hard core" restrictions pursuant to Art. 4 VBER may still qualify for an individual exemption from the prohibition on restrictive agreements, albeit only under exceptional circumstances.

2.23 How are MFNs treated under the law?

MFN (also "most favoured customer" or "best price") clauses have traditionally been used to contractually guarantee that an undertaking gets the best price and/or condition available on the market, either in form of a "narrow" MFN or a "wide" MFN.

Narrow MFN clauses prohibit the contracting party from offering lower prices or better conditions on its own website than those offered to the platform. Wide MFN clauses prohibit the contracting party from offering lower prices or better conditions on competing platforms and, respectively, require the contracting party to (automatically) extend more beneficial conditions agreed with third parties also to the platform operator.

Both wide and narrow MFN clauses – in the form of "best price" clauses as used in the hotel reservation sector – have been subject to review by the FCO as well as German courts. The FCO found that both types of MFN clauses have the effect of restricting competition in the market for hotel reservation platforms as well as on the end-consumer market for hotel rooms, since hotel operators are prevented from applying different prices in different distribution channels and, in the case of narrow MFN clauses, also on their own website. While the FCO's prohibition of wide MFN clauses was upheld on appeal, the Higher Regional Court of Düsseldorf decided in June 2019 that narrow MFN clauses are admissible since they effectively prevent "free riding" by hotel operators to the detriment of booking platform operators (see also the response to question 1.15 above).

2.24 Describe any notable case developments concerning vertical merger analysis.

The FCO's general approach in assessing vertical mergers is laid out in chapter C of its "Guidance of Substantive Merger Control" of 29 March 2012 (available in English on the FCO's website). The anti-competitive effects that may be relevant in assessing vertical mergers are input foreclosure, customer foreclosure, and access to confidential business information of competitors. In the view of the FCO, vertical mergers may only raise competition concerns if at least one of the merging parties has some degree of market power on at least one of the affected markets.

These general principles were put to the test recently in the contemplated acquisition of a majority shareholding in Four Artists, a company active in organising and financing concerts, festivals, tours, and other events, and offering booking services for artists in Germany, by CTS Eventim who is active in operating a ticketing systems service and also in organising concerts and other events. The FCO prohibited the transaction in December 2017. In its decision of 5 December 2018, the Higher Regional Court of Düsseldorf rejected the appeal brought by CTS Eventim against the FCO's prohibition order.

The FCO's decision was based on the finding that CTS Eventim had a dominant position in the German market for the operation of ticketing systems. Since the ticketing systems operator serves two distinct customer groups – organisers of concerts and other events (promoters), on the one hand, and advance booking offices, on the other hand – the FCO considered this market to be a multi-sided product market and found that CTS Eventim had a dominant position on both sides of this market with market shares in excess of 50%.

This finding led the FCO to assess the transaction with regard to the dominance criteria set out in Sec. 18(3a) ARC that specifically concern multi-sided (platform) markets and network markets. In this respect, the FCO found that significant positive indirect network effects exist between the two market sides which, in addition to the high market shares, supports the assumption of a market-dominant position. These network effects act as a market barrier and have a considerable lock-in effect for users on both sides, reducing their willingness to switch to other ticketing system operators. The FCO further found that multi-homing does not lessen the lock-in effects and barriers to entry since CTS Eventim's ticketing system is seen as indispensable by the majority of the system users and competing ticketing systems are only used for complementary purposes. Given its well-established online ticket shop, CTS Eventim also benefits from access to competitively relevant data which competitors cannot easily duplicate due to their significantly smaller user base and frequency of use. Further, the FCO has not found any indication for innovation-driven competitive pressure that may counteract CTS Eventim's dominance.

Following on from that, the FCO concluded that the contemplated acquisition of Four Artists would strengthen CTS Eventim's market-dominant position and thus significantly impede effective competition. Although the concerts organised by Four Artists account for only 1% of the annual ticket sales in Germany, this apparently small ticket volume is approx. 100 times higher than that achieved by the average customer of CTS Eventim on the promoter side. Further, the concerts and events organised by Four Artists were considered highly attractive and thus particularly important for income opportunities of ticketing systems. Furthermore, the FCO found that CTS Eventim's contracts with promoters usually contained exclusivity clauses requiring them to sell virtually all of their tickets via CTS Eventim's ticketing system. Given that, it was highly likely that Four Artists' ticket volumes would also have been sold exclusively via CTS Eventim's ticketing system, and thus was safe to assume an overall customer foreclosure strategy pursued by CTS Eventim.

This case is already notable for the fact that the prohibition resulted from the transaction's negative effects in the vertical context, i.e. the existing overlaps between the parties in the upstream market for organising concerts and other events did not play a decisive role in the authority's decision. Furthermore, the specific dominance criteria for multi-sided markets and networks that were introduced in June 2017 played a prominent role in both the authority's as well as the court's decision. Until the FCO updates its "Guidance of Substantive Merger Control" to account for the statutory changes since 2012, the analysis and reasoning of the FCO and the court will provide important assistance in the interpretation of Sec. 18(3a) ARC, as well as in the assessment of vertical mergers in multi-sided markets.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

In recent years, the FCO has continuously reviewed market conduct of dominant undertakings, with a particular focus on the energy sector. A further focus has been on negotiations between producers and retailers in the food retail sector. Due to the fact that certain types of abusive behaviour, in particular excessive pricing, require considerable resources for their review, as well as legal and economic analysis of market data, the number of investigations and decisions tends to be lower than in the case of cartels or vertical restraints.

3.2 What are the laws governing dominant firms?

Unilateral conduct by market-dominant undertakings is governed by Sec. 18 *et seq*. ARC. These provisions prohibit (i) a dominant undertaking from abusing its market position, (ii) specific types of abusive conduct by undertakings that have "relative market power" in relation to small or medium-sized enterprises, and (iii) specific types of abusive behaviour by undertakings with superior market power in relation to small and medium-sized competitors. German law thus contains partly stricter rules than those laid down in Art. 102 TFEU.

Additional provisions exist for specific industry sectors (e.g. electricity and water supply; see the response to question 1.10). Insofar as the unilateral conduct may affect cross-border trade, the FCO is obliged to apply European law in parallel (Art. 102 TFEU).

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analysis is substantively the same as for defining markets in vertical agreement cases (see the response to question 2.6 above).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Pursuant to Sec. 18(4) ARC, there is a (rebuttable) presumption that an undertaking is dominant if it has a market share of at least 40%. A comparable presumption also exists for collective dominance (see the response to question 3.10 below).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being adjudged "dominant" or a "monopolist" does not have any legal consequences in the first place, since having a dominant market position and a monopoly, respectively, is not considered illegal *per se*, but rather only the abuse of this position is prohibited (Sec. 19(1) ARC).

Market conduct is considered abusive if a dominant undertaking, acting as a supplier or purchaser of a certain type of goods or commercial services:

- directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;
- demands payment or other business terms which differ from those which would very likely arise under effective competition; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
- demands less favourable payment or other business terms than the dominant undertaking itself demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
- refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate consideration, provided that without such joint use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such joint use is impossible or cannot reasonably be expected; or
- uses its market position to invite or cause other undertakings to grant it advantages without any objective justification (*cf.* Sec. 19(2) ARC).

The prohibition on abusive conduct in the form of unfairly impeding and, respectively, discriminating against other undertakings without objective justification further applies to undertakings which do not qualify as market-dominant in the meaning of Sec. 18(1), (4) ARC, but where small or medium-sized enterprises as suppliers or purchasers of certain goods or services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (so-called "relative market power").

Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair impediment exists in particular if an undertaking:

- offers goods or services not just occasionally below cost price; or
- demands from small or medium-sized undertakings, which are competitors on downstream markets in the distribution of goods or services, a price for the supply of such products which is higher than the price it itself offers on this market.

The aforementioned conduct may be justified for objective reasons such as impending deterioration of foodstuffs in the case of their sale below cost price.

3.6 What is the role of economic analysis in assessing market dominance?

Following the more economic approach of the European Commission, the role of economic analysis in assessing market dominance has also increased at a national level. Economic analysis plays an important role in determining whether an undertaking possesses a dominant market position, in assessing potential effects of a dominant undertaking's conduct, and most importantly in analysing and comparing a dominant undertaking's prices with price levels in markets with effective competition.

3.7 What is the role of market share in assessing market dominance?

In assessing the market position of an undertaking in relation to its competitors, the market share of an undertaking plays an important role and may lead to the presumption of dominance (see the responses to questions 3.4 and 3.10). However, the assessment of market dominance shall also take into account an undertaking's financial strength, access to supply or sales markets, links with other undertakings, legal or factual barriers for market entry by other undertakings, actual or potential competition from undertakings in Germany or abroad, the undertaking's ability to shift its supply or demand to other goods or commercial services, and the ability of the opposite market side to resort to other undertakings.

Further, the 9th Amendment Package has clarified that, in case of multi-sided markets and networks, the following further aspects shall be taken into account: direct and indirect network effects; parallel use of competing services and switching costs for users; economies of scale arising in connection with network effects; access to competitively relevant data; and competitive pressure that is driven by innovation.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Generally speaking, any apparently abusive market conduct might be justified for objective reasons or for an overriding interest which outweighs the interest of companies affected by the conduct. In principle, the same applies to undertakings with relative and superior market power, respectively.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

In contrast to the European antitrust regime, the efficiency defence is not explicitly recognised in German law. In essence, it is argued that potential efficiencies which arise out of *prima facie* abusive conduct and may benefit consumers (e.g., predatory pricing, loyalty rebates, etc.) are unlikely to last for a longer period of time. Thus, such beneficial effects may not outweigh the negative effects on competition and the market position and chances of the remaining competitors. However, efficiencies may, at least indirectly, influence the balance test and the legal assessment of whether a dominant behaviour is objectively justified or qualifies as unfair.

3.10 Do the governing laws apply to "collective" dominance?

The governing laws also apply to "collective" dominance. Pursuant to Sec. 18(5) ARC, two or more undertakings are considered to have a collective dominant position if no substantial competition exists between them with respect to certain kinds of goods or commercial services, and they are not exposed to significant competition by, or have a superior market position as compared to, third-party competitors.

In addition, there is a market share-based (rebuttable) presumption for collective dominance according to which:

- three or fewer companies are presumed to be collectively dominant if they enjoy a combined market share of at least 50%; or
- five or fewer companies are presumed to be collectively dominant if their combined market share exceeds 66.6%.

If collective dominance is established, all companies qualified as collectively dominant are subject to the same standard as a single dominant firm (see the response to question 3.5 above).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The rules outlined in the response to question 3.5 apply equally to both suppliers and purchasers that have a dominant market position.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Please see the response to question 3.5 above.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Intellectual property rights regularly grant the rights holder a monopoly and thus he will have to abide by the higher standards for market-dominant undertakings. As intellectual property rights are key for innovation, competition concerns may arise if the rights holder's market conduct might effect a foreclosure on the technology market. Against this background, intellectual property rights might be considered "essential facilities" which may have to be made available to other market participants against fair, reasonable and non-discriminatory ("**FRAND**") conditions, depending on the circumstances of the individual case.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Particularly in the context of merger control proceedings, "direct effects" may complement the market share analysis and may also be considered as (additional) evidence of market power. The FCO now also recognises indirect effects in the form of (bilateral and unilateral) network effects which link user groups of a specific platform. Indirect network effects exist where the value of the platform service (e.g., a dating platform) for one user group depends on the size and composition of the other user group. These effects can be either positive (value of the platform for one user increases with the number of potentially interested parties on the other side) or negative (value of the platform for one user group decreases if the other user group grows).

3.15 How is "platform dominance" assessed in your jurisdiction?

Market-dominant platforms are subject to the same standard as any other dominant undertaking. The decisive criterion is whether or not the dominant undertaking's scope of action is still sufficiently controlled by the (remaining) competition. However, an assessment of a platform's market power does not necessarily have to focus predominantly on price competition, as many digital business models are challenged by strong innovation dynamics and not the price. High levels of concentration are also typical for digital business models, meaning that the absolute market share should not be treated as the most relevant factor in the course of the assessment. Moreover, digital markets require a case-by-case assessment which should also take into account other, more specific factors, such as: (i) network effects; (ii) economies of scale; (iii) single-homing (use of single platforms), multi-homing (use of several platforms) and the degree of differentiation (i.e. to what degree the platforms in a market differ from one another); (iv) access to data; and (v) the innovation potential of digital markets.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

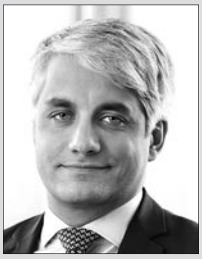
Refusals to deal may constitute an abuse of a dominant market position unless they are justified for objective reasons. In the event that a market-dominant supplier services several comparable customers, but refuses to deal with another potential purchaser, the latter may – absent any objective justification – sue the dominant undertaking and force him to enter into a contractual relationship. The same applies to suppliers with relative market power who refuse to deal with small or medium-sized undertakings (Sec. 20(1) ARC).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The provisions of German antitrust law on abusive conduct provide for the concept of an "undertaking with relative market power" that is subject to the same rules as market-dominant undertakings despite lacking a dominant market position. An undertaking qualifies if small or medium-sized enterprises, as suppliers or purchasers of certain goods or services, depend on that undertaking to an extent that the SMEs do not have sufficient and reasonable possibilities of switching to another undertaking (as customer or supplier). The concept of "relative market" power is regularly applied in disputes between (wholesale or retail) distributors and suppliers of branded products. If products of a certain brand are considered a "must have" for specialist retailers in the respective product market, the manufacturer's refusal to supply may negatively affect the retailer's recognition by consumers as a specialist. Unless the retailer may retain his recognition as a specialist with other branded products, the manufacturer of the "must have" brand products may be obliged to supply the retailer and, respectively, not to terminate the supply relationship without an objective justification.

It has to be stressed that the definition of the term "undertaking with relative market power" does not test for market shares. Thus, an undertaking may qualify even if, for example, its market share is less than 5% and, under the standard dominance concept, would therefore not be considered as having market power.



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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

In Greece, the Hellenic Competition Commission (“**HCC**”) is the competent authority to investigate and enforce the laws governing vertical agreements and dominant undertakings. Namely, the HCC is entrusted to enforce Law 3959/2011 (“**Law**”) on the protection of free competition, which is the core competition law in Greece, as well as articles 101 and 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) where applicable. The HCC is an independent authority with administrative and economic autonomy, supervised by the Minister of Finance, Competitiveness and Shipping. It consists of eight (8) regular members acting under the following capacities: President; vice-President; four (4) rapporteurs; and two (2) members (and their alternates). In addition, the Hellenic Telecommunications and Post Commission, which is also an independent administrative authority, acts as a competition authority in the electronic communications market and postal services market.

1.2 What investigative powers do the responsible competition authorities have?

Articles 38–41 of the Law regulate the HCC’s investigative powers. Article 38 of the Law provides that the HCC may send requests for information to undertakings, associations of undertakings, individuals, legal entities, public or other entities. Addressees of such requests are obliged to provide the HCC with prompt, full and accurate information.

In addition, article 39 stipulates that the personnel of the HCC’s General Directorate for Competition, exercising the powers of a tax auditor, may conduct dawn raids at the premises of an undertaking and, more specifically: (i) inspect its books, data, documents, correspondence of its employees and receive copies; (ii) seize books, documents as well as electronic means of storage and data transfer; (iii) monitor and collect information and data from mobile terminals, portable devices as well as servers in cooperation with the competent authorities; (iv) conduct inspections at its offices and other places, as well as its means of transport; (v) seize any professional place, books or documents during the inspection period; (vi) conduct searches at the residences of businessmen, directors, etc., if there are reasonable grounds to suspect that such persons keep books or other documents connected to the undertaking; and (vii) receive sworn or unsworn statements. Article 40 entitles the HCC to conduct sector enquiries in cases where the configuration of prices or other circumstances cause suspicions that competition has been distorted. Finally, it should be noted that in accordance with article 41 of the Law, the personnel of the HCC’s General Directorate for Competition have a duty of confidentiality with regard to all the information it receives under its investigative powers.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The Law, in conjunction with the HCC’s Rules of Management and Procedure, lays down the process from the opening of an investigation to its resolution.

In particular, the HCC opens an investigation either at its own initiative or following a complaint submitted by a third party, or following a request submitted by the competent Minister. The President introduces before the HCC cases which fulfil the criteria set out by the HCC’s points system, which is aimed at prioritising its cases. Such system is based on objective criteria and is intended only for internal use as a management tool for investigation of pending cases by the HCC’s Directorate General for Competition.

The introduction by the President of each case before the HCC presupposes the issue of a Statement of Objection (“**SO**”). In that regard, the case is assigned by lot to one (1) of the HCC’s four (4) rapporteurs in order to draft the SO. Following such assignment, the rapporteur, assisted by the personnel of the HCC’s General Directorate for Competition, drafts the SO within a deadline of one hundred and twenty (120) days, which may be extended by up to sixty (60) days.

The President designates for each case the time and place of the hearing and convenes the HCC to sit either in chambers or in *plenum* if the case is of major importance. The secretary convenes the parties in writing at least forty-five (45) days before the hearing. Such convocation is served to the parties with the SO and the parties are obliged to respond to the SO twenty (20) days the latest before the hearing. Each party may propose the examination of up to three (3) witnesses. The parties may file their supplemental pleadings ten (10) days at the latest before the hearing. The President or the person who substitutes the President directs the hearing, gives the floor and poses questions to the rapporteur, the parties, etc. Following the end of the hearing, the parties may, upon the permission of the President, submit supplementary pleadings. Finally, the HCC should take its decisions within twelve (12) months from the assignment of the case to the rapporteur. In exceptional circumstances, the HCC may extend such deadline by up to two (2) months.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

Article 25 of the Law stipulates that in case of competition law infringement, the HCC may: (i) issue recommendations; (ii) oblige the interested undertakings to cease the infringement and desist from it in the future; (iii) impose structural or behavioural measures which should be necessary and proportionate for the ceasing of the infringement; (iv) impose a fine; (v) threaten to impose a fine in case of continuation or repetition of the infringement; or (vi) impose the threatened fine in the case that it issues a decision which confirms the continuation or repetition of the infringement. It is highlighted that the HCC is not entitled to award damages to the parties, since it is solely competent for the public enforcement of competition law. With regard to private enforcement of competition law, see question 1.9 below.

1.5 How are those remedies determined and/or calculated?

The Law, in conjunction with the HCC's guidelines on fines, sets the method for the determination of fines. It should be noted that the HCC follows the EU respective guidelines for the calculation of fines. In that context, it is noted that fines cannot exceed 10% of the aggregate turnover of the undertaking for the last fiscal year of the infringement, or for the current fiscal year in the case that the infringement is ongoing until the issuance of the decision.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

By virtue of its decision no. 588/2014, which takes into account the decisional practice of the European Commission ("**Commission**"), the HCC sets out the conditions and the procedure for the submission of commitments. The HCC has wide discretion to decide whether it shall accept commitments from the concerned undertakings. More specifically, the undertakings may propose commitments with regard to any possible infringement arising from articles 1 and 2 of Law 3959/2011, which mirror articles 101 and 102 TFEU respectively. The HCC considers the commitments procedure as suitable in cases where the concerns as to competition law: (i) may be easily identified; (ii) are fully resolved by the proposed commitments without causing new concerns; and (iii) may be resolved efficiently and quickly by such commitments. On the other hand, the HCC does not accept commitments in the following cases: (i) hardcore restrictions; (ii) serious cases of abuse of dominance; and (iii) anti-competitive horizontal agreements which have benefitted from the leniency programme.

In addition, the HCC has adopted a revised leniency programme by its decision no. 526/VI/2011, which is solely applicable to cartels and covers both individuals and undertakings. The HCC may grant immunity, either full or partial, should the following prerequisites be met: (i) the applicant cooperates fully and continuously with the HCC; (ii) it remains at the HCC's disposal to answer promptly at any request which may contribute to the establishment of the facts; (iii) it does not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel; (iv) it does not disclose to any third party the fact or content of its application before a recommendation on the case is issued and notified to the parties, unless otherwise agreed with the HCC; (v) its involvement in the cartel has ended at the latest when the application was filed; and (vi) the applicant has treated its application as fully confidential until the issue of an SO by the HCC. As noted above, the HCC may grant either full immunity (Type 1A or type 1B) or, if the conditions for granting full immunity are not met, partial immunity (i.e. reduction of fine). With regard to natural persons, the grant of full immunity absolves them from criminal liability, whereas the grant of a reduction of fine is considered as a mitigating factor.

Finally, by its unanimous decision no. 628/2016, issued on the basis of article 25A of the Law, the HCC introduced the terms and conditions for the settlement procedure, which is applicable only to cartel cases. Such procedure aims to simplify and accelerate the administrative procedure with regard to the issuance of decisions by the HCC, as well as to reduce the number of appeals against the HCC's decisions. In addition, a reduction of the imposed fine by 15% may be obtained, whilst persons who successfully conclude a settlement procedure are absolved of criminal liability in relation to offences committed with the same actions.

This procedure presupposes that the undertaking makes a clear and unequivocal acknowledgment of its participation in a horizontal anti-competitive agreement and accepts its liability with regard to the infringement of article 1(1) of the Law and/or 101(1) TFEU. In addition, the undertaking waives its right, under certain circumstances, to have full access to the administrative file and to have an oral hearing before the HCC. The settlement procedure requires the undertaking's initiative, given that the undertaking should express its interest for the initiation of this procedure. The HCC and the undertaking organise bilateral meetings in which part of the evidence included in the HCC's administrative file is disclosed. Afterwards, the undertaking is obliged to submit, within a specified deadline, a proposal for settlement which includes certain statements (e.g. unequivocal acknowledgment of its participation in the cartel, acceptance of the maximum amount of fine which may be imposed, etc.). If such proposal reflects the conclusions drawn in the bilateral sessions, the rapporteur drafts an SO and suggests its acceptance by the HCC. Finally, the HCC issues its final decision following a simplified procedure.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No such defence is required.

1.8 What is the appeals process?

Article 30 of the Law provides that the HCC's decisions are subject to appeal before the Athens Administrative Court within sixty (60) days from their notification. The Athens Administrative Court examines such decisions for errors in law and fact. Following the decision by the Athens Administrative Court, a further appeal is possible, under certain conditions, before the Council of State, which is competent to review such decision only on points of law.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes. Any person (natural or legal), irrespective of whether he is a direct or indirect customer of the infringer and has suffered harm due to an infringement of Greek and/or EU competition law, is entitled to full compensation. Greek civil courts, namely the Magistrate's Courts or the Courts of First Instance, are competent, depending on the value of the claim, to hear private disputes due to infringements of competition law. In addition, Law 4529/2018, which implemented into Greek law Directive 2014/104/EU, provides for substantive and procedural rules which aim to facilitate the effective exercise of the rights of the injured parties to claim damages for antitrust infringements.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The HCC has adopted a *De Minimis* Notice on agreements of minor importance which do not appreciably restrict competition under article 1(1) of Law 703/77 (i.e. the former competition act). Such notice is modelled on the respective EU *De Minimis* Notice and specifies certain market thresholds which quantify whether there is an appreciable restriction of competition under article 1(1) of the Law. More specifically, a vertical agreement between undertakings does not appreciably restrict competition within the meaning of article 1(1) of the Law if the market share held by each of the parties to the agreement does not exceed ten (10) per cent of any of the relevant markets affected by the agreement. It should be underlined that the *De Minimis* Notice is not applicable to vertical agreements which contain hardcore restrictions.

Furthermore, with regard to vertical agreements, the Commission's Regulation 330/2010 ("**Block Exemption Regulation**") and the Commission's Guidelines on Vertical Restraints ("**Vertical Guidelines**") apply in the Greek legal order. In that context, a vertical agreement between a supplier and a distributor benefits from the Block Exemption Regulation, in the sense that a safe harbour is created, provided that: (a) market shares of the parties do not exceed 30% in the relevant product market; and (b) the agreement does not contain any hardcore restriction. In the case that the market share of at least one of the contracting parties exceeds 30%, the effects of the practice are assessed in accordance with the analytical framework provided in the Vertical Guidelines.

1.11 Does enforcement vary between industries or businesses?

No. The HCC does not treat industries differently.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The HCC and the courts assess an industry's regulatory context by examination of the practices within that industry.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The HCC is an independent administrative authority.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The HCC's primary objective is to promote the competitive process. In that context, there are not any specific enforcement trends and priorities. Nevertheless, the latest decisions issued by the HCC show an emphasis on scrutinising practices in the fast-moving consumer goods ("**FMCG**") sector.

1.15 Describe any notable case law developments in the past year.

The HCC has examined "classic" competition law practices (e.g. resale price maintenance, non-compete obligations) in line with the Commission's decisional practice. In that context, there are not any notable case law developments.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

According to the HCC's decisional practice, vertical agreements are considered less restrictive in comparison to horizontal agreements. Namely, the HCC has underlined that vertical agreements may produce pro-competitive effects. Nevertheless, it is noted that certain practices, such as resale price maintenance and prohibition of passive sales, are considered as hardcore restrictions.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The HCC follows the same analysis with the Commission's decisional practice. In that context, the HCC examines the common will of the parties, irrespective of its form (e.g. written, oral). Namely, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. Moreover, an agreement is considered as vertical if it is concluded between undertakings which are active in different changes of supply and distribution.

2.3 What are the laws governing vertical agreements?

Article 1(1) of the Law, which mirrors article 101(1) TFEU, is the core provision which governs vertical agreements. Namely, article 1(1) of the Law stipulates: "*all agreements between undertakings, all decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition in the Greek territory are prohibited and, in particular, those which: (i) directly or indirectly fix purchase or selling prices or any other trading conditions; (ii) limit or control production, markets, technical development, or investment; (iii) share markets or sources of supply; (iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, in particular by refusing without valid justification, to sell, purchase, or conclude any other transaction; (v) or make the conclusion of contracts subject to acceptance by other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the object of such contracts*". Furthermore, article 101(1) TFEU is applicable to the extent the vertical agreement restricts competition within the internal market or part of it and affects trade between Member States.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

See question 1.10.

2.5 What is the analytical framework for assessing vertical agreements?

First of all, the HCC examines whether the practice under examination qualifies as an agreement, a decision by an association of undertakings, or concerted practice. Subsequently, the HCC reviews whether such agreement/decision/concerted practice restricts competition by object or effect. In that context, the HCC examines whether the agreement/decision/concerted practice may benefit either from its *De Minimis* Notice or the Block Exemption Regulation; in the case that it is not exempted, it scrutinises them in accordance with the Vertical Guidelines.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The HCC follows the Commission's practice with regard to the definition of a market in a vertical agreement case. In particular, the HCC's market definition is based on the Commission's notice on the definition of relevant market for the purposes of EU competition law (97/C 372/03).

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Such agreement is assessed in the context of both the analytical framework for horizontal and vertical agreement. More specifically, the Vertical Guidelines stipulate that "*vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Guidelines on the applicability of Article 101 to horizontal cooperation agreements. However, the vertical aspects of such agreements need to be assessed under Vertical Guidelines*".

2.8 What is the role of market share in reviewing a vertical agreement?

See question 1.10 above. It is underlined that market shares are not taken into consideration in case of vertical agreements which include hardcore restraints.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is important in case of definition of the relevant product market and the assessment of efficiencies.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies are invoked by the parties, in the context of individual exemption under article 1(3) of the Law, which mirrors article 101(3) TFEU, in cases where the HCC assesses that the vertical agreement causes competition law concerns. It is noted that efficiencies are more likely to be accepted where vertical agreements are considered to restrict competition by effect rather than by object.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

The HCC follows the Commission's decisional practice. In that context, the Vertical Block Exemption Regulation, as well as the Block Exemption concerning the transfer of technology, apply.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes, except in the case that the vertical agreement contains hardcore restrictions.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Such weighing takes place only in the context of individual exemption. See question 2.10 above.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Except for the efficiencies which may be invoked in the context of individual exemption (see question 2.10 above), there are not any other defences.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No such guidelines have been issued.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is considered as a "by object" restriction of competition.

2.17 How do enforcers and courts examine exclusive dealing claims?

Such practice may benefit from the Block Exemption Regulation should its prerequisites be met. If it does not benefit from such Regulation, the HCC examines it in accordance with the analytical framework provided in the Vertical Guidelines. Exclusive dealing raises competition law concerns in cases where the supplier has a dominant position.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

The HCC examines such claims as a unilateral practice, in the context of abuse of dominance.

2.19 How do enforcers and courts examine price discrimination claims?

See question 2.18 above.

2.20 How do enforcers and courts examine loyalty discount claims?

See question 2.18 above.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

See question 2.18 above.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

The HCC does not have an exclusive list of vertical restraints considered as anti-competitive. Contrary to the Commission's recent decisional practice, for the time being the HCC does not focus on the e-commerce sector.

2.23 How are MFNs treated under the law?

MFNs are not *per se* anti-competitive except in cases where they are used as a means to create or facilitate resale price maintenance.

2.24 Describe any notable case developments concerning vertical merger analysis.

There are not any notable case developments.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The HCC has paid great attention to unilateral practices, by issuing notable decisions, especially in the FMCG sector.

3.2 What are the laws governing dominant firms?

Article 2 of Law 3959/2011, which reflects article 102 TFEU, governs dominant firms. Furthermore, the HCC applies *mutatis mutandis* the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("**Guidance**").

3.3 What is the analytical framework for defining a market in dominant firm cases?

The HCC applies the Commission's notice on the definition of the relevant market for the purposes of EU competition law (97/C 372/03).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The HCC considers market share as one of the factors in order to assess whether a firm is dominant/monopolist. Namely, according to the HCC, a presumption of dominance exists in cases where a company has a market share which exceeds 50%.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being dominant or even monopolist is not considered as *per se* illegal. Article 2 of Law provides for an indicative list of practices which are considered as abusive (see question 3.12 below).

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is one of the tools used in assessing market dominance.

3.7 What is the role of market share in assessing market dominance?

Market share is one of the factors taken into account in assessing market dominance. See also question 3.4 above.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The dominant undertaking may provide an objective justification for its defence or may demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. With regard to efficiencies, it is noted that the HCC takes into account the EU jurisprudence as well as the analytical framework provided under the Guidance.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are used as a means of defence in cases where a practice is deemed an abuse of dominance. See question 3.8 above.

3.10 Do the governing laws apply to "collective" dominance?

Yes, they do.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Greek law does not treat dominant purchasers differently from dominant suppliers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 2 of the Law includes an indicative list of practices which are deemed exploitative and exclusionary. More specifically, article 2 of the Law prohibits any abuse by one or more undertakings of a dominant position, within the national market or in a part of it. Such abuse may, in particular, consist in: (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (ii) limiting production, markets or technical development to the prejudice of consumers; (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and (iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The exercise of an intellectual property right by a dominant firm may, under specific circumstances, constitute an abuse of dominance.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The HCC considers whether a practice applied by a dominant undertaking is likely to foreclose the market, whilst it is not necessary to examine actual effects.

3.15 How is "platform dominance" assessed in your jurisdiction?

The HCC has not adopted any specific assessment with regard to platform dominance.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

The HCC follows Commission's decisional practice with regard to refusal to deal.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The HCC's decisional practice is in line with the Commission's practice.

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Competition Commission of India (**CCI**) is the primary Indian authority that enforces laws governing vertical agreements and dominant firm conduct. The CCI is assisted by its investigative arm – the Director General (**DG**). See the response to question 1.8 for an overview of the appellate authorities and processes.

In addition, sector-specific regulators (such as the Telecom Regulatory Authority of India (**TRAI**) established under the Telecom Regulatory Authority of India Act, 1997 and the Petroleum and Natural Gas Regulatory Board created by the Petroleum and Natural Gas Regulatory Board Act, 2006) are empowered to promote and maintain competition in their respective sectors, which extends to anti-competitive conduct by enterprises operating in those sectors.

1.2 What investigative powers do the responsible competition authorities have?

The CCI and the DG are vested with powers of an Indian civil court for, *inter alia*, enforcing competition rules, including those relating to vertical agreements and dominant firm conduct. These powers extend to:

- summoning and enforcing the attendance of any person and examining them on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavit;
- issuing requests for examination of witnesses or documents; and
- requisitioning public records or documents from any office.

The DG is also empowered to conduct dawn raids and the CCI may call upon experts from disciplines such as economics, commerce, accountancy and international trade to assist in its inquiry.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

An overview of the process, from the opening of an investigation to its resolution before the CCI, is set out below:

Initiation stage: The CCI may inquire into allegations of behavioural contraventions: (a) on its own; (b) on receipt of 'information' from any person, including consumers or trade associations; or (c) by way of a reference made to it by Government (**Information**).

Formation of a *prima facie* view by the CCI and initiation of investigation: The CCI must, on a 'best efforts' basis, reach a *preliminary* conclusion on whether the relevant conduct contravenes the provisions of the Competition Act, 2002 (**the Act**) within 60 calendar days. In practice, this takes much longer. As part of this process, the CCI may, at its discretion, call parties for a 'preliminary conference' to understand the conduct in more detail. If the CCI reaches a *prima facie* conclusion as to the contravention, it directs the DG to carry out a detailed investigation. If not, it closes the matter after recording its reasons. Such closure orders are published on the CCI's official website.

Investigation by the DG: The Act requires the DG to submit its investigation report to the CCI within 60 days from the receipt of a direction to investigate from the CCI. This may be extended by the CCI up to a 'reasonable period' further to specific requests from the DG. Typically, the DG seeks multiple extensions from the CCI, and an investigation by the DG may take anywhere between a few months to more than two years. In its investigation report, the DG makes a finding on fact and recommends certain actions by the CCI on the basis of those facts.

CCI's review of the report of the DG and final order: Parties are typically given 30 days from receiving the investigation report of the DG to respond to the report's findings. Parties are also invited to make oral arguments before the CCI. As far as possible, the CCI is required to pass its final order within 21 working days from the conclusion of the oral hearings. However, as with the investigation process, this process typically takes much longer and has, in the past, taken up to 47 months. Subsequent to its review of the investigation report of the DG and parties' submissions, the CCI may pass an order closing the inquiry, directing the DG to conduct further investigation, or finding a contravention.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The CCI could adopt the following measures as part of a contravention decision relating to vertical agreements and abuse of dominant position:

Fines: The CCI can levy a penalty of up to 10% of the average relevant turnover for the three preceding financial years of the contravening enterprise(s). The CCI can also penalise the individual office-bearers responsible for the conduct of the business of the enterprise found guilty of contravening the provisions of the Act.

Cease-and-desist directions: The CCI can direct the erring enterprise to cease and desist from carrying on with the anti-competitive conduct.

Interim injunctions: The CCI can temporarily restrain a party from carrying on with its anti-competitive or abusive acts.

Other remedies: The CCI has other wide-ranging remedial powers, which include: (a) directing a division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position (this power is yet to be exercised by the CCI); (b) directing any agreement to be modified in a prescribed manner; (c) passing any order as the CCI may deem fit (which are often in the nature of other behavioural remedies); and (d) direct payment of costs.

1.5 How are those remedies determined and/or calculated?

For determining the quantum of fine within the 10% capped limit (explained in the response to question 1.4), the CCI is required to consider aggravating and mitigating factors. Notably, a 2017 decision of the Supreme Court of India (**SCI**) concluded, among other things, that the CCI is required to: (a) compute fines based on the turnover derived from the infringing product or service, as opposed to the total turnover of an enterprise; and (b) follow the principle of proportionality while determining fines.

Moreover, as the response to question 1.4 explains, the CCI has wide-ranging powers to impose remedies once it finds a behavioural contravention. These remedies typically range from straightforward cease-and-desist directions to more robust remedies, such as directing amendments to exclusive clauses, modifying by-laws of erring associations, making after-market components available in the open market through an efficient network and enhancing transparency, directing supply on fair terms, and formulating proper processes and parameters to avoid unfair treatment of stakeholders.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Presently, the Act does not contemplate any mechanism by which parties may offer or negotiate remedies with the CCI for abuse of dominance or anti-competitive vertical agreements.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Unlike the Department of Justice or the Federal Trade Commission in the United States, the CCI is vested with both regulatory and adjudicatory powers, and adjudicates questions of anti-competitive conduct. That said, as explained in the response to the following question, the CCI defends its decisions before the appellate court or writ courts, should a party challenge its decision (as a proper or necessary party to such proceedings).

1.8 What is the appeals process?

Any person that is demonstrably aggrieved by a decision of the CCI may challenge it in an appeal before the National Company Appellate Tribunal (**NCLAT**) within 60 days from the date of the receipt of the decision. Any decision or order of the NCLAT may further be appealed to the SCI within 60 days of such decision or order being issued to parties. In terms of duration, while the NCLAT is required to dispose of appeals within a maximum period of 180 days on a 'best efforts' basis, in practice, this process takes anywhere between one to two years.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Competition law enforcement in India is not adversarial. The Act is exclusively enforced by the CCI (along with the appellate courts) and remedies by the CCI are accorded *in rem*. Private litigants cannot bring a lawsuit alleging anti-competitive conduct in any other forum apart from the CCI. Although private entities may file 'information' before the CCI, alleging anti-competitive conduct, once filed, the Act presently does not contemplate settlements. Thus, even if a litigant withdraws its complaint, the CCI is required to complete its investigation and reach a finding of its own.

That said, once the CCI finds an enterprise to have contravened the provisions of the Act, any person aggrieved by such anti-competitive conduct may approach the appellate authority, the NCLAT, to seek compensation for the loss suffered on account of such conduct. Although a handful of compensation claims are pending before the NCLAT (illustrated below), a final resolution of a compensation application is yet to be reached.

- MCX Stock Exchange Limited filed a compensation claim against National Stock Exchange (**NSE**), claiming loss suffered as a result of NSE's pricing strategy in the currency derivatives segment.
- Compensation claims have been filed against Ghaziabad Development Authority and Coal India Limited arising out of abuse-of-dominance decisions against them.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The Central Government has the power to exempt any class of enterprise, agreement or practice from the application of the Act (or any of its provisions). While this power is sparingly used, the Central Government has exempted vessel-sharing agreements in the liner shipping industry from the provisions concerning anti-competitive agreements, in respect of carriers of all nationalities operating ships of any nationality from any Indian port. This exemption does not apply to concerted practices involving the fixing of prices, limitation of capacity or sales and the allocation of markets or customers.

In addition, the Act creates the following carve-outs with respect to restrictions in vertical agreements:

- a legitimate holder of intellectual property is allowed to impose vertical restraints that are found to be both 'reasonable' and 'necessary' for protecting the intellectual property right in question; and
- vertical restraints in agreements which exclusively relate to production, supply, distribution or control of goods or provision of services for export of goods from India are not prohibited (since they are unlikely to impact competitive conditions in India).

1.11 Does enforcement vary between industries or businesses?

The CCI's mandate under the Act is to regulate anti-competitive conduct by 'enterprises', 'persons', or their associations. Accordingly, the CCI's inquiries usually concern specific enterprises, as opposed to entire sectors.

This does not, however, preclude the CCI's ability to *de facto* examine sector-level conduct by directing the DG to investigate each enterprise that is involved in 'similar anti-competitive practices'. For instance, in a separate set of cases involving the spare-parts market and the market for in-house sale of syringes by hospitals, the CCI expanded the investigative scope to cover almost every entity concerning those markets *(Vivek Sharma v. Becton Dickinson India Private Limited; see also Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors.(**Autoparts**))*.

More recently, the Delhi High Court (a judicial court) confirmed that the DG itself is empowered to expand its investigative scope to cover other enterprises which may also be engaging in similar anti-competitive practices *(Cadila Healthcare Ltd. & Anr. v. CCI & Ors.)*. Enforcement actions aimed at specific enterprises and/or all enterprises in a given sector follow similar enforcement processes and standards.

As part of its regulatory role, the CCI also carries out market-wide studies in sectors that are strategic or sensitive to the economy. These may culminate in its sectoral findings and non-binding recommendations. For example, last year, the CCI published a policy note titled *Making Markets Work for Affordable Healthcare* which recommended certain practices for public procurement in the pharmaceutical sector. More recently, the CCI has also initiated a study of India's e-commerce market, inviting comments from stakeholders, to understand the state of competition better.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The CCI has, more often than not, asserted its jurisdiction in cases involving enterprises that are subject to the jurisdiction of sector-specific regulators, finding that its jurisdiction does not interfere with those of sectoral regulators. The CCI derives this power from a statutory principle in the Act which confirms that its provisions are in addition to, and not in derogation of, other laws. Along the same lines, a 2016 decision of the Delhi High Court allowed the CCI to proceed with its review of allegations of dominance emanating from exercise of rights for standard essential patents against Ericsson, dismissing Ericsson's plea that the presence of another remedy under the patents legislation would preclude the CCI's jurisdiction over the issue *(Telefonaktiebolaget LM Ericsson v. CCI & Anr.)*.

In the context of the overlapping regulatory jurisdiction, the SCI has clarified that if a sector-specific regulator (in this case, the TRAI) is already deciding certain jurisdictional issues, which are also integral for the CCI to reach a finding, the CCI must defer its inquiry until such issues are settled by the sector-specific regulators *(CCI v. Bharti Airtel Limited & Ors. (**Bharti Airtel**))*.

In some other cases, the CCI has itself chosen to close inquiries where it believed that certain allegations were better addressed by the sector-specific regulators. For example, in a case involving allegations of denial of market access in the supply of electricity, the CCI considered the Central Electricity Regulatory Commission or State Electricity Regulatory Commission to be better suited to address such concerns *(Bajrang Steel and Alloys Pvt. Ltd. v. Western Electricity Supply Company of Orissa;* see also *Achintya Mukherjee v. Loop Telecom Pvt. Ltd & Ors.)*.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The CCI falls within the Ministry of Corporate Affairs of the Government of India. The Government has the power to exempt any class of enterprises or agreements from the application of the Act, issue directions to the CCI on policy issues, and even supersede the CCI if it fails to perform its functions. The Government is also involved in appointment of the CCI's Chairperson and members. The Act does not contemplate any role for the executive in the CCI's substantive review of competition cases, including on vertical restraints or abuse of dominant position.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Given that almost 75% of contravention decisions issued in 2018–19 were cartel-related, the enforcement trend appears to focus on cartel-related conduct, with several decisions arising from leniency applications. In respect of vertical restraints, the CCI tends to interfere only where the enterprise enforcing the vertical restraint has a high market share in the relevant market *(Noida Software Technology Park Ltd. v. Star India Pvt. Ltd. & Ors.)*. In most cases, the CCI closes the inquiry at an initial stage after undertaking a preliminary assessment of whether the alleged vertical restraint causes, or is likely to cause, an appreciable adverse effect on competition (**AAEC**) in India *(Karni Communications Pvt. Ltd. v. Vivo Mobile India Pvt. Ltd. (**Vivo**))*. Where it finds that the market share of the alleged enterprise was not significant or the restraints were objectively justified and there was no evidence of exclusionary conduct, the CCI, more often than not, closes the inquiry at a preliminary stage. Publicly available statistics indicate that while only 25% of the contravention decisions issued by the CCI in 2018–19 related to abuse of dominance, enforcement for abuse of dominance was higher in 2017, at almost 34%.

1.15 Describe any notable case law developments in the past year.

While the CCI has issued a few noteworthy substantive decisions in respect of vertical restraints, including resale price maintenance (**RPM**) *(Vivo; KC Marketing v OPPO Mobiles MU Private Limited (**Oppo**))* (discussed in some detail below), more generally the following two developments were noteworthy:

- The SCI's decisions in *Bharti Airtel* on overlapping regulatory jurisdictions (see response to question 1.12).
- On a constitutional challenge instituted by some of the Original Equipment Manufactuers (**OEMs**) penalised by the CCI in *Autoparts*, the Delhi High Court directed the following changes in the CCI's functioning:
  - A 'judicial member' of the CCI must participate in any adjudicatory hearings.
  - The 'revolving door' concept whereby any members of the CCI could participate in any proceeding at any given point of time was unconstitutional. Only those members who hear a case should decide it.
  - The provision which allows the CCI Chairperson to have a 'casting vote' is unconstitutional.
  - The CCI could expand the scope of inquiry to include other allied issues and parties.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

In all the infringement decisions issued by the CCI, we estimate that only around 3% of the cases relate to vertical restraints. The vast majority of the CCI's decisions to date relate to cartels and abuse of dominance. Decisional practice of the CCI has confirmed that the CCI will interfere in vertical restraints only where the enterprise enforcing the restraint has sufficient market power in the relevant market and there are disproportionate or no objective justifications for the restraints enforced.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

'Agreement' has been widely defined under the Act to *include* any arrangement, understanding or action in concert, whether or not it is formal, in writing or intended to be enforceable by legal proceedings (Section 2(c) of the Act). An agreement is considered to be *vertical* if it is amongst enterprises functioning at different stages or levels of a production chain in different markets in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services (Section 3(4) of the Act).

2.3 What are the laws governing vertical agreements?

The Competition Act is the primary legislation which governs vertical agreements. Although an inclusive list, the Act specifically identifies the following kinds of vertical restraints that are prohibited only if, upon investigation, the CCI is able to establish that they cause, or are likely to cause, an AAEC in India:

- tie-in arrangements: a purchaser of goods is required to purchase any other goods as a condition of purchase;
- exclusive supply agreements: which restrict, in any manner, the purchaser from acquiring or otherwise dealing with the goods of the seller or any person;
- exclusive distribution agreements: which limit, restrict or withhold the supply of goods or allocate any area or market for the disposal or sale of goods;
- refusal to deal: which restricts, or is likely to restrict, by any method, the person or persons from or to whom goods are bought and sold; and
- RPM: any agreement wherein goods are sold on the condition that the resale price shall be the price stipulated by the seller, unless clearly stated that prices lower than those prices may be charged.

While certain sector-specific regulators in India also enforce rules that are aimed towards promoting competition in their respective sectors (see the responses to questions 1.1 and 1.12), the CCI's powers are in addition to, and not in derogation of, other statutory regulators.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

Only the exemptions identified in the response to question 1.10 and 2.11 are applicable to vertical restraints. There are no block exemptions or safe harbour provisions relevant to the analysis of vertical restraints in India.

2.5 What is the analytical framework for assessing vertical agreements?

Vertical restraints in India are assessed by the CCI under the 'rule of reason' framework – *i.e.*, vertical restraints are prohibited only if the CCI, upon an inquiry, concludes that they cause, or are likely to cause, an AAEC in India. An assessment of AAEC involves considering the net impact of certain pro-competitive and anti-competitive factors.

The anti-competitive harms that the CCI is required to examine are:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market; and
- foreclosure of competition by hindering entry into the market.

The pro-competitive benefits that the CCI is required to examine are:

- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services; and
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Inherent in the CCI's assessment of market foreclosure is an analysis of other factors such as market position of the enterprise enforcing the vertical restraint, duration of the restraint, etc. (see response to question 2.8). In its assessment of vertical restraints, the CCI also often considers whether such restrictions are objectively necessitated or justified (see response to question 2.14).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Unlike provisions relating to abuse of dominance, there is no explicit requirement for the CCI to define a relevant market for examining vertical restraints. However, to appropriately examine the market power of the involved enterprises and to consider whether a vertical restraint causes or is likely to cause an AAEC in India, the CCI considers it important to examine allegations of vertical restraints in the context of appropriately defined relevant markets. Indeed, the NCLAT set aside a CCI decision penalising Hyundai for entering into an anti-competitive RPM on the grounds that the CCI failed to, *inter alia*, apply statutory principles for defining a relevant market *(Hyundai Motor India Ltd. v. CCI & Ors.)*.

A relevant market is determined on the basis of a 'relevant product market' (**RePM**) and a 'relevant geographical market' (**ReGM**). An RePM is defined on the basis of products/services that are considered substitutable by consumers, whereas an ReGM is delineated on the basis of homogeneity of competitive conditions across a region. The response to question 3.3 sets out in some detail the applicable statutory principles for defining a relevant market.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

There is no legislative guidance on how the CCI should characterise dual distribution agreements. The CCI's decisional practice, however, acknowledges that buyer-seller agreements may lead to anti-competitive effects if the buyer and seller also compete in a related market. This was most recently tested in a decision relating to cartelisation among battery suppliers, where the CCI characterised a 'mutual comfort clause' in a supply arrangement between a manufacturer-seller (Panasonic) and buyer-reseller (Godrej), which prevented parties from taking steps detrimental to the other's market interest, as a horizontal anti-competitive agreement. For its analysis, the CCI noted that: (a) Godrej was re-selling batteries under a separate brand-name and was viewed by consumers as a competitor in the retail market for batteries; and (b) Godrej (buyer) and

Panasonic (seller) operated on a principal-to-principal basis (*i.e.*, not an agency or joint-venture relationship to justify a commonality of economic interests) *(In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India (**Godrej**))*.

Given the CCI's reasoning and conclusion in the *Godrej* case, it appears that the CCI's examination of dual-distribution agreements would involve not only the relationship, but equally the operative conduct of the parties.

2.8 What is the role of market share in reviewing a vertical agreement?

Assessment of market shares while examining vertical restraints is not a mandatory requirement under the Act. The CCI's decisional practice, however, confirms that it would consider vertical restraints to raise antitrust concerns only when they are enforced by enterprises enjoying a sufficient degree of market power. Indeed, the CCI has, on multiple occasions, rejected allegations of vertical restraints where enterprises' market shares were insignificant. For example, the CCI recently dismissed allegations of RPM against a manufacturer of Vivo mobile handsets in India on account of low (and declining) market shares, low turnover and a high degree of inter-brand competition in the Indian smartphone market *(Tamil Nadu Consumer Products Distributors Association v. Fangs Technology Private Limited (**Fangs Technology**))*. Similarly, the CCI dismissed allegations of exclusivity in distribution agreements because both parties to the agreement had insignificant market shares. The CCI held that this diminished the likelihood of market foreclosure *(Automobiles Dealers Association v. Global Automobiles Limited & Ors.)*.

2.9 What is the role of economic analysis in assessing vertical agreements?

Consistent with the objective of the Act, examination of vertical restraints also follows an 'effects-based' analysis, for which a sound economic analysis is key. The effects-based approach requires establishing an actual or likely appreciable adverse effect on competition in India. This assessment requires balancing any or all of the anti-competitive and efficiency-enhancing economic factors listed in the response to question 2.5, inherent in which is a rigorous economic analysis. Thus far, the CCI's application of these factors has usually focused on factors such as likelihood of price increase *(Fx Enterprise Solutions India Pvt. Ltd. & Anr. v. Hyundai Motor India Ltd. (**Hyundai**))*, presence of other competitors in the market and their market strength *(Ghanshyam Dass Vij v. Bajaj Corp Ltd. & Ors.)*, economic peculiarities of a sector *(Faridabad Industries v. Adani Gas Limited (**Faridabad Industries**))*, actual sales information to assess competitive harm *(Jindal Steel and Power Ltd. v. Steel Authority of India Ltd (SAIL))*, and lack of consumer harm due to high inter-brand competition *(Oppo; Vivo)* (see also *Autoparts*).

2.10 What is the role of efficiencies in analysing vertical agreements?

As the response to question 2.5 explains, the CCI is required to examine pro-competitive effects or efficiencies arising out of vertical restraints. These include: consumer benefits; improvements in production or distribution of goods or provision of services; and promotion of technical, scientific and economic development. Indeed, the CCI acknowledges that rules on vertical restraints must not stifle pro-competitive agreements.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

'Reasonable' restrictions 'necessary' for protecting any intellectual property rights registered under one of the following intellectual property laws in India, are afforded protection from the charging provisions setting out the law for vertical restraints:

- the Copyright Act 1957;
- the Patents Act 1970;
- the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999;
- the Geographical Indications of Goods (Registration and Protection) Act 1999;
- the Designs Act 2000; and
- the Semi-conductor Integrated Circuits Layout-Design Act 2000 (**IPR Exemption**).

The CCI tends to be conservative in extending the benefit of the IPR Exemption to vertical restraints and has clarified that the IPR Exemption would not apply in cases where the holder could protect its IPR by adopting a less restrictive method (see *Autoparts*).

2.12 Does the enforcer have to demonstrate anticompetitive effects?

See response to question 2.5.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

See response to question 2.5.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Apart from the exemptions explained in the responses to questions 1.10 and 2.11 and the analytical framework explained in the response to question 2.5, the CCI often dismisses allegations of vertical restraints where it finds such restraints to be objectively necessitated or justified (for example, by industry-specific concerns). For example, in 2017, the CCI refused to interfere in Hyundai Motor India Limited's objectively justified practice of cancelling its warranties upon installation of unauthorised compressed natural gas kits in its vehicles.

The CCI also recognises the concept of single economic entity doctrine, and does not typically subject agreements between enterprises forming part of the same group to the scrutiny of Section 3 of the Act (which includes the prohibition on vertical restraints). While allowing enterprises the benefit of the single economic doctrine, the CCI is likely to test *de facto* and *de jure* control exercised by a common parent over the management and affairs, including commercial decisions of the related companies.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The CCI has not issued any formal guidelines regarding vertical agreements. The CCI, however, regularly publishes non-binding material in the form of competition compliance manuals, advocacy booklets, FAQs, etc., to which enterprises may refer in order to align their practices with the Act.

2.16 How is resale price maintenance treated under the law?

RPM has been defined to include any agreement where goods are sold on the condition that the resale price shall be the price stipulated by the seller, unless it is clearly stated that prices lower than those prices may be charged. An RPM agreement that causes, or is likely to cause, an AAEC in India is prohibited. As the definition suggests, the Act only prohibits vertical agreements that prescribe a minimum or floor resale price. Fixing a maximum resale price by a supplier is unlikely to raise RPM-related concerns.

Although the CCI has examined a few resale price restrictions, it has reached a finding of infringement in only one instance. In *Hyundai*, the CCI found that Hyundai Motor India Limited's (**HMIL**) prescription of a maximum permissible discount to its dealers stifled intra-brand competition and resulted in higher prices for consumers. The CCI noted that anti-competitive resale price restrictions could be achieved both directly or indirectly, for example, by: fixing the distribution margin; fixing the maximum level of discount; making the grant of rebates or the sharing of promotional costs conditional on adhering to a given price level; linking a resale price to the resale prices of competitors; or using threats, intimidation, warnings, penalties, delay or suspension of deliveries as a means of fixing the prices charged by the buyer. Notably, however, the CCI's decision in *Hyundai* was set aside by the appellate court for failing to follow statutory principles for defining the relevant market and failing to *independently* verify the evidence collected by the DG.

The CCI also recently dismissed allegations against Ola and Uber (two of the largest radio taxi aggregators in India) of fixing resale prices by way of their algorithms. It was alleged that as the algorithms decide the price to be charged by the drivers to riders, drivers do not have any discretion to charge a lower amount. The CCI held that a 'resale' is fundamental to an RPM arrangement and did not find a resale in the allegations against Uber and Ola. Instead, it found that the drivers were agents of Uber and Ola, with the companies offering composite services – characterised by a single transaction between the rider on the one hand and Ola or Uber on the other. It also noted that such dynamic pricing often results in prices lower than those charged by independent taxi drivers, which also shows that there is no fixed floor price as such. Together, the CCI held that these factors precluded any RPM concerns *(Samir Agrawal v. ANI Technologies Pvt. Ltd. & Ors. (**Samir Agarwal**))*.

Contrary to the CCI's decision in *Samir Agarwal,* the CCI, while examining RPM allegations instituted by one of India's major e-commerce marketplace platforms against a kitchen appliance-seller on its website, decided that although digital marketplaces facilitate transactions between the end-customers and the sellers (as opposed to being in a traditional buying-selling relationship), their relationship would satisfy the essentials of 'resale' in an RPM claim.

2.17 How do enforcers and courts examine exclusive dealing claims?

The Act deals with the following kinds of exclusivity-related vertical restraints: (a) exclusive supply agreements; and (b) exclusive distribution agreements.

Exclusive supply agreements refer to agreements that restrict the purchaser from acquiring or otherwise dealing with the goods of the seller or any other person, and are prohibited only if they cause, or are likely to cause, an AAEC in India. *Autoparts*, for example, involved allegations against OEMs for restricting their authorised dealers from procuring spare parts from alternative sources. Finding that OEMs wielded significant market power in their respective after-markets for supply of spare parts (a spare part for one OEM was found not to be substitutable with that of another, making each OEM dominant in the supply of their respective spare parts), the CCI found this restriction of prohibiting over-the-counter sales to have foreclosed independent repairers and other service providers from the market for automobile repair services. This restriction was assessed under provisions prohibiting 'refusal to deal' and 'exclusive supply agreements'.

In 2011, the CCI dismissed allegations against an exclusive supply agreement that required the Indian Railways to procure its supplies of rails exclusively from Steel Authority of India Limited, finding such restrictions to be justified on the basis of quality and safety requirements and the absence of an equally viable competitor *(Jindal Steel and Power Ltd. v. Steel Authority of India Ltd.)*.

In *Hyundai*, the CCI assessed a circular issued by HMIL to its dealers directing them to purchase engine oil from only two designated vendors – Indian Oil Corporation Limited and Shell Oil Company. This, according to the CCI, limited dealers' choice in procuring engine oil from alternate suppliers. The CCI, however, found this restriction to be objectively justifiable, and noted that since the customers could in fact procure engine oil from other suppliers, there was no risk of AAEC.

An exclusive distribution agreement, on the other hand, refers to agreements that limit, restrict or withhold the supply of goods or allocate any area, market or customers for the disposal or sale of goods. These agreements, like all vertical restraints, are prohibited if they cause, or are likely to cause, an AAEC in India. For example, in a recent case, the CCI did not find territorial restrictions in the distribution of mobile phones to be problematic because there was no restriction on (a) passive sales by dealers, and (b) dealers from dealing with competing products in and outside the designated region *(Oppo; Vivo)*.

Similarly, in *Fangs Technology*, the CCI did not identify any concerns with a clause that prevented distributors from making sales to corporate customers without prior intimation or written consent of the seller. The CCI appreciated that this restriction was necessary to ensure genuineness of the corporate sales (rather than to completely prevent them).

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

A tie-in (or bundling) arrangement that causes, or is likely to cause, an AAEC in India is prohibited. See question 2.3 for the definition of a tie-in arrangement. The CCI's decisional practice lays down the following essentials for establishing an anti-competitive tie-in or bundling arrangement *(Sonam Sharma v. Apple Inc. (**Sonam Sharma**)):*

- the presence of two separate products or services capable of being tied;
- the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and
- the tying arrangement must affect a substantial amount of commerce.

In *Vishal Pande v. Honda Motorcycles and Scooters India Pvt. Ltd. (**Honda Motorcycles**)*, the CCI has initiated an investigation into a tie-in arrangement, whereby a certain advertising cost is debited from the dealers' accounts on the basis of the number of vehicles dispatched to them. The CCI has suggested that this could create entry barriers for other advertising agencies.

In 2017, the CCI found Hyundai's practice of cancelling warranties for failing to comply with an obligation that required its dealers to fit Hyundai's CNG-compliant cars with CNG kits from a Hyundai-prescribed agency (pegged a tie-in obligation) as objectively justified for maintaining quality *(Hyundai)*.

2.19 How do enforcers and courts examine price discrimination claims?

Although price discrimination concerns are statutorily addressed by the provisions relating to abuse of dominant position (see response to question 3.5), a recent decision of the CCI characterised 'price discrimination' as a vertical restraint (*i.e.*, constructive refusal to deal). Here, the CCI decided to investigate Star India and Sony Pictures Network India for allegedly offering channels to select distributors at higher prices and on more onerous commercial terms, as opposed to other distributors, who were offered channels on better commercial terms *(Noida Software Technology Park Limited v. Star India Private Limited)*.

The CCI's substantive tests for establishing price discrimination under the rules relating to vertical restraint are likely to mirror its past assessments under the provisions relating to abuse of dominance – *i.e.*, the CCI will likely assess whether there is (a) dissimilar prices applied to equivalent transaction; and (b) harm or likely harm to competition in the market *(Schott Glass India Pvt. Ltd. & Anr. v. CCI & Ors. (**Schott Appeal**))*. Since rules relating to vertical restraints expressly require demonstrating AAEC in India, the burden of demonstrating actual or likely competitive harm would likely be higher in such cases.

2.20 How do enforcers and courts examine loyalty discount claims?

There are no specific provisions under the Act for examining loyalty discount schemes. Loyalty discount schemes may, however, be examined as constructive refusal to deal (under the rules relating to vertical restraint) or unfair or discriminatory prices and conditions or denial of market access (under the rules relating to abuse by dominant firms) (see responses to questions 3.5 and 3.16).

Generally, the CCI does not consider discounts which are consistently applied by a seller on the basis of objective parameters to be problematic (see, for example, *Pawan Kumar Agarwal v. Rashtriya Ispat Nigam Ltd.*). In another decision, the CCI concluded that incentive schemes, which provided incentives to distributors for meeting sales requirements of the high-demand products *versus* low-demand products, were justified *(ESYS Information Technologies Pvt. Ltd. v. Intel Corporation & Ors. (**Intel**))*. In a 2014 decision, the appellate tribunal clarified that volume-based discounts are unlikely to be considered discriminatory so long as differential discounts were not being offered to similarly placed parties *(Schott Glass India Pvt. Ltd. v. Competition Commission of India & Ors. (**Schott CCI**))*. Apart from this, the CCI has also resisted interfering in discount policies that are instrumental in deriving operational efficiencies or meeting competition on the merits *(Dhruv Suri v. Mundra Port & Special Economic Zone Ltd. (**Dhruv Suri**); Sri Rama Agency v. Mondelez India Foods Private Limited (**Mondelez**))*.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

There are no specific provisions under the Act for examining loyalty discount schemes. Multi-product or bundled discount claims can be examined as a constructive refusal to deal (under the rules relating to vertical restraint) or the imposition of unfair or discriminatory prices or conditions in the sale or purchase of goods or services, denial of market access, making conclusion of contracts subject to supplementary obligations, or leveraging (under the rules relating to abuse by dominant firms).

For example, in the abuse-of-dominance context, the CCI has examined the practice of making the sale of 'amber tubes' contingent upon the sale of 'clear tubes' from a glass manufacturer in order to successfully avail of discounts offered by the seller. The CCI found this 'bundled' discount scheme to be abusive, as the glass manufacturer essentially 'tied' both products with a view to protecting its dominance in the upstream market and maximised its revenues by selling two products together by providing bundled discounts *(Schott CCI)*. However, in appeal, the appellate tribunal disagreed with the CCI's observations, *inter alia* finding that the products were not entirely different, and that the infringing enterprise had no economic incentive to make the sale of amber tubes contingent on the sale of clear tubes *(Schott Appeal)*.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Apart from the types of vertical restraints addressed above, the Act also identifies '*refusal to deal*' as a vertical restraint, and prohibits such agreements if they cause an AAEC in India. See response to question 2.3. A refusal to deal is prohibited if it causes or is likely to cause an AAEC in India.

2.23 How are MFNs treated under the law?

To the best of our knowledge, no decision of the CCI addresses a most-favoured-nation restriction. Like all vertical restraints, most-favoured-nation restrictions are likely to be examined by the CCI under the 'rule of reason' framework. Therefore, absent market power, vertical restraints are unlikely to raise suspicion under the Act. The CCI has consistently acknowledged that there is ample competition between online platforms, and no one platform could be said to be in a dominant position. In *Jasper Infotech Private Limited v. KAFF Appliances India Private Limited*, while assessing whether vertical restraints enforced through online platforms could be covered under the ambit of the Act, the CCI took note of the international jurisprudence where competition authorities have considered restraints enforced through online platforms, such as those pertaining to most-favoured-nation restrictions.

2.24 Describe any notable case developments concerning vertical merger analysis.

Last year, the CCI reviewed the acquisition of Monsanto Company (**Monsanto**) by Bayer Aktiengesellschaft (**Bayer**). The CCI noted that Monsanto had a market share of 95–100% in the upstream market for licensing of Bt cotton traits in India, which made the downstream seed companies fully dependent on Monsanto. Moreover, Monsanto was itself present in the downstream market. Given that Bayer was Monsanto's primary competitor with competing Bt cotton technology, the CCI found their combination to result in input foreclosure; any potential entrant shall have to enter both the downstream and the upstream level in order to compete effectively in either market. Accordingly, the CCI directed a divestiture of Bayer's broadacre crop seeds and traits business, which included its cotton seeds business.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The Act prohibits certain types of abusive conduct, as explained in response to question 3.5 below. In all the infringement decisions issued by the CCI, we estimate that a little over 30% of the cases relate to abuse of dominant position. Although the CCI's primary enforcement focus has been cartel-related conduct, the CCI has issued a significant number of final decisions relating to unilateral conduct and several entities have been penalised. Once an enterprise is found dominant in a relevant market, the CCI will scrutinise the alleged conduct closely to determine whether there exists a *prima facie* concern. The chances of the CCI concluding the existence of a *prima facie* concern increase once the enterprise is found dominant. For example, while the CCI initiated an investigation into the practice of requiring motorcycle servicing to be availed of exclusively from a dealer/dealership network in the case of a dominant enterprise *(Honda Motorcycles)*, the CCI did not initiate an investigation in the case of a competing enterprise *(Shrikant Kale v. Suzuki Motorcycles India Pvt. Ltd.)*.

3.2 What are the laws governing dominant firms?

The Act regulates the conduct of dominant firms. See our responses to questions 1.11 and 1.12 for the relevance of sector regulators in promoting competition in their respective sectors.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The first step for examining cases of abuse of dominant position is to delineate an accurate relevant market. See the response to question 2.6 for key principles applicable for relevant market definitions. Moreover, the Act sets out certain demand-side and supply-side substitutability factors that the CCI shall consider for defining an RePM (e.g., physical characteristics or end-use of goods, prices, consumer preferences, classification of industrial products, existence of specialised producers, etc.) and ReGM (e.g., regulatory trade barriers, local specification requirements, transport costs, consumer preferences, national procurement policies, etc.).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

See response to question 3.7.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Dominance is not *per se* prohibited under the Act. Only where an enterprise is found to be dominant in a relevant market does the CCI consider whether its conduct is abusive in terms of the following types of behaviour:

a. imposing unfair or discriminatory (a) conditions in the purchase or sale of goods or services, or (b) price in purchase or sale (including predatory price) of goods and services;

b. limiting or restricting (a) production of goods or provision of services or market, or (b) technical or scientific development relating to goods or service to the prejudice of consumers;

c. engaging in practice(s) resulting in denial of market access in any manner;

d. making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts; or

e. using its dominant position in one relevant market to enter into or protect another relevant market.

3.6 What is the role of economic analysis in assessing market dominance?

A 'dominant position' has been defined as a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affects its competitors or consumers or the relevant market in its favour. The Act also sets out certain factors that the CCI must consider while assessing whether an enterprise enjoys a dominant position, which include market share, size and resources, economic power of the enterprise including commercial advantages over competitors, vertical integration, dependence of consumers, entry barriers, market structure and size, size and importance of competitors, etc. For example, to determine WhatsApp's dominance in the market for instant messaging services through consumer communication apps, the CCI relied on the number of active users in India and the number of installations in India *(Vinod Kumar Gupta v. WhatsApp Inc. (**WhatsApp**))*.

3.7 What is the role of market share in assessing market dominance?

While market share is indeed an important 'initial indication' for adjudging an enterprise's market power, the CCI typically considers market shares in the context of the other factors identified in the response to question 3.6.

There is no statutory 'bright line' market share threshold above which an entity is presumed to be dominant; the CCI undertakes a case-by-case assessment on the basis of sector-specific considerations such as nature of competition, technology and innovation dimensions, competitive strategies of firms, etc.

For example, the CCI has consistently refused to find Uber or Ola, India's two key cab aggregation enterprises, to be independently dominant in any of the cities they operate in, despite the fact that their individual market shares are as high as 50% in certain cities in which they operate. Clarifying that the Act does not recognise or address concerns of joint dominance, the CCI recognised that there was strong competition between Uber and Ola. It noted that undertakings in hi-tech markets often have high market shares in the early years of introduction that are typically short-lived due to market fluctuations.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The only statutorily available defence to an abuse-of-dominance allegation is the '*meet the competition*' defence. This allows dominant firms to defend claims of discriminatory prices or conditions imposed by them to meet competition (e.g., conduct adopted in response to the competitors' conduct). This defence was successfully applied in a case involving allegations of price predation against a port service provider for allowing rebates to shipping lines, *inter alia* because the discount was justified in view of stiff competition from competing port operators *(Dhruv Suri).* In another case, the CCI acknowledged that an alleged imposition of unfair or discriminatory prices and conditions will not be considered illegal if it is adopted to meet the competition *(Ministry of Agriculture and Farmers Welfare and Ors. v. Mahyco Monsanto Biotech (India) Ltd. and Ors.)*.

Apart from this, dominant firms have also successfully defended allegations of abuse by objectively justifying their conduct on the basis of objective justifications or necessities. In fact, decisional practice of the appellate tribunal suggests that the CCI is required to consider the commercial rationale offered by firms before finding conduct to be unfair *(India Trade Promotion Organisation v. CCI & Ors.)*. Some of the cases where this defence has been successfully applied include: (a) in the sports sector, the CCI found certain restrictive conditions to be inherent and proportionate to their objectives, and noted that they cannot be condemned on a *per se* basis unless there is an instance where these are applied in a disproportionate manner; (b) in *Faridabad Industries,* the CCI held that allegedly restrictive arrangements are necessitated by the extremely inter-dependent and inter-linked nature of the business; and (c) in *Gujarat Industries Power Company Ltd. v. GAIL (India) Ltd.*, the CCI held that alleged abusive practices of imposing 'take-or-pay' obligations (which required natural gas customers to pay for all the natural gas booked, despite a difference in actual consumption and booking value) were justified for safeguarding commercial interests.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Unlike the rules relating to vertical restraints, the abuse-of-dominance provisions of the Act do not statutorily require actual or likely anti-competitive effects to be proven, or efficiencies to be considered, while analysing dominant firms' conduct. While there have been certain cases that have adopted an object-based approach (e.g., *MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors.*, *Belaire Owners' Association v. DLF Ltd. & Ors.*), recent decisional practice of the CCI seems to examine anti-competitive effects arising out of dominant firm conduct, and equally, examine any efficiencies arising out of such conduct.

For example, the CCI has observed that offering rebates in order to derive operational efficiencies and awarding discounts on dealers' performance is not anti-competitive (see *Dhruv Suri*, *Mondelez*).

3.10 Do the governing laws apply to "collective" dominance?

The Act does not recognise the concept of 'collective' dominance. The provisions relating to abusive conduct only extends to individual enterprises or groups. On this basis, the CCI has rejected a series of allegations of abuse of '*collective*' dominance (e.g., *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd & Ors. (**Meru**)*, *Fasttrack Call Cabs Pvt. Ltd. & Anr. v. ANI Technologies Pvt. Ltd.*, *Arjun v. Viacom 18 & Ors.*, *Dish TV India Ltd. v. Hathway Cable and Datacom Ltd. & Ors.*).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The Act does not distinguish between dominant purchasers and dominant sellers or suppliers, and the rules applicable to dominant firms apply to both dominant purchasers and dominant sellers. For example, the CCI found Coal India Limited (**CIL**) to be the dominant purchaser in the market for 'services relating to the collection, preparation and transportation of coal samples'. The CCI dismissed allegations of unfair pre-qualification requirements in tenders floated by CIL for scientific and technical services in the collection, preparation and transport of coal samples, finding that a purchaser's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it, unless there exist rare competition concerns where a dominant buyer exercises the option in an anti-competitive manner.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

See response to question 3.5.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The general prohibition on abuse of dominance under the Act applies equally to IP-related business practices as it would to any other conduct. Statutorily, the carve-out available under the rules relating to vertical restraints (explained in the response to question 2.11) does not extend to unilateral conduct, thereby exposing intellectual property holders to the risk of scrutiny under the abuse-of-dominance provisions. For example, in 2013, the CCI preliminarily found Ericsson to be a dominant player in Standard Essential Patents (**SEPs**) for GSM- and CDMA-compliant mobile phones; and directed the DG to investigate whether Ericsson had abused its dominant position by charging excessive royalties which contradict the FRAND obligations, trying its SEPs with other patents, etc.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

To our knowledge, the CCI has not considered 'direct effects' evidence of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

The CCI's analysis of platform dominance typically follows an analysis of similar economic factors relevant for the CCI's assessment of dominance (see response to question 3.6). Apart from this, the CCI has increasingly relied on network effects and counter-effects of multi-homing in platform markets to examine dominance of platforms. For example, in a decision involving abuse-of-dominance allegations against Ola (a major cab aggregation platform in India), the CCI considered Ola to be a non-dominant player, despite its high market shares. Although the CCI acknowledged the importance of network effects in establishing dominance, it noted, among other things, that multi-homing by driver partners and customers could constrain the power of platforms to act independently of market forces *(Meru)*. However, while analysing Google's dominance in the market of online general web search services and online search advertising, the CCI overlooked evidence of user/advertiser multi-homing (constraint exerted by advertisers switching platforms), and instead considered market shares, technical advantages and barriers of entry to assess dominance *(Matrimony.com Ltd. v. Google LLC & Ors. (**Google**))*.

In 2017, the CCI also refused to investigate WhatsApp's privacy policies and zero-pricing policies. Although the CCI considered WhatsApp to be a dominant player in the market for instant messaging services using consumer communication apps through smartphones in India, it relied on, *inter alia*, extensive multi-homing to reach its finding of no contravention *(WhatsApp)*.

The CCI also recently held that free services qualify for 'sale' or 'purchase' (essential for applicability of certain provisions of the Act) where users of such services offer indirect consideration in the form of their attention, or allow the platform to collect their information *(Google)*.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Claims of refusal to deal are addressed by the Act's provision relating to vertical restraints. Refusal to deal refers to an agreement which restricts, or is likely to restrict, by any method, the person or persons from or to whom goods are bought and sold; it is prohibited if it causes, or is likely to cause, an AAEC in India.

Claims of a similar nature against dominant firms could be examined by the as 'denial of market access'. The CCI has acknowledged that unlawful denial of market access requires satisfaction of the following elements: (a) there should an indulgence in a practice of denial of market access by a dominant firm; and (b) the conduct should have resulted in a denial of market access, *i.e.*, anti-competitive effect or distortion in the market in which denial has taken place *(XYZ v. REC Power Distribution Company Limited)*.

The SCI recently clarified that denial of market access need not necessarily be limited to foreclosure of competitors (and, implicitly, could also be in vertically related markets) *(CCI v. Fastway Transmission Pvt. Ltd and Ors.)*.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

All the important points relating to the assessment of vertical restraints and abuse of dominant position in India have been covered above.

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The authors would like to thank Mohith Gauri for his invaluable contribution to the writing of this chapter. Mohith is an associate in the competition law team at AZB & Partners, Delhi. Mohith has worked in the competition practice in India since 2018. Mohith's experience includes advising and representing leading companies before the Competition Commission of India, National Company Law Appellate Tribunal, Delhi High Court and the Supreme Court, in antitrust investigations (cartels and abuses of dominance) including leniency cases, in a wide range of industries, including the consumer batteries, flashlights, broadcasting services, bearings, printing, conveyor belts, autoparts, financial institutions, and real estate industries. Mohith completed a B.S.L. LL.B. from ILS Law College, Pune in 2018.

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Hemangini is a partner at the competition practice at AZB & Partners, New Delhi office. She has advised and represented clients on complex anti-trust and merger control issues across several sectors, including pharmaceuticals, cement, automobiles, private equity funds, information technology, media, entertainment and airlines. Recent merger control assignments include representing Tata Steel in securing the first CCI approval under the Insolvency and Bankruptcy Code (**IBC**); GSK Consumer Healthcare in its merger with Unilever's HUL; and Softbank's acquisition of shares in Dehlivery. On the behavioural side, Hemangini has represented a number of clients before the CCI and the appellate courts, including Lafarge SA and GSK Pharmaceuticals in cartel proceedings; and Google, Warner Brothers, Tata Motors and Honda Motorcycles in abuse-of-dominance proceedings. She also regularly conducts compliance training sessions and contributes to reputed competition law journals, and has been involved in representing the firm in contributing towards the Competition Law Review Committee's working group recommendation report on digital and new-age markets and anti-competitive agreements.

Hemangini graduated from Gujarat National Law University, Gandhinagar in 2010 with a B.A. LL.B. (Hons.). She completed her LL.M. in Law, Science and Technology from Stanford Law School in 2017 with Honors in subjects such as Advanced Antitrust and Network Neutrality. Hemangini has also cleared the New York Bar Examination and is currently awaiting formal admission to the New York Bar.

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Aakarsh Narula is a senior associate in the competition law team at AZB & Partners, Delhi. Aakarsh represents clients in various antitrust enquiries and merger control filings before the Competition Commission of India and also advises on, among other things, certain jurisdictional challenges before the Delhi High Court. Aakarsh's antitrust experience spans a wide range of sectors such as online search and advertising, shipping, steel, telecommunication, logistics, digital payments, banking and finance, and pharmaceutical.

Aakarsh takes a strong interest in public policy and has acted as a research fellow as part of the Legislative Assistant to Member of Parliament (**LAMP**) Fellowship. As a LAMP Fellow, Aakarsh was responsible for preparing detailed parliamentary interventions for a member of the lower house of the Indian parliament. As part of AZB's competition law team, he continues to be associated with drafting competition law policy recommendations to various organisations, including Government divisions. Aakarsh earned his LL.B. from Campus Law Centre, University of Delhi in 2014, and a B.Com. (Hons) from the University of Delhi in 2011.

AZB & PARTNERS
ADVOCATES & SOLICITORS

AZB & Partners (**AZB**) is one of the prominent law firms in India. Founded in 2004 with a clear purpose to provide reliable, practical and full-service advice to clients, across all sectors, the Firm brought together the practices of CZB & Partners in Mumbai and Bangalore and Ajay Bahl & Company in Delhi. Having grown steadily since its inception, AZB now has offices across Mumbai, Delhi, Bangalore, and Pune. We have an accomplished and driven team of 430+ lawyers committed to delivering best-in-class legal solutions to help clients achieve their objectives.

The Competition Team (**Team**) at AZB is a market-leading competition practice in India. The Team offers unrivalled expertise across the entire spectrum of competition law matters, including merger control, anti-competitive agreements, abuse of dominance, competition compliance and competition litigation. The Team has been involved in several landmark cases and merger filings before the Competition Commission of India (**CCI**), including the first cartel case and the first merger filing in India. By drawing on the Firm's wide-ranging expertise in mergers and acquisitions, corporate finance, technology licensing, complex litigation, intellectual property and regulatory matters, our competition lawyers are able to offer a seamless service to safeguard our clients' commercial interests in the most efficient manner. Our clients include a number of multinational corporations and domestic conglomerates across various industries, including information technology, life sciences, media and telecommunications, energy and infrastructure, aviation and retail.

The Team undertakes advocacy efforts and interacts with various stakeholders in the competition law regime, and routinely engages with the CCI, industry associations and the International Bar Association. The team has also participated in the consultation process leading up to the framing of merger control regulations under the Competition Act, and has been part of the depositions before the Parliamentary Standing Committee on the amendments to the Indian Competition Act.

Italy

DDPV Studio Legale

Luciano Vasques

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Authority in charge is the Italian Antitrust Authority ("**IAA**") (*Autorità Garante della Concorrenza e del Mercato*).

Address: Piazza Verdi 6a, 00198 Rome, Italy. Website: www.agcm.it. Tel: +39 06 85 82 11. Fax: +39 06 85 82 12 56.

1.2 What investigative powers do the responsible competition authorities have?

The IAA may conduct dawn raids at the headquarters of the investigated company or even at the domicile of the company's directors (with the permission of a court). The IAA is also entitled to request information from the investigated companies and entities, which could be useful for the IAA's investigation.

During the dawn raids, the IAA can make copies of all the documents that are useful for the investigation, including emails and personal documents that are in the place where the dawn raid is conducted.

The Italian Antitrust Law (Law n° 287/90 – "**IAL**") provides a fine for an undertaking (and physical person) which: i) refuses to provide information required by the IAA; or ii) provides false or misleading information to the IAA.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The IAA normally, but not every time, initiates an in-depth investigation at the same time as the dawn raid. The decision to initiate an investigation is made public by the IAA via the IAA's Bulletin (the "**Bulletin**") and the IAA's website after a few days. Within 30 days of becoming aware of the decision to open an investigation, non-investigated entities may request to participate in the IAA proceedings if they are interested in the investigation.

After the IAA's decision to open an investigation, the parties to the proceedings (the "**Parties**") have the right to access non-confidential documents contained in the file of the proceedings. They also have the right to be heard by the IAA.

During the investigation, the Parties are entitled to submit memoranda.

At the end of the investigation phase (normally 12–16 months from the opening of the investigation), the IAA issues statements of objections (*contestazione delle risultanze istruttorie* – "**SO**"), and the Parties may reply to the SOs with a final defensive memorandum within a time limit set by the IAA.

After the SOs have been notified, the IAA allows the Parties to have access to documents from the file of the proceedings that are classified as confidential, which the IAA considers useful for establishing proof of antitrust infringements.

After the Parties have filed the final memos, the Parties may request to be heard by the IAA in a final hearing. After the final hearing, the IAA issues the final decision, taking into account the defences of the investigated Parties and the evaluation of non-investigated Parties which have been allowed to participate in the proceedings (for example, complainants).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the event that the IAA ascertains an infringement of the antitrust law (cartels, concerted practices, abuses of dominance), it may impose a fine of up to 10% of the total turnover generated in the preceding business year on the undertaking considered liable for the antitrust law infringement.

If the IAA ascertains an antitrust infringement, the IAA orders the Parties to bring the anti-competitive conduct to an end. In its final decision, the IAA could also order the Parties to adopt measures aimed at restoring conditions of effective competition in the affected market(s) within a specific period, as well as to report on their progress in this respect.

In urgent cases, where there is a risk of serious and irreparable harm to competition and a cursory examination reveals the probable existence of an infringement, the IAA could order interim measures before the issuance of the final decision.

In the event that antitrust infringement results in a violation of criminal law (*e.g.* bid-rigging), the IAA is obliged to report the facts to the prosecution office (*Procura della Repubblica*).

1.5 How are those remedies determined and/or calculated?

The IAA recently adopted new guidelines on the calculation of antitrust fines (IAA decision of 22 October 2014, n° 25152 – the "**Notice**"). The Notice is quite similar to the European Union ("**EU**") Commission Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation (EC) No. 1/2003 (*OJ*, C, 210, of September 2016).

On the basis of the Notice provisions, the fine is calculated taking into consideration the value of the undertaking's sales in the affected market during the last full year of its participation in the infringement. A percentage of up to 30% of this value is considered, depending on the gravity of the infringement (in the case of cartels, the percentage cannot be lower than 15%). The amount resulting from applying this percentage to the value of sales is multiplied by the number of years of participation in the infringement. The IAA can also decide to include in this basic amount an additional sum of between 15% and 25% of the value of sales in the case that there have been particularly serious restrictions of competition (a so-called "**entry fee**"). The Guidelines provide for the adjustment of the basic amount in consideration of certain aggravating or mitigating circumstances. The fine could be decreased by up to 50% if the undertaking provides decisive information concerning a distinct infringement of competition rules. The final amount of the fine cannot exceed 10% of the total turnover achieved in the last financial year preceding the adoption of the final IAA decision.

In a recent case, the IAA imposed a fine of up to 20% of the turnover, considering that the investigated company had committed two different infringements (price-fixing and bid-rigging) ascertained in the same IAA decision (case n° I/806, decision of 13 February 2019). This decision is under Court review.

Several concerns emerged after the implementation of the Notice. In particular, it gives rise to serious discrimination in the calculation of fines between single-product and multi-product companies. Several commentators have also highlighted that the Notice, in fact, does not encourage the Parties to submit commitments and/or compliance programmes during the investigation, given that the calculation criteria of the Notice do not allow an effective fine reduction.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

In the context of the Italian antitrust procedure (as well as the European one), both structural and behavioural commitments are allowed. The submission of commitments could lead to the closure of the investigation without the imposition of any fine.

The Parties can submit commitments to the IAA within three months from the decision to open the investigation.

Commitments that are not manifestly inadequate are published on the IAA website and on the Bulletin. Third parties are entitled to submit comments.

The IAA could also conduct a market test (for example, the IAA could issue a request for information to third parties). At the completion of the market test, the Parties may amend the commitments proposed, taking into consideration the market test results.

After assessing the suitability of the commitments, the IAA can make them binding on the undertakings concerned and close the investigation without ascertaining any infringement and without imposing any fine. The commitment decisions are published on the IAA's website and on the Bulletin.

In the past, the IAA has closed investigations with commitments, even in cases of serious antitrust infringements. However, in recent years, the IAA has changed its approach, considering that an excessive use of commitment tools for serious antitrust infringements may undermine the antitrust law enforcement (and also discourage leniency). Since then, the IAA has ruled that commitments cannot lead to the closure of the investigation without any fine in the case of hard-core infringements.

However, with regard to vertical agreements, the IAA has recently accepted commitments (please see question 2.4) and has not fined an undertaking involved in a complex case of vertical agreements affecting prices and other hard-core restriction clauses.

For a reduction of a fine, the IAA could also consider commitments (for example, a compliance programme) filed during the proceedings. However, in the case of hard-core restrictions, the fine calculation mechanisms of the Notice could *de facto* impede a real fine reduction.

On 25 September 2018, the IAA has adopted **Guidelines on antitrust compliance** to provide undertakings with guidance on: i) the definition of the content of the compliance programme; ii) the request for an assessment of the programme for the purposes of awarding possible mitigation; and iii) the criteria that the Authority intends to adopt in its assessment for the purposes of awarding mitigation.

Compliance programmes adopted before the opening of proceedings may qualify for mitigation of up to:

- 15% for adequate compliance programmes that have worked effectively to enable the prompt detection and interruption of the infringement before the opening of proceedings. In cases eligible for leniency, such a reduction may be granted only if the undertaking has submitted a leniency application.
- 10% for programmes that are not manifestly inadequate, provided that the undertaking adequately amends the programme and begins its implementation after the opening of proceedings (and within six months from the opening of proceedings).
- 5% for programmes that are manifestly inadequate, only if the undertaking introduces substantial changes to the programme after the opening of proceedings (and within six months from the opening of proceedings).

Compliance programmes adopted *ex novo*, after the opening of proceedings, may qualify for a reduction of the fine up to 5%.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

IAA decisions can be appealed before the Administrative Tribunal (*Tribunale amministrativo regionale del Lazio* – "**TAR**"). TAR judicial reviews concern the coherence and logic of the reasoning of the IAA's decision, the adoption of sufficient probative standards to prove antitrust infringement, and the balance in the imposition of fines. The TAR does not have a competence of merit, but it could heavily review IAA decisions. The TAR may recall sanctions imposed by the IAA and may annul a decision of the IAA if it is illogical ("*eccesso di potere*") or violates the law.

The parties can also request interim measures to the TAR. Interim measures requests are usually decided by the TAR in one to three months from the submission of the request. The TAR's interim measures can be appealed before the second instance administrative court (*Consiglio di Stato* – "**CdS**").

1.8 What is the appeals process?

Undertakings may appeal the decisions of the IAA before the TAR within 60 days from notification of the final decision. IAA decisions can be also appealed before the President of the Republic (*Ricorso Straordinario al Presidente della Repubblica* – "**PR**") within 120 days from notification of the final decision. It is also possible to appeal IAA decisions that do not ascertain any breach of the antitrust law (in the latter case, the complainants or entities that suffered damages from an alleged antitrust violation that the IAA has not ascertained may appeal the IAA decision (*indicare decisione TAR*)).

The TAR and PR decisions can be appealed before the CdS. Judgments issued by the CdS can be appealed, in a few rare circumstances, before the Supreme Court (*Corte di Cassazione*) under article 110 of the *Codice Processo Amministrativo* ("**CPA**"), and to the CdS under article 106 CPA and article 396 of the Italian Civil Code of Procedure (*revocazione*).

The President of the TAR has stated that in the period from 2016 to April 2019, the TAR totally annulled 40% and partially annulled 30% of the IAA's decisions on antitrust cases (see https://www.aaiantitrustconference.it/gallery).

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

While the IAA (public enforcement) ascertains antitrust infringements and imposes fines (to be paid to the State), the civil courts (private enforcement) primarily seek to ascertain antitrust infringements for the purpose of restoring the damage allegedly suffered by the plaintiff. It should be noted that civil proceedings do not provide for punitive damages. The civil court does not have any power to impose fines for antitrust infringement.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The IAA has adopted soft law, which provides a leniency programme consistent with Community law and principles. With regard to exceptions to the principles of free competition, the Community principles relating to *de minimis* as well as exemption provided for at Community level are applied in Italy. Hard-core restrictions normally cannot benefit from any exemption.

1.11 Does enforcement vary between industries or businesses?

No; it is possible that a particular feature of the market may affect the IAA market analysis, but there are no rules that regulate separately the power of the IAA to enforce antitrust law across particular industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

It is common for regulation, especially in sectors such as post, energy and telecommunications, to have a direct impact on the structure of the market; thus the IAA is required to carry out a careful analysis of the regulation to ascertain any violation of antitrust law. Sectoral regulation cannot, however, prevent or otherwise limit public antitrust enforcement, even in highly regulated industries.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The IAA is an authority independent from political power and from the government; any interference that the government should exert on the IAA would be unlawful.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The IAA has prioritised its interventions in the health sector and, in particular, in industries related to products or services purchased by the State, in order to avoid abusive or collusive behaviours that in fact cause an increase in public expenditure. The IAA is focusing its attention on pharmaceutical businesses, as well as on new network technology businesses. The IAA is also focusing its attention on big data issues, and on matters relating to the sharing economy.

1.15 Describe any notable case law developments in the past year.

Please refer to the cases outlined in the section below.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The approach of the IAA with regard to vertical agreements has been quite conservative over the past few years. Pursuant to article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and article 2 IAL, investigation statistics show that only in a few cases did the IAA open an investigation on vertical agreements. This IAA approach is based on the view that vertical agreements are less harmful to competition than horizontal ones, especially if the vertically integrated undertaking does not have market power and/or a dominant position, or when similar vertical agreements are not being used by a number of competing companies, with the exclusion of possible concerns of horizontal collusion. The IAA is also aware of issues of protection of distribution systems from free-riding.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

A vertical agreement concerns companies operating at different stages of the production and distribution phases. It does not exclude competing undertakings from also being considered, in particular if the agreement covers different stages of production (a producer and a distributor, a producer of an end product and a company which produces raw material, etc.) if one of the two undertakings is vertically integrated.

The IAA's vertical agreement investigations were related to distribution agreements and contractual restrictions. Several decisions of the IAA (and of the Italian courts) stated that it is not necessary to have a formal agreement for an infringement of article 2 IAL or article 101 TFEU; however, all the IAA vertical restraint cases are related to agreements between companies which operate at different stages of the production and distribution phases.

2.3 What are the laws governing vertical agreements?

Law n° 287 of 10 October 1990 ("**IAL**") provides the main Italian antitrust rules. Article 2 IAL prohibits any form of collusion (that is, agreements between undertakings, concerted practices or decisions by associations of undertakings) that has as its object or effect the prevention, restriction or distortion of competition within the national market, or a substantial part of it, including conduct such as price-fixing, output limitation, market-sharing and discrimination among trading partners.

Article 1.4 IAL provides that IAL substantive provisions must be interpreted in accordance with well-established EU antitrust principles. The IAA applies the Commission Regulation 330/2010 (the "**Vertical Regulation**") and the Commission Notice – Guidelines on Vertical Restraints, *OJ*, C, 130, of 9 May 2010 ("**EU Notice**").

The IAA can directly apply the EU provision (article 101 TFEU) to horizontal and vertical agreements and practices, which may affect not only the Italian territory but also trade between countries of the EU.

The procedural rules concerning the IAA investigation are regulated by D.p.r. 217/1998 and by Law n° 241/1990 (general regulation of administrative proceedings and access to the file of the proceedings).

The Notice regulates fine calculation; it must be applied in compliance with the principles set by Law n° 689/1981 (principle of legality and personality of responsibility).

Italian law does not provide for criminal sanctions for antitrust infringements.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

For vertical restraints, the IAA applies the Regulation and the EU Notice, thus *per se* illegal resale price maintenance ("**RPM**"). Suppliers (producers, manufacturers) are not allowed to fix the (minimum) price at which distributors can resell their products. They cannot impose restrictions to passive sales. Exclusivity clauses and selective distribution restrictions are allowed within the limits provided by the Vertical Regulation.

The IAA has intervened in cases of contractual clauses only falling within the black list clauses; in such cases, the IAA adopted a rule of reason approach, investigating the possible restrictions of the agreement with regard to competition concerns (both intra-brand and inter-brand competition).

In the *Power-One Italy* case (n° I/718/2014 – *Renewable Energy*), the IAA clarified that RPM is a hard-core restriction; thus, RPM could not be exempted under any *de minimis* rule, according to the principles set forth in the Commission *de minimis* Notice (Commission Notice *de minimis*, *OJ*, C, 368 of 22 December 2001), the IAA said.

However, the IAA has not ruled out the possibility of RPM benefitting from an individual exemption (*Power-One Italy* (case n° I/774/2013)), if certain conditions are met (see question 3.6).

In the *Enervit* case (n° I/718/2014), the IAA ascertained that Enervit imposed: i) a minimum selling price (RPM) in the form of a maximum percentage of consumer discount; ii) a ban on the sale of products manufactured in Italy outside the national borders; iii) a ban on passive sales outside the territory/customer group assigned exclusively; and iv) non-competition for an indefinite period clause.

The IAA closed the investigation after commitments proposed by Enervit, despite the fact that it had adopted hard-core infringement provisions in its distribution agreements. Also in the *Power-One Italy* case (n° I/718/2014 – Renewable Energy), hard-core violations did not impede the IAA from closing the investigation with commitments.

The IAA, in the decision of 18 April 2018, case n° I/813, *Cadel S.r.l.*, stated that a vertical agreement between a stove producer and its retailers which fixes a minimum resale price, imposes absolute territorial restrictions and forbids the sale of the products on the internet, could infringe article 101 TFEU. The investigated company submitted commitments. In particular, they agreed to eliminate all the clauses that gave rise to antitrust concerns. Thus the IAA accepted these commitments and closed the investigation without imposing any fine on the investigated companies. Also in this case, the IAA accepted commitments in an investigation when a hard-core infringement (price-fixing) was ascertained.

2.5 What is the analytical framework for assessing vertical agreements?

See the answer to question 2.6.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Normally, the IAA adopts the "rule of reason" approach in analysing the effect of any vertical agreement. In case of hard-core restrictions, the IAA has a formalistic approach (*per se* rule); however, the IAA does not open an investigation if the undertakings involved have a low market share. In such circumstances, the IAA, using a moral suasion, suggests that the undertakings involved amend the hard-core clauses (for example, RPM).

We have seen a number of instances where the IAA has investigated several hard-core vertical restraint cases concerning small undertakings (with low market shares). In such cases, the IAA, instead of opening an investigation, contacted the undertakings, underlining breaches of compliance of the agreements with the IAL.

The contacted undertakings complied with the IAA's requests and amended the hard-core clause.

Thus, the IAA has never opened an in-depth investigation for hard-core restrictions against small undertakings with low market shares.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

These cases are normally analysed by the IAA, as a first step, taking into consideration the horizontal aspect of the agreements or concerted practice (collusion on price or other contractual conditions). In such circumstances, the IAA also considers the possible vertical effect, if this could give rise to discrimination or foreclosure effects against competitors (with harm to competition).

The foreclosure or discriminatory effects related to agreements which have both a horizontal and vertical structure are used in order to demonstrate the anticompetitive effect of the agreements (or concerted practice under investigation) in horizontal collusion investigations.

The Italian Competition Authority opened a proceeding into companies managing the taxi service in Naples (case n° I832, decision of 13 February 2019) for a possible violation of articles 101 of the TFEU and 2 of Law n° 287/90. The investigation concerns a supposed anti-competitive agreement concerning the prohibition on taxi drivers belonging to the investigated companies from using third-party taxi booking applications.

For the same reasons, the IAA also fined a radio-taxi services company in Milan and Rome (case n° I/801A–I/801B of 27 June 2018). These are cases with both horizontal agreement (among companies managing radio-taxi services) and vertical agreement (between such companies and the taxi drivers which are independent individual undertakings). For a similar case, see also n° A/521 *Turin Taxi* of 10 October 2018 (opening of investigation), as discussed in question 3.12.

2.8 What is the role of market share in reviewing a vertical agreement?

The IAA applies the rules of the Vertical Regulation and of the EU Notice; thus, market share lower that 30% in the upstream and downstream markets is taken into consideration. The market share safe harbour (lower than 30%) is not applicable for hard-core restrictions. Please refer to the hard-core cases in question 2.6.

2.9 What is the role of economic analysis in assessing vertical agreements?

In Italian national cases, the economic analysis of vertical restraints has always played a key role in assessing the unlawfulness of the conduct. Normally, the IAA has antitrust concerns if a vertical restraint involves undertakings in a dominant position or which owns an essential facility, or if the affected market is characterised by a barrier to entry and the vertical restraint could increase the barrier to entry into the market.

Thus, the IAA conducts a deep market analysis which requires an accurate definition of the product and geographic market involved, as well as the barrier to entry into the market.

With regard to the effect, the IAA will ascertain whether vertical restraint could give rise to foreclosure or discriminatory effects, and the existence of similar vertical agreements which, in fact, could give rise to foreclosure effects (also, if the single vertical agreement involves undertakings with a market share lower than 30% in the upstream and/or downstream markets).

2.10 What is the role of efficiencies in analysing vertical agreements?

The role of efficiencies is essential, especially for analysing vertical restraints without hard-core provisions. In certain exceptional circumstances, the RPM could be considered in compliance with law if all the provisions pursuant to article 101.3 TFEU and article 4 IAL are fulfilled (article 4 IAL is substantially similar to the provisions in article 101.3 TFEU).

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no specific rules governing vertical agreements in the context of intellectual property rights. Italian legislation provides a specific law which regulates franchising agreements (Law n° 129/2004). This law allows certain contractual restrictions aimed at defending the franchisor's know-how and trademarks. The Italian Franchising Law must be interpreted in compliance with the Vertical Regulation and the EU Notice.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The IAA is not required to test the effects of hard-core vertical restraint violations.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes, but within the rigid system of exemptions under article 101.3 TFEU or article 4 IAL. The IAL is reluctant to use efficiency arguments to justify hard-core provisions in vertical restraint cases.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

In case of hard-core infringement, the fulfilment of all of the conditions set forth in article 101.3 TFEU or article 4 IAL is the only possible defence.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No, they have not.

2.16 How is resale price maintenance treated under the law?

In principle, although the IAA has not excluded an individual exemption for RPM, the IAA is, in fact, very restrictive and forbids any form of price-fixing in the context of vertical agreements.

In the *Enervit* case (n° I/718/2014), the IAA stated that there is a relative presumption regarding the restriction of RPMs. This means that in the case of an investigation into RPM, the investigated undertaking must demonstrate that the RPM satisfies all the conditions laid down in article 101.3 TFEU (or article 4 IAL). This is in fact a "*probatio diabolica*", which makes *de facto* RPM *per se* illegal.

The IAA allows a producer to suggest a minimum price to its distributors/resellers, but undertakings in the downstream market must be free to decide their price policy.

Also, the IAA evaluates with great suspicion a suggested price which in fact could produce the effects of making the prices uniform. The IAA allows the maximum resale prices.

With regard to RPM issues, we also refer to the IAA's decision of 18 April 2018 in case n° I/813 – *Cadel S.r.l.*, as described in question 2.4.

2.17 How do enforcers and courts examine exclusive dealing claims?

With regard to exclusive dealing and territorial restrictions, the IAA applies the EU principles within the limits set by the Vertical Regulation and by the EU Notice. The IAA is very strict in not allowing any kind of restriction on passive sales (see case n° I/718/2014 – *Enervit*). The IAA allows territorial restrictions (in compliance with the Vertical Regulation and the EU Notice provisions) when there is indeed a legitimate reason for the restrictions, *e.g.*, defending the distribution system from free-riding, and supporting the pre-sales and post-sales services granted by the sellers to final customers on the basis of the agreements with the manufacturer.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligations are not relevant in the context of vertical restraints, with two exceptions:

a) When the tying/supplementary obligation is proposed by an undertaking (upstream or downstream markets) in a dominant position (i.e., a producer in a dominant position who unjustifiably imposes tying/supplementary obligations on its distributors, which do not have any legitimate business justification).

b) When the tying/supplementary obligations are applied by several competing undertakings (upstream or downstream markets) and such provision could collectively restrict competition.

With regard to the exclusivity clause adopted by the dominant firm, the *Unilever impulse ice cream* case is of relevance (n° A484, decision of 31 October 2017). The IAA fined Unilever over 60 million euros for an infringement of article 102 TFEU, where Unilever put in place an abuse of an exclusionary nature to hinder the growth of competitors in the market of individually-wrapped impulse-buy ice cream, in which Unilever holds a dominant position, mainly through products under the "Algida" brand. The IAA ascertained that Unilever's adopted exclusive product clauses and a series of further loyalty conditions, commercial policy instruments and overall conduct were aimed at imposing the exclusivity of Algida products on end-consumer retailers.

2.19 How do enforcers and courts examine price discrimination claims?

With regard to price discrimination in vertical relations, both the IAA and the civil courts (private enforcement) consider price discrimination unlawful only if a dominant undertaking discriminates or if horizontal profiles exist, such as, for example, vertical agreements with restrictions that are uniformly adopted by more competing manufacturers in agreements with their distributors or retailers.

In the *Akron* case (n° A/444/2015 – *Akron waste disposal recycling paper*), the IAA assessed that Hera abused its dominant position by, *inter alia*, offering a special price to its subsidiary Akron which was lower than the one available in a competitive market.

2.20 How do enforcers and courts examine loyalty discount claims?

Issues of loyalty discount are taken into account primarily in the context of an abuse of dominant position. In the context of vertical agreements, loyalty discount issues may be relevant, for example, when a dominant producer establishes, through its own distributors or retailers, loyalty discount policies that may harm the entry of other competing producers into the market. In such context, clauses concerning loyalty discount which are provided for in agreements between the producer and the distributors may be null and void and, as a consequence, not enforceable.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount claims are taken into account primarily in the context of an abuse of dominant position (in the upstream and/or downstream markets).

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Italian law does not prohibit any other types of vertical restraints.

2.23 How are MFNs treated under the law?

Under certain conditions, a most-favoured-nation ("**MFN**") clause could infringe article 2 IAL and/or article 101 TFEU. The IAA, in the recent *Booking and Expedia* case (n° I/779/2015 – *Hotel e-booking business*), stated that the MFN clause that obliged hotels in their network not to offer better prices, terms and conditions through other competitor online travel agencies and, in general, through any other channel infringed the antitrust law. The IAA proceeding was closed on 21 April 2015 with a commitment made by Booking to narrow the operating area of the MFN clause. Indeed, all offline reservation channels have been excluded from applying the tariff parity clause – provided prices charged in these channels are not published online – and have further expanded the ability of hotels to offer discounted rates directly to their customers. In effect, the parity clause of tariffs, terms and conditions would only apply to online sales made directly by the hotel.

This case is relevant as the IAA accepted commitments in an RPM hard-core infringement.

2.24 Describe any notable case developments concerning vertical merger analysis.

The IAA pays significant attention to the possible vertical effects of a merger and, in particular, risks of foreclosure effects caused by a vertical integration. The IAA cleared the Luxottica/Barberini merger with conditions (case n° C/12183, decision of 19 November 2019).

EssilorLuxottica Group, a global leader in the eyewear sector, active in all the main stages of production, acquired Barberini, an undertaking operating in the upstream market manufacturing of high-quality flat-glass lenses for sunglasses and glass blanks – the raw material for producing lenses. Among the various antitrust concerns, the IAA feared that the merger could impede EssilorLuxottica's competitors from having access to the lenses' raw material, considering the lack of actual and potential competition in the upstream market where the target (Barberini) operates.

The IAA authorised the merger with commitments; in particular, the merged entity must commit to supply Barberini's raw materials to competitors on a non-discriminatory basis, including Barberini's products which are a result of technological innovation and/or are covered by intellectual property rights.

Another merger case where vertical foreclosure antitrust concerns have been taken into consideration, is the acquisition by Sky Italian Holding S.p.A. (Sky Group) of certain assets in digital terrestrial pay-TV owned by Mediaset Premium S.p.A. (case n° C12207, decision of 20 May 2019). Sky Group is a dominant firm in the Italian retail pay-TV market. The target owns certain pay-TV content. The IAA feared that the merger would create antitrust concerns, not only on the pay-TV market but also in the related wholesale market for the supply of pre-packaged pay-TV channels, as well as the market for the licensing of broadcasting rights for TV content.

For this reason, the IAA decided to impose remedies to restore competition in the pay-TV market for a period of three years. Specifically, the remedies consist of a ban on the Sky Group from acquiring exclusive broadcasting rights for audio-visual content and linear channels for internet platforms in Italy.

The peculiarity of this case is that the parties had withdrawn the transaction before the closing of the phase II investigation. Nevertheless, the IAA continued the investigation and imposed remedies on the parties. In this case, the IAA clearly used merger control for regulatory purposes. The IAA's approach of using merger control for regulating the markets can also be seen in case n° C/12023 – *Mondadori/RCS*, decision of 26 May 2016, concerning the book publishing market.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Almost all of the IAA interventions for abuse of dominant position concern unilateral conduct; the level of attention is extremely high, especially in telecoms, pharmaceuticals, postal services and energy businesses.

3.2 What are the laws governing dominant firms?

The abuse of dominance is regulated by article 3 IAL. It is basically consistent with article 102 TFEU. The IAA is entitled to apply article 102 TFEU in the case of an abuse of dominance related to the Italian territory, which could also affect trade within the EU.

Article 2597 of the Italian Civil Code applies to legal monopolies and imposes an obligation to conclude contracts with third parties upon their request under non-discriminatory conditions. Specific definitions of dominance are provided in regulated industries such as the telecoms and media industries (Law n° 249/1997).

3.3 What is the analytical framework for defining a market in dominant firm cases?

With regard to market definition in dominant cases, the IAA operates in accordance with European law (we refer to the Commission Notice on the definition of relevant market for the purposes of Community Competition Law (n° 97/C 372/03)).

Proper definition of the relevant market (from the product/service and geographic point of view) is essential when defining dominance. Indeed, all assessments of dominant position (market share held by competitors, level of market concentration, barriers to entry) are related to a specific market duly defined from an economic point of view.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The IAL does not provide for market share thresholds with respect to the definition of dominance and of collective dominance. Market share is generally used by the IAA as a first indication of dominance; however, many other factors are to be taken into account. Specifically, an undertaking could be considered as dominant even with a market share of less than 40%, owing to its strength in the relevant market, its vertical integration, the high concentration of the relevant market, modest competitors' market share, etc.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

According to EU laws and principles, the simple dominant position on a relevant market does not constitute an abuse in Italy, but the dominant firm holds a 'special responsibility' not to allow distorting effects on the competitive structure of the market.

Article 3 IAL does not define the concept of abuse of dominance, but lists the following examples of abusive behaviour that relate to both exploitative and exclusionary practices:

i. to directly or indirectly impose unfair purchase or selling prices or other unfair contractual conditions;

ii. to limit or restrict production, market outlets or market access, investment, technical development or technological progress;

iii. to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and

iv. to agree 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.

Abuse of dominance occurs when an undertaking in a dominant position engages in practices that influence the structure of a relevant market by reducing, hampering or eliminating competition.

Abuse of dominance is defined more in terms of the effects of conduct on the market, rather than in relation to the form or type of conduct. The IAA, in compliance with EU Commission law and practice, defines abuse as conduct that has the ability, by its nature, to foreclose actual or potential competitors from the market, and thus has the likely effect that, ultimately, prices will increase or remain at a supra-competitive level. If conduct has exclusionary effects and does not create any efficiency, such conduct is presumed to be abusive (see case n° A/431/2012 – *Pfizer*).

In several 2018 cases, the IAA investigated several incumbents (former legal monopolists) for actions aimed at leveraging their dominant position in other markets.

The IAA, on 25 September 2018 (case n° A508 – *SIAE/Management of Copyrights*), ascertained that SIAE (the State entity that managed certain copyright rights in Italy on a basis of legal monopoly provisions) had tried to keep its dominant position concerning the management of certain IP rights in areas of business that are totally liberalised.

The IAA ascertained that certain information, achieved by a legal monopolist, that has been used for competing in other downstream markets, could give rise to antitrust concerns, and that these behaviours give rise to an abuse of dominant position. In particular, in cases n° A511 (*Enel*) and n° A513 (*ACEA*) (*Unlawful conduct in the electricity market*) of 20 December 2018, the IAA fined the two incumbents in several local distributors of electricity markets (natural monopoly), because they used commercial data, collected for the provision of distribution services, for marketing purposes in the downstream market of electricity sales (ACEA: 16,199,879.09 euros; Enel S.p.a., Servizio Elettrico Nazionale S.p.a. e Enel Energia S.p.a.: 93,084,790.50 euros). (A2A discharged – case n° A512.)

On 10 April 2019, the IAA fined the incumbent local transport operators in the Province of Bolzano (case n° A510 – *SAD Trasporti Locali S.p.a.* – "**SAD**") for a violation of article 102 TFEU. The IAA ascertained that SAD had refused to provide certain information (concerning the characteristics of its services that are essential for preparing tender documents) to the procuring entity. This kind of behaviour on the part of SAD was aimed at delaying the tender for the awarding of the Concession until the SAD concession had expired and a new tender procedure for such concession would have to be put in place by the procuring entity.

On 12 March 2019, the Italian Competition Authority ("**ICA**") (case n° 527) opened an investigation to assess whether Ireti Spa, Italgas Reti Spa and 2i Rete Gas Spa – the incumbent gas distribution operators in several municipalities of the Province of Genoa – have individually infringed article 102 TFEU by abusing their dominant position, as current exclusive concessionaires, in order to inhibit or at least significantly delay the planned competitive procedure for awarding the gas distribution service in a captive area (ATEM Genoa 1, a territorial district that includes the Genoa municipality).

In particular, the Municipality of Genoa, as the tender authority, reported to the IAA that the aforesaid three operators had refused to provide certain information on the characteristics of their distribution networks which is essential for preparing the tender documents. The supply of this information from all three operators is crucial to the drafting of the call for tender, and to the carrying out of the tender procedure. As a consequence of the delay in awarding the new concession contract, each operator continues to provide the gas distribution service according to the previous concession. The investigation shall be concluded by 30 March 2020.

On 30 April 2019, the Italian Competition Authority opened an investigation against COREPLA – the National Consortium for the Collection, Recycling and Recovery of Plastic Packaging – to assess an alleged abuse of dominant position in violation of article 102 TFEU. In particular, COREPLA is currently the only operator active in the market for compliance services of household plastic packaging waste, where it thus holds a dominant position. The IAA is investigating whether COREPLA would have allegedly hindered the market entrance of a potential competitor, CoRiPET, a new association set up by producers of PET bottles. The allegedly abusive conduct would consist in COREPLA claiming exclusive rights on all the household plastic packaging waste, wherever it is collected in Italy, as well as enforcing exclusive clauses with the selection platforms and auctioning all the material thus obtained. COREPLA, in fact, refused to negotiate a temporary agreement with CoRiPET to allow the latter to obtain the plastic PET packaging waste originating from market operators belonging to its consortium. COREPLA's conduct appears to be deliberately aimed at preventing the newcomer from developing its activity, and at preserving its market position, the IAA said. The investigation shall be concluded by 30 April 2020.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis is crucial to market definition and to analysing the restrictive effects of abusive behaviours. The IAA must prove that the behaviours of the dominant firm give rise to a reduction in the level of competition and cause poorer conditions for consumers. However, as in some previous cases, the IAA tends to presume the abuse in the presence of a dominant position and of abusive conduct listed in article 3 IAL.

3.7 What is the role of market share in assessing market dominance?

Market share is only one of the elements considered by the IAA when analysing dominance; other relevant factors are taken into consideration, such as market access, sunk costs, barriers on entry into the market, maturity of the market, level of innovation, potential competition, specific regulation of the market, etc.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Defences typically focus on market definition (the IAA tends to restrict markets to more easily determine dominance), as well as the absence of the restrictive effects caused by the behaviour of the investigated undertakings. Sometimes the defence could also be focused on the correct reconstruction of the facts concerning the investigation.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiency is an assessment that is the basis for evaluating the effects of abusive behaviours. As a rule, the IAA does not evaluate the efficiency as an element that justifies abusive behaviours if it does not, however, result in a tangible benefit for consumer welfare.

3.10 Do the governing laws apply to "collective" dominance?

In merger control cases, the IAA has mainly used the notion of the collective dominance doctrine. The IAA has rarely used the concept of collective dominance in cases of abuse; however, in an old precedent (case n° A/3S7/2005 – *Tele2/Tim-Vodafone-Wind wholesale market, access to mobile network*), the IAA investigated mobile telecoms operators for an alleged collective abuse of dominant position. In its final decision, the IAA closed the proceedings without being able to prove that collective dominance existed. It should be noted that in some cases it is difficult to distinguish the abuse of collective dominance from a concerted practice.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The IAA has rarely considered the possibility of a dominant position on the demand side. There is a precedent concerning rail equipment businesses (case n° A80/1993, *Consorzio Trevi e Capri*), as well as a precedent concerning the grocery retail market, where the IAA considered the buying power (case n° I/184/1997, *GS/Standa – Supercentrale*).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Both exploitative and exclusionary practices could constitute an abuse of dominant position pursuant to article 3 IAL. Almost all of the IAA's precedents over the last decade concern this kind of abuse.

The IAA, at the completion of an investigation against Vodafone Italia ("**VI**") and Telecom Italia ("**TI**") in the bulk SMS market (cases n° A/500A/2016 – *Vodafone-Sms* and n° A/500B/2016 – *Telecom Italia-Sms*, decision of 13 December 2017), stated that VI and TI abused their dominant position by implementing internal/external discriminatory conducts, both technical and economic, resulting in a margin squeeze to the detriment of competitors in the downstream market. VI and TI applied tariffs on both the upstream and downstream markets of mass SMS services, which make the potential margin for competitors in the retail market insufficient to cover specific costs for providing services to end-customers, the IAA said (TAR).

The IAA ascertained that two dominant firms (*Compagnia Italiana di Navigazione* and *Moby*) adopted commercial strategies aimed at boycotting and discriminating clients that used competitors' services (imposing higher prices and worse contractual conditions – case n° A/487 – *Shipping freight transport from and to Sardinia*, decision of 28 February 2018).

With regard to exclusionary practices, the opening of an investigation concerning the market of maintenance of diagnostic imaging devices ("**DID**") is of relevance (case n° A/517). The IAA, on 31 January 2018, opened an in-depth investigation aimed at ascertaining whether certain DID manufacturers impeded the purchase of DID spare parts and access to the source code essential for the full maintenance of the

DID, for independent repairers. The IAA has to ascertain if the DID's manufacturers intended to impede the access to the secondary market of DID maintenance and repairs to independent operators.

With regard to price discrimination and competitor margin squeeze, on 7 March 2019 the IAA closed with commitments an in-depth investigation (case n° A/505 – *Monte Titoli/Servizi di Post-Trading*) concerning an alleged abuse of dominant position carried out by Monte Titoli ("**MT**" – belonging to London Stock Exchange Group) in the market of post-trading services, with specific regard to financial settlement and custody services. The IAA investigated whether the price policy applied by MT to settlement services could be designed with the aim of favouring its financial custody services against the services offered by competitor banks. The IAA closed the investigation after the submission from the investigated companies of commitments aimed at eliminating any possible discrimination concern against downstream market competitors.

With regard to abuse related to possible discrimination, the *Amazon* case is of relevance. On 10 April 2019, the IAA opened an in-depth investigation against five companies of the Amazon group ("**Amazon**") (case n° A/528) for alleged abuse of dominant position in breach of article 102 TFEU. The IAA is investigating whether Amazon would allegedly discriminate on its e-commerce platform in favour of third-party merchants who use Amazon's logistics services.

In particular, Amazon would grant improved visibility of the seller's offerings, higher search rankings and better access to consumers on Amazon.com only to third-party sellers that subscribe to "Amazon Logistics" or "Fulfilment by Amazon" ("**FBA**"), putting other third-party merchants at a disadvantage. Such practice seems to be outside competition on the merits, as the benefits are not necessarily related to the efficiency and quality of the service provided by the seller, and are only based on its subscription to Amazon's FBA ("self-preferencing").

In such a way, Amazon would unduly exploit its dominant position in the market for e-commerce platform intermediary services in order to significantly restrict competition in the e-commerce logistics market, as well as – potentially – in the e-commerce platform market, to the detriment of final consumers, the IAA said. Investigation shall be concluded by 15 April 2020.

With regard to the entry barrier issue, a pending investigation against Google is of relevance. On 8 May 2019, the IAA opened an in-depth investigation into Alphabet Inc., Google LLC and Google Italy S.r.l. ("**Google**") for an alleged violation of article 102 TFEU. The IAA is investigating whether Google's refusal to integrate the "Enel X Recharge" app into the Android Auto environment could represent an abuse of dominant position.

Google holds a dominant position in the market of operating systems for smart devices, the IAA said; this dominant position is due to Google's control of the Android operating system. Enel X Recharge was developed by Enel (the Italian former incumbent of the electricity production and distribution). This app provides information and services to end-users for recharging electric car batteries.

Android Auto allows owners of Android smartphones to easily and safely use certain apps and mobile phone features when driving a vehicle. The exclusion of Enel X Recharge from Android Auto could reduce the usability of this app by users and restricts their ability to use the utilities of the app, including booking charging columns, the IAA said.

The IAA is evaluating a possible Google exclusionary strategy aimed at defending the Google Maps app, which offers a wide range of services to end-users, including information on the location of columns for charging electric cars and directions on how to reach them. Google Maps also represents a point of access to end-users as well as to the data stream generated by their activities, the IAA said. The investigation shall be concluded by 30 May 2020.

With regard to the foreclosure effect related to an exclusivity clause in an upstream market, the *TicketOne* case has to be mentioned. On 20 September 2018, the Italian Competition Authority decided to open an in-depth investigation into several companies of the TicketOne group ("**TicketOne**") in order to ascertain a possible abuse of dominant position pursuant to article 102 TFEU.

TicketOne holds a dominant position in the market for ticketing services for live music events (pop and rock concerts) in Italy.

The IAA fears that TicketOne has allegedly implemented an exclusive strategy to tie the most important promoters of live music events active in Italy to its ticketing platform, thereby preventing its competitors from gaining access to tickets, i.e. to the necessary input to compete on the market.

The exclusivity clause contained in the contracts between promoters and TicketOne is particularly stringent with respect to the online channel, which is currently the main means of selling tickets for this type of events, the IAA said.

This alleged abusive strategy could also harm final consumers, as by hindering the presence of competing platforms, TicketOne is able to charge higher pre-sale prices for live music event tickets and limit consumers' choice between different ticketing service providers, the IAA said. It is relevant that most of the promoters belong to companies controlled by Ticket One, thus one of the main issues of this investigation is whether decisions to internalise business within the TicketOne group constitute a legitimate group strategy or could represent an abuse. The investigation will be concluded by 31 December 2019.

With regard to the artificial creation of entry barriers, case n° A/521 – *Turin Taxi* has to be mentioned; the IAA, on the 10 October 2018, opened an investigation in order to ascertain if the prohibition on taxi drivers belonging to the investigated company (the main company that manages taxi services in Turin) from using third-party taxi booking applications, could give rise to an abuse of dominant position. The investigation will be completed at the end of 2019.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The availability of intellectual property rights could give rise to a dominant position. For example, in the pharmaceutical industry, the IAA considers each active principle as an autonomous product market; thus, the owner of the patented Anatomical Therapeutic Chemical ("**ATC**") class has a dominant position (see case n° I/480/2016 – *Aspen*). In *Roche-Novartis* (case n° I/760/2014 – *farmaci Avastin e Lucentis*), the IAA stated that two drugs (owned by Avastin and Lucentis) in different ATC classes are part of the same market; the IAA based the said definition on the medical practice of using the oncologic drug (Avastin) off-label for treatment in the ophthalmic field.

The principle that intellectual property rights cannot be exercised in such a way as to reduce competition is now consolidated in the IAA precedents. The IAA fined a pharmaceutical patent holder for excessive pricing (*Aspen* case n° 1/480/2016), pursuant to article 102 TFEU, when it increased the price of irreplaceable drugs for haematological or oncological patients by up to 1,500%.

With regard to the scope and limits in the use of the patent system by pharmaceutical companies, the IAA, in the *Pfizer* case (n° A/431/2012, confirmed by the CdS in decision n° 116/2014), stated that certain behaviours of pharmaceutical companies which own an expired patent (or a patent that is going to expire) which delays the entrance of generic producers into the market (using the ATC of the expired patent) are abusing their dominant position.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The IAA considers "direct effects" evidence of market power (see case n° I/480/2016 – *Aspen*).

3.15 How is "platform dominance" assessed in your jurisdiction?

The IAA has adopted a careful approach in analysing "platform dominance"; for example, in the e-booking case (n° I/779/2015 – *Hotel e-booking business*), the IAA preferred the adoption of commitments that were appropriate in striking a balance between preventing potential restrictions to competition while preserving the operators' ability to offer and develop innovative services that are valuable to consumers. For issues related to "platform dominance", the IAA tends to coordinate its investigative power with other authorities of the European Competition Network, considering that such platforms operate at a multinational level.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

On the basis of the IAA precedent, the refusal to deal could give rise to an antitrust infringement only if a dominant undertaking (or an undertaking which holds an essential facility) refuses to deal in the absence of a legitimate business reason (see question 4.1 below with regard to abuse of economic dependence).

In the *Acido colico* case (n° 1/473/2015 – *Fornitura acido colico*), the IAA investigated whether an undertaking abused its dominant position in the market of production and sale of cholic acid (used to produce a drug for liver disease) by refusing to supply the input (the cholic acid) for the production of an active ingredient based on such acid, to competitors. The proceeding was closed with the acceptance of the commitments proposed by the investigated parties.

The IAA investigated a possible abuse consisting of a refusal to grant access to an airport facility in Bergamo airport (airport handling) to a competitor (case n° A/507 – *Jet fuel refuelling Bergamo Airport*, decision of 14 March 2018). The IAA accepted commitments proposed by the investigated company (to grant competitors access to the facility on a non-discriminatory basis) and closed the investigation without imposing any fine.

With regard to the "refusal to deal" issue, the IAA opened (on 19 December 2018) an investigation into a newspaper distribution company (case n° A525 – *M DIS Distribution and Media*) which had allegedly limited the distribution of newspapers in a local area (municipality of Genoa and Trigullio) with unjustified discriminatory refusal to deal, to the detriment of certain local retailers.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

Article 9 of Law n° 192/1998 states that the IAA may fine undertakings which abuse the economic dependency of other undertakings. Economic dependence exists when an undertaking finds itself in a position to bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another undertaking. The assessment of economic dependence also accounts for any real possibility for the dependant undertaking to find satisfactory alternatives elsewhere in the market. An abuse may consist of the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions or the arbitrary interruption of established commercial relations (the IAA has recently applied this law in one case – n° RP1/2016 *Hera*). It is often discussed whether these provisions are aimed at protecting competition or small companies only.

Article 62 of Decree Law n° 1/2012, which governs trade relations in the agro-food sector, states that the IAA could fine undertakings which put in place unfair practices in the agro-food sector (abuse of commercial strength). In the last few years, the IAA has opened several investigations on the basis of this new competence: *Distribution of milk in Sardinia* (case n° AL21/2019); *Wheat seeds* (case n° AL22/2019); and *Supermakets' bread return policies* (case n° AL15/2018).

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Luciano Vasques concentrates on antitrust, consumer protection, energy and other regulatory matters in Italy and in the European Union, and on corporate law (bankruptcy proceedings).

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STUDIO LEGALE
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DDPV is a boutique law firm (with offices in Rome and Milan) which assists its clients in connecting with antitrust investigations of the EU Commission and the Italian Antitrust Authority ("**IAA**") for alleged violations of articles 101 and/or 102 TFEU (i.e. agreements against competition, abuse of dominant position) or articles 2 and 3 of the Italian Antitrust Law.

DDPV's Antitrust department also assists clients in appeal proceedings against the EU Commission and IAA antitrust decisions before the lower and higher domestic and European courts (TAR, *Consiglio di Stato*, EU General Court and Court of Justice), as well as in private antitrust enforcement litigation and litigation concerning the abuse of economic dependence.

DDPV also has vast experience in the drafting and submission of merger filings before the national antitrust authorities (including multijurisdictional filings) and the EU Commission (CO and RS forms), as well as in antitrust audit-compliance programmes and State aid issues.

Chapter 11

Japan


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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Japan Fair Trade Commission (the "JFTC") enforces the Antimonopoly Act (the "Act"), which governs vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The JFTC may (i) order persons concerned with a case or a witness to appear at a designated time and place to be interrogated or to produce documentary evidence or reports, (ii) order expert witnesses to appear to give expert opinions, (iii) order persons to produce accounting books or any other documents, and (iv) enter any business premises or any other places that the JFTC deems it necessary to enter, with a view to investigating the conditions of the business operation, accounting books and any other material that the JFTC finds on the premises.

It should be noted that there is no attorney-client privilege in Japan, so the JFTC has authority to seize, or order persons to produce, any documents that might be privileged in another jurisdiction.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

When the JFTC is aware of a potential violation of the Act with regard to vertical agreements or dominant firm conduct, and decides to open an investigation, it may start the investigation by taking the measures mentioned in question 1.2 above or by asking the undertaking to voluntarily cooperate with the JFTC's investigation. It is not unusual for the JFTC to open an investigation by conducting a dawn raid (the measure described at (iv) in question 1.2 above), even in the cases of vertical agreements and dominant firm conduct. When the JFTC has gathered sufficient evidence to find a violation of the Act, before issuing a formal order, the JFTC needs to issue a notice to the undertaking regarding the commencement of its opinion-hearing process; allow the undertaking to review evidence that the JFTC has gathered to establish a violation of the Act; and hold an opinion-hearing process, where the JFTC will hear the opinion of the undertaking. The opinion-hearing process is not open to the public. The JFTC will take account of the opinions presented at the opinion-hearing process when it proceeds to issue a formal order, such as a surcharge payment order or cease-and-desist order. As for the process of negotiating commitments, please see question 1.6.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The JFTC may issue a cease-and-desist order to the companies, which will require, among other activities, that the companies cease to engage in private monopolisation or unfair trade practices. On rare occasions where there is an urgent necessity, the JFTC may file a motion to the court to order the companies to temporarily cease to engage in the conduct at issue.

In addition, the JFTC is required to issue a surcharge as an administrative penalty to companies that engage in the following conduct, on condition that such companies concerned repeat the same type of violation within 10 years: (i) concerted refusal to deal; (ii) discriminatory pricing; (iii) predatory pricing; and (iv) resale price restriction. The JFTC is also required to order the companies to pay administrative surcharges if they engage in private monopolisation or abuses of a superior bargaining position.

Furthermore, in theory, an individual who commits, or attempts to commit, private monopolisation may be subject to imprisonment for not more than five years or a criminal fine of not more than JPY 5 million. As a matter of practice, however, criminal accusations have only been filed against horizontal agreements, such as cartels and bid-rigging, and it is unlikely that those who commit private monopolisation will be criminally charged.

1.5 How are those remedies determined and/or calculated?

The JFTC has broad authority to order companies that have engaged in unfair trade practices or private monopolisation to cease and desist the prohibited acts or to take any other measures necessary to restore competition in the relevant market.

On the other hand, the JFTC does not have discretion regarding the amount of any surcharge payment order; such surcharge amount is calculated in accordance with the formula provided in the Act. Namely, the amount of surcharge is determined by multiplying the turnover from the relevant goods or services derived during the period of the prohibited acts (up to three years) by the relevant surcharge rates provided in the Act. The relevant rates range from 1% to 10%, differing based on the type of business (e.g., manufacturer, wholesaler, retailer, etc.) and the type of prohibited act at issue.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

If the JFTC finds it necessary for the promotion of fair and free competition, the JFTC can send a notice to the firm, informing it that it will be allowed to submit proposed commitments. Such notice will also include an outline of concerned conduct and relevant statutory provisions. The notified firm may submit proposed commitments within 60 days after receipt of such notice. If the JFTC finds that (i) the proposed commitments are sufficient for eliminating the conduct concerned, and (ii) they are expected to be implemented, the JFTC shall issue a commitment decision.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The JFTC's formal orders will be subject to review by courts. There used to be a "substantial evidence rule", which means that the court is bound by the JFTC's findings of facts as long as they are supported by substantial evidence. Under the current law, however, there is no such rule. Accordingly, the JFTC's formal orders will be quashed if the court finds that such orders do not meet the requirements of the Act.

1.8 What is the appeals process?

When the JFTC's formal orders (i.e., cease-and-desist orders and/or surcharge orders) are issued, the addressees of such orders can file the action for judicial review against the JFTC to the Tokyo District Court. Such actions shall be brought within six months from the date when the addressees come to know of such orders, or within one year from the date when such orders are issued, whichever comes first. Such actions are subject to the exclusive jurisdiction of the Tokyo District Court.

If either of the addressees or the JFTC has any objection to the decision rendered by the Tokyo District Court, such parties can appeal to the Tokyo High Court.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Private rights of action are available to persons who have allegedly suffered because of any violation of the Act. The persons may seek to quash all or part of a contract which arguably violates the Act to compensate its damages caused by the violation of the Act, and/or to suspend or prevent the conduct in violation of the Act (injunction); or the persons who allegedly suffered by such conduct may simply seek the compensation for damages suffered under article 25 of the Act if there is a final and binding cease-and-desist order or surcharge order or/and under article 709 of the Civil Code (Torts). For the purpose of clarification, the injunction is only available against unfair trade practices.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The Act shall be applied to the enterprise and the trade association. Under the Act, the enterprise is defined as "a person who operates a commercial, industrial, financial or other business". The meaning of "other business" has been widely interpreted and it can be satisfied if a person repeatedly receives certain economic interests as consideration in exchange for supplying certain economic interests (economic activities). Therefore, not only the conduct of a private company but also that of any public entities, such as the government body and states, can be subject to the Act as long as such public entities engage in any economic activities.

The Act provides a few exemptions. Especially, the provisions of the Act do not apply to acts found to constitute an exercise of rights under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act. However, the meaning of "exercise of rights" has been strictly interpreted and many kinds of conduct cannot be exempted because of the exercise of IP rights.

In addition, in relation to unfair trade practice, Guidelines concerning Distribution Systems and Business Practice provide that the provisions of unfair trade practice under the Act may not be applied to certain transactions between a parent company and its subsidiary.

1.11 Does enforcement vary between industries or businesses?

There is no substantial difference in the enforcement of the Act between industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Act shall be applied to the regulated industries as well, unless any specific exemptions are set forth in such laws that regulate the said industries. If there seem to be any conflicts between the industrial regulations and the Act, the extent to which the Act should be applied is examined in each case. On the other hand, in some cases, the interests protected by the industrial regulations and by the Act are common and, under such circumstance, both laws are applied. To make clear the applications of laws, it is not unusual for the Guidelines, which show the kind of conduct which may be allowed and which is prohibited, to be jointly prepared by the JFTC and the other regulatory agency.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

In Japan, the political environment may not affect antitrust enforcement. That being said, the Japanese government has recently been showing strong interest in the area of digital platform operators, which tend to have a dominant market position due to a network effect, etc., and the JFTC's enforcement activities in this are on the rise.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Currently, the JFTC shows a strong interest in any possible foreclosure effects or unfair trade conduct by using its dominant or superior power in the area of IT/digital-related fields, and has been monitoring this area. In addition, the JFTC actively deals with any anticompetitive unilateral conduct by introducing and ensuring the effective market mechanisms in the regulated industries.

1.15 Describe any notable case law developments in the past year.

In *JASRAC*, the JFTC issued the cease-and-desist order against

JASRAC, finding that JASRAC, a dominant copyright management organisation, excluded other copyright management entities from the market by entering into comprehensive contracts with broadcasting companies in February 2009. JASRAC requested the commencement of tribunal procedures to challenge the cease-and-desist order rendered by the JFTC, and the JFTC commenced the procedures in May 2009. The JFTC tribunal rescinded the original cease-and-desist order in June 2012, because there was no evidence that JASRAC's royalty collection method had the effect of damaging the business activities of other copyright management organisations. However, another copyright management organisation made a filing to bring an objection to the Tokyo High Court regarding such decision of the JFTC tribunal, requesting an order to rescind the JFTC tribunal's decision, in July 2012. In November 2013, the Tokyo High Court granted that appeal and in April 2015 the Supreme Court confirmed the Tokyo High Court decision.

According to the decision rendered by the Supreme Court, the JFTC resumed the tribunal procedures to review the original cease-and-desist order rendered by the JFTC in June 2015. The tribunal procedures ended with the withdrawal of the request for the commencement of a tribunal procedure by JASRAC in September 2016.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The JFTC's enforcement activities in the area of vertical agreements are on the rise. According to the JFTC's annual report for the fiscal year 2017 (i.e., from April 2017 to March 2018), the JFTC has issued only six formal orders in unfair trade practice cases during the past five years. However, a trend may be observed that the JFTC's enforcement activities in the area of vertical agreements are becoming more active.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

An agreement is not a requirement in order to find a violation of the Act. For example, in cases of resale price restriction, if the undertaking restricts the other party's ability to determine its resale price, it would be sufficient to find a violation of the Act. In other words, the JFTC does not need to find an agreement to establish a violation of the Act. Therefore, a discussion of the analysis to determine whether there is an agreement would not be applicable. Likewise, a discussion of the analysis to determine whether the agreement is vertical would not be applicable.

2.3 What are the laws governing vertical agreements?

Vertical agreements are regulated by the prohibition of "private monopolisation" and the prohibition of "unfair trade practices". Private monopolisation is defined as business activities by which any entrepreneur, individually or in combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in the relevant market. Generally speaking, this prohibition only applies to business entities with dominant market power in the market. On the other hand, "unfair trade practices" regulate concerted boycotts, discriminatory pricing, predatory pricing, resale price restriction, abuse of superior bargaining position and other business activities that are designated by the JFTC, which includes various types of vertical agreements such as tying, exclusive dealing, and trading on restrictive terms. The types of vertical agreements that are regulated by private monopolisation and unfair trade practices substantially overlap. However, the JFTC has preferred to bring formal proceedings under the unfair trade practices regulations, which require a lower standard of anticompetitive effect than the one required under private monopolisation.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No vertical agreements or restraints are protected *per se*. However, according to the Guidelines concerning Distribution Systems and Business Practice – with the exception of certain conduct such as territorial allocation – vertical agreements or restraints are generally allowed under the Act, if they are done by an undertaking with a market share of 20% or less.

2.5 What is the analytical framework for assessing vertical agreements?

The analytical framework for assessing vertical agreements varies depending on the types of conduct at issue. Under the Act, there are no vertical agreements that are illegal *per se* and, accordingly, the assessment of both the conduct itself and its competitive effect is generally required.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

According to the JFTC's Exclusionary Private Monopolisation Guidelines, its basic approach is to identify the relevant exclusionary practice at issue and define the product/geographic range affected by such practice as a relevant market. According to the guidelines, the JFTC also adopts, as necessary, an approach that is more widely used in other jurisdictions. Namely, the JFTC also considers a demand-side substitutability and supply-side substitutability.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

When one of the parties to a vertical agreement is vertically integrated at the same level as the other party, such agreement can be analysed as both a vertical and a horizontal agreement. Generally speaking, the JFTC's enforcement activities are more active in the area of a horizontal agreement and, if the JFTC finds that the agreement could relate to the overlapping markets, the JFTC tends to first try to scrutinise such an agreement as a horizontal one.

2.8 What is the role of market share in reviewing a vertical agreement?

The market share is an element that the JFTC will consider when analysing the anticompetitive effect. A high market share is not a prerequisite to find a vertical agreement to be in violation of the Act. That being said, according to the Exclusionary Private Monopolisation

Guidelines, the JFTC's enforcement priority is on cases where the market share of the undertaking exceeds approximately 50% after the commencement of the conduct at issue and where the conduct is deemed to have a serious impact on the lives of citizens in Japan.

2.9 What is the role of economic analysis in assessing vertical agreements?

The JFTC may use some economic analysis to support its findings. However, it appears that economic analysis has not played a key role in assessing vertical agreements so far.

2.10 What is the role of efficiencies in analysing vertical agreements?

The JFTC considers efficiencies in analysing vertical agreements. According to the Exclusionary Private Monopolisation Guidelines, the JFTC will consider efficiencies in analysing the anticompetitive effects only where (i) the efficiencies are specific to the conduct at issue and cannot be achieved by less anticompetitive means, and (ii) the efficiency gains will be passed on to consumers and enhance the consumer welfare in the form of price reduction, improvement of product quality, introduction of innovative products, etc.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Article 21 of the Act provides that any conduct that is recognised as the exercise of intellectual property rights is exempted from the Act. However, "exercise of intellectual property rights" has been interpreted quite narrowly, and thus this provision does not appear to offer significant safe harbour in practice. In fact, an abuse of intellectual property rights in an anticompetitive way continues to be subject to scrutiny under the Act and does not qualify as exercise of intellectual property rights that are exempted from the Act. The JFTC has issued Guidelines for the Use of Intellectual Property under the Antimonopoly Act.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes. Substantial restraint of competition is a prerequisite for a finding of private monopolisation. In light of the court precedents, it is generally understood that substantial restraint of competition means establishing, maintaining or strengthening the state in which a certain undertaking or a certain group of undertakings can control the market at will by being able to influence price, quality, quantity and other conditions to some extent due to the lessening of competition. On the other hand, likeliness of impeding fair competition is a prerequisite for a finding of unfair trade practices. It is generally understood that establishing likeliness of impeding fair competition is easier than establishing substantial restraint of competition.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The JFTC and courts will consider potential benefits or efficiencies in analysing vertical agreements. For example, when a vertical agreement promotes an inter-brand competition by solving a free-rider problem, that could be considered in analysing the vertical agreement.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

It is generally understood that a vertical agreement may be justified if (i) it has a legitimate purpose, (ii) it is necessary to achieve such purpose, and (iii) there is no less anticompetitive alternative to achieve such purpose. Examples of such legitimate purposes include product safety and promotion of public welfare.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The JFTC issued the following Guidelines: (i) the Exclusionary Private Monopolization Guidelines; and (ii) the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act. In addition, there are other Guidelines that refer to vertical agreements, such as the Guidelines for the Use of Intellectual Property under the Antimonopoly Act and Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act.

2.16 How is resale price maintenance treated under the law?

Resale price maintenance is generally presumed to be illegal. In theory, an undertaking can rebut the presumption by demonstrating a justifiable reason such as the fact that the resale price maintenance is procompetitive by promoting inter-brand competition. In practice, however, an undertaking is rarely able to convince the JFTC or courts that the resale price maintenance is procompetitive.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing may fall foul of the Act when it has a strong foreclosure effect, i.e. when it makes it difficult for new entrants or competitors to find alternative sources of supply or distribution channels. The relevant Guidelines state that if the market share of the undertaking engaging in an exclusive dealing does not exceed 20%, there would not be such foreclosure effect. Key factors to analyse the foreclosure effect include the duration of the exclusive dealing and the percentage of the market that is foreclosed. However, no clear safe harbour has been set with regard to the duration of the exclusive dealing. In light of the precedents, a sufficient foreclosure effect is likely to be found when more than 50% of the market is foreclosed by exclusive dealings.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

When analysing the tying claims, the JFTC and courts will first analyse if there are two distinct products/services. If two distinct products/services are tied, it may fall foul of the Act when an anticompetitive effect is found in the tied product/service market. In some precedents, the JFTC or courts have easily found an anticompetitive effect, stating that the tying deprived the buyer of the freedom to choose a supplier and therefore harms competition on the merit in the tied product/service market, without analysing in detail the effect perceived in such market.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination will not have an anticompetitive effect if the price difference results from a fair difference in cost (e.g. the cost-saving effect due to production in large quantities) or reflects the supply-demand balance in the market. However, price discrimination may fall foul of the Act if it has an anticompetitive effect in the market where the undertaking is active, or in the downstream market. When the JFTC or courts scrutinise an anticompetitive effect in the market where the undertaking is active, a key factor is whether the price is below a certain measure of cost, which makes it impossible for an equally efficient competitor to survive the market. On the other hand, when the JFTC or courts scrutinise an anticompetitive effect in the downstream market, they will analyse, among others, whether the products at issue are indispensable for the business activities in the downstream market and whether such price discrimination has an exclusionary effect in the downstream market. In addition, if an undertaking engages in price discrimination in order to achieve an otherwise illegal purpose, it would also fall foul of the Act.

2.20 How do enforcers and courts examine loyalty discount claims?

The JFTC and courts may regard loyalty discount as having the exclusionary effect similar to exclusive dealings under certain circumstances. In analysing the exclusionary effect, the JFTC and courts will take account of, among others, the level of rebate percentage, including whether it is progressively set in accordance with the volume of trade, the thresholds for granting rebates, and whether the rebates are granted on all purchases in a particular period once a certain threshold is exceeded (or granted only on the incremental purchases above the threshold).

In 2005, the JFTC found that the rebate system of Intel Japan constituted a private monopolisation. According to the findings of the JFTC, Intel Japan granted rebates to its customers, which were Japanese manufacturers of personal computers, on condition that (i) the customers purchase CPUs only from Intel Japan, (ii) 90% of the CPUs that the customers use are purchased from Intel Japan, or (iii) the customers do not use Intel Japan's competitors' CPUs for major personal computer brands. The level of rebate percentage was not made public by the JFTC. The customers to which Intel Japan granted rebates represented approximately 77% of the total procurement volume of CPUs in Japan.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

The JFTC's Guidelines state that if sufficient customers choose bundled products as a result of the bundled discount, the JFTC will analyse the bundled discount in a similar way to that in which it analyses a tying. The JFTC's guidelines also mention that if the undertaking's competitors can readily offer the bundled products and compete with the undertaking in the market of bundled products, the JFTC will analyse the bundled discount in a similar way to that in which it would analyse predatory pricing.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Given that the list of vertical restraints that are prohibited by the Act is not exhaustive, the Act can be read to cover any type of vertical restraint that has an anticompetitive effect. In fact, the list of unfair trade practices includes "trading on restrictive terms" and "interference with a competitor's transaction", and they can serve as a catch-all provision to make an anticompetitive vertical agreement illegal.

2.23 How are MFNs treated under the law?

There are no court precedents that have analysed most-favoured-nation ("MFN") clauses under the Act, nor are there any enforcement decisions or guidelines of the JFTC that analyse MFN clauses. Accordingly, it is unclear how MFNs are treated under the Act by the JFTC or courts. The JFTC was investigating Amazon Japan in relation to its MFN clauses or price parity clauses, etc. in the contracts with the sellers on Amazon Marketplace. However, the JFTC announced that it had closed its investigation following Amazon Japan's proposed commitments not to exercise its rights in relation to such parity clauses, etc. In its press release, the JFTC did not elaborate on how it will analyse MFN clauses.

2.24 Describe any notable case developments concerning vertical merger analysis.

This is not applicable in Japan.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The level of enforcement activities conducted by the JFTC in relation to private monopolisation is not particularly high. However, the JFTC has a significant ongoing interest in prohibiting any foreclosure conduct and controlling conduct by using the dominant or superior position in a certain field. Therefore, such conduct has been regulated by various types of unfair trade practice rules. As explained in question 3.2 below, the conduct of any entrepreneur with a dominant or superior power can be regulated by the rules on private monopolisation and unfair trade practices. However, the JFTC is inclined to apply the provisions of unfair trade practice regulation to such conduct, rather than private monopolisation rules.

3.2 What are the laws governing dominant firms?

The Act prohibits private monopolisation, which is defined as business activities "by which any entrepreneur, individually or in combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in the relevant market". Generally, this prohibition only applies to business entities with dominant market power in the relevant market.

In addition, the Act prohibits unfair trade practices such as exclusionary conduct, bundling, and abuse of superior bargaining power. In the case where dominant firms engage in such conduct, such conduct is likely to be found to be made "without justifiable grounds" and thus to constitute unfair trade practices.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The relevant market shall be defined based on the various factors, including but not limited to the relevant product, area, and manner, etc. of the specific conducts. Generally, by examining the conduct and the effects of such, the JFTC will define the relevant market where the competition shall be substantially restrained. To define the relevant market, the substitutability of products on the demand side has a great influence on the analysis, but the substitutability on the supply side is also considered. Please also refer to question 2.6 above.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no clear threshold of the market share to consider a firm as dominant or a monopolist. However, a market share over 50% is generally considered as a certain benchmark by the JFTC in setting its enforcement priorities. The Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) provide that: "the JFTC, when deciding whether to investigate a case as Exclusionary Private Monopolization, will prioritise the case where the share of the product that the said undertaking supplies exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry".

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Under the Act, dominance or monopoly itself is not *per se* illegal. Any conduct excluding the business activities of other entrepreneurs (hereinafter referred to as exclusionary conduct) can be considered illegal as private monopolisation to the extent that, contrary to public interest, such exclusionary conduct causes a substantial restraint of competition in any particular field of trade. For example, below-cost pricing, exclusive dealing, tying and refusal to supply, and discriminatory treatment thereby causing a substantial restraint of competition in any particular field of trade, are the typical examples for private monopolisation.

3.6 What is the role of economic analysis in assessing market dominance?

In general, economic analysis has not played a significant role. Although the number of cases where the JFTC found the violation of private monopolisation is very small, so far, it is much harder to identify a specific case where economic analysis was considered in its finding. However, for the purpose of the merger review, the number of cases where economic analysis has been considered seems to have increased recently, and there is a possibility that economic analysis will play a certain role in assessing market dominance in the future. However, economic analysis may be considered as supportive only when such analysis coincides with presumed facts based on qualitative evidence.

3.7 What is the role of market share in assessing market dominance?

Please refer to question 3.4 above.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

For private monopolisation, if the conduct substantially restrains the competition in the relevant market, such conduct shall be deemed illegal. Therefore, the entrepreneur allegedly engaging in private monopolisation may defend the case by showing that such conduct will not substantially restrain the competition in the relevant market.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are one of several factors to be considered when assessing whether there is any substantial restraint of competition. However, as a practical matter, in cases where the exclusionary conduct leads to a dominant or strong market power, it is unlikely to be possible to prove that there is no substantial restraint of the competition by only showing the efficiencies.

3.10 Do the governing laws apply to "collective" dominance?

Yes. As set forth in the Act, exclusionary conduct can be made individually or in combination with other entrepreneurs.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

There are no substantial differences between the purchase and the sale, and thus the same as described above will be applied to dominant purchasers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

A type of conduct similar to the unfair trade practices listed in Article 2 (9) of the Act can be found as exclusionary conduct. Therefore, a part of unfair trade practices may also fall under exclusionary conduct. On the other hand, exclusionary conduct has not necessarily been limited to that which is similar to unfair trade practices, and several types of conduct other than these have been also regarded as exclusionary conduct. There is a wide variety of conduct deemed as exclusionary conduct, and thus it is difficult to characterise all of it. The Exclusionary Private Monopolisation Guidelines (as of 28 October 2009), however, provide for five typical types of exclusionary conduct: below-cost pricing; exclusive dealing; tying and refusal to supply; and discriminatory treatment.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The scope and effect of intellectual property may be considered when assessing dominance or market power.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The exclusionary effect is not necessarily recognised as direct on the market where the alleged violator is active. However, if any indirect effects on the different markets can be found, this could be sufficient to establish illegal exclusionary conduct with the effect of the restraint of competition.

3.15 How is "platform dominance" assessed in your jurisdiction?

The effect on a certain market by big data or platform dominance is one of the hot topics which the JFTC has recently been actively studying. It has been said that the legacy analysis methods may not be appropriate for the competitive analysis in such cases, but the discussion on how to analyse it is currently in progress. Recently, it was publicised that the new guideline or the new special designation for the unfair trade practices will be brought into force by the JFTC to preserve the fairness and transparency rules in consideration of possible platform dominance.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

If it is highly likely that a supplier in the upstream market will have difficulty in continuing business activities in that market, or in commencing business activities in that market as a new market entrant, due to refusals to deal, such refusals could be deemed exclusionary conduct. To assess whether it is highly likely that the supplier's refusal may cause difficulties in continuing business activities or commencing business activities, the degree of concentration, the nature of products, the degree of the economies of scale, and distribution systems in the upstream market and the downstream market shall be considered. To constitute exclusionary conduct, it is not necessary for it to be found to have resulted in the actual elimination of business activities of other entrepreneurs from the market, or in the complete blocking of business activities for entry into the new market, due to such exclusionary conduct.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Conduct that falls under private monopolisation can also be subject to unfair trade practices rules, and the JFTC is inclined to deal with such conduct by the regulation of unfair trade practices. Under the current Act, the types of conduct which are listed in the Exclusionary Private Monopolisation Guidelines (as of 28 October 2009) as typical exclusionary conduct may be subject to not only a cease-and-desist order but also a surcharge order, even if they are found to constitute unfair trade practices and the JFTC may achieve a similar result within the framework of unfair trade practice regulation.

Under the Act, the JFTC may, in order to ensure the proper operation of the Act, make any necessary matters public, except for the secrets of enterprises. Recently, the JFTC seems to be utilising this power to issue a warning against the types of conduct which do not violate the Act but could lead to the violation of the Act, by requesting the cessation of such conduct and taking any measures to prevent any recurrence. As the warning is not a formal disposition, the addressee of such warning has no right to object to any factual findings by the JFTC, while the fact that the addressee engaged in the suspected conduct which could lead to the violation of the Act is disclosed to the public. The substance of the warning or its substantial effect is very similar to that of a cease-and-desist order. Following the introduction of commitment procedures at the end of 2018, the JFTC may be more willing to make use of commitment procedures rather than information warnings.

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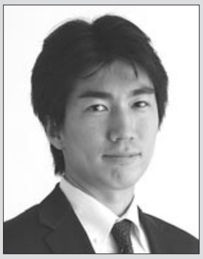

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Korea

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Korea Fair Trade Commission (the "KFTC") investigates anti-competitive activities and enforces the Monopoly Regulation and Fair Trade Act (the "Act"), which governs vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The KFTC may 1) order an interview and production of documentary evidence, 2) conduct an on-site investigation, and 3) require the submission of financial transaction data. Under Article 50, Section 1 of the Act, the KFTC may, if deemed necessary for the enforcement of the Act, summon relevant parties or witnesses to seek their opinions, designate an expert witness to seek expert opinions, and issue an order requiring a business entity or business entities' organisation or its executives or employees to report on the cost and its business administration or to submit other necessary materials or articles or keeping the submitted materials or articles in custody. Also, under Article 50, Section 2 of the Act, the KFTC, if deemed necessary to enforce this Act, may require public officials under its control to enter the office or place of business of a business entity or business entities' organisation to examine its business and management, account books, documents, electronic data, voice-recording materials, video materials, and other materials, and to take statements from the parties, interested parties, or witnesses at any designated place.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

An investigation opens when the KFTC acts upon its authority or receives a report. A KFTC investigator first reports the commencement of an investigation and then conducts the investigation and examination. If the investigator believes there is an unlawful practice, a report is produced and introduced to the Commission. Depending on the importance of the case, a small meeting may be held or all members may participate in a meeting. The investigator sends the report to parties being investigated, who may then submit their opinion about the report in writing. Once the report is introduced to the Commission, the investigator and the parties may go through a hearing process before the review date. On the day of the review, the parties and the investigator present oral arguments. After the review, the commissioners discuss and decide on the illegality and corrective measures.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

For business entities that violate the Act, the KFTC can order corrective measures which include a cease-and-desist order not only on previous unlawful activities but also on the same types of activity that may be repeated in the near future. Under the Act, the KFTC can also impose an administrative fine for violations of procedural regulations, as well as penalties for violating the law. The latter have characteristics of both the recovery of unjust enrichment and the administrative sanctions. In addition, the KFTC can take criminal actions by reporting the violations to the prosecutor's office.

1.5 How are those remedies determined and/or calculated?

The KFTC has enacted and implemented the "Guidelines for the KFTC Corrective Measures", and has broad discretion on the contents of such corrective measures. Under Article 55, Section 3, Clause 1, the type, degree, duration and number of violations, as well as the profit gained, are taken into account when assessing the penalty, which is calculated pursuant to the "Public Notice of Detailed Guidelines for Imposing Administrative Monetary Penalties". The KFTC has the duty to report to the Prosecutor General violations that are objectively clear and serious to the extent that they are deemed to significantly impede competition. The KFTC decides to report such violations based on the "Guidelines for Reporting Violations of the Monopoly Regulation and Fair Trade Act".

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Under Korean law, there is no official negotiation process for the KFTC's administrative sanctions (corrective measures and penalties). However, under Article 51, Section 2, there can be an "agreement resolution", in which violators are exempted from administrative sanctions if they take corrective actions and consumers are compensated. Unfair collaborative acts as well as clear and serious violations are excluded from this process.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

A party may file a civil action requesting cancellation of KFTC measures, over which the Seoul High Court has exclusive jurisdiction. In such cases, the KFTC must argue and prove that its measures are proper, and the court decides based on the relevant KFTC rules as well as precedents.

1.8 What is the appeals process?

A party may make an objection to the KFTC or file a lawsuit to revoke a KFTC decision with the Seoul High Court within 30 days from the receipt of the KFTC notice. The action to revoke is a two-step process with the lawsuit of first instance before the Seoul High Court and the appeal to the Supreme Court, respectively.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Under Article 56, Section 1 of the Act, a person who sustains damage from a violation caused by a business entity or business entities' organisation can file a claim for damages. This differs from government enforcement action in that its purpose is to compensate those who suffered, and those who filed claims must argue and present a *prima facie* case.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The KFTC may exempt or reduce penalties for a person who voluntarily reports unfair collaborative acts. Penalties may also be reduced for cooperating with KFTC investigations or for other reasons listed in the "Public Notice of Detailed Guidelines for Imposing Administrative Monetary Penalties". The KFTC also sets a "Safety Zone" in which, despite an outwardly unfair trade practice, it may choose not to commence an investigation if the impact on fair trade is deemed insignificant based on the business's market share and other factors. Furthermore, the KFTC may determine that illegal support has not been provided when the difference between the interest rate applied to the assistance and the normal interest rate is less than 7% and the assisted amount is less than KRW 100,000,000.

1.11 Does enforcement vary between industries or businesses?

There are certain industries where anti-competitive action is allowed wholly or partially based on special laws due to the distinct characteristics of those industries. In such case, the KFTC deems an anti-competitive action as a lawful practice according to the special laws. Such special laws include the Fair Transactions in Subcontracting Act, the Large Franchise and Retail Business Act, the Fair Business Act, the Electronic Commerce Act and the Agency Act, among others.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

When courts and the KFTC determine the possibility of anti-competition, they consider all circumstances, comprehensively focusing on relevant special laws. For example, pursuant to the special laws for energy industry such as electricity, gas, etc., the government controls the decision-making of market entry and business terms and conditions including the price, which might be interpreted as restricting the free and fair competition in the market. When special laws directly allow the government's anti-competitive behaviours, the courts deem it as "legally fair trade practice".

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

There are no laws or provisions that specifically allow the political environment to directly affect the execution of anti-competition laws. However, Korea is a country where the President has a high degree of authority and discretion; the KFTC's tendency in enforcement often changes according to the President's policies, as the KFTC sits under the Executive Branch. Thus, it could be said that the political environment has an indirect effect on the KFTC's execution of the Act.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Currently, the KFTC is showing a strong interest in regulating the unfair trade practices of dominating enterprises, as well as in reforming the practice of large conglomerates. Also, there is a tendency of strengthened enforcement of prosecutions and criminal sanctions.

1.15 Describe any notable case law developments in the past year.

In 2018, the Supreme Court of Korea held that, if the KFTC unjustifiably refused a request by a subject of its investigation (the "Respondent") to peruse and obtain copies of the records despite there being no justifiable grounds for refusal as set forth in Article 29(12) of the Rules of the KFTC's Committee Operation and Case Handling Procedures, such disposition of the KFTC must be invalidated in principle due to its procedural defects. However, in exceptional cases where such procedural flaws cannot be deemed to have effectively impaired the Respondent's ability to present its defence, such disposition of the KFTC may not be invalidated (Supreme Court Judgment 2015Du44028).

The above precedent is meaningful in that the Supreme Court has provided guidance within the guidelines as to when a disposition rendered by the KFTC may be invalidated due to procedural defects, and the Supreme Court has laid down guiding principles on the substance and the limitations of the right of perusal and the right to obtain copies of records.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The Act does not specifically stipulate vertical agreements as unfair trade practices. Instead, it regulates the trade practices that may be treated as vertical agreement, such as resale price maintenance under Article 29 or the abuse of market dominance. The regulations on vertical agreements are not too strict. According to the KFTC's annual report for the fiscal year 2018, only 1.9% of unfair trade practice cases were about resale price maintenance. There were only 18 cases in the past three years, with three cases in 2016, five cases in 2017, and 10 cases in 2018.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Korean laws and precedents do not provide the exact requirements for determining whether an agreement is vertical. Instead, the trade practices based on vertical agreements are regulated as unfair trade practices. In such cases, the primary determination is whether the terms and conditions of business, such as prices, etc., have been decided within the vertical relationship and have been forced to be followed. Unlike for horizontal agreements, there are no legal standards to determine whether there is a vertical agreement.

2.3 What are the laws governing vertical agreements?

The governing law is the Act, which regulates unfair trade practices such as the practice of resale price maintenance, forcing the transaction with binding terms and conditions on the trading partners or on the partners at each level of transaction, etc. In addition, special laws apply based on the type of transaction. For example, the Large Franchise and Retail Business Act applies to the vertical agreement between large-scale distributors and suppliers; the Franchise Act applies to franchisors and franchisees; and the Agency Act applies to authorised dealers. The special laws take priority over the Act.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No vertical agreements or restraints are *per se* protected under current laws.

2.5 What is the analytical framework for assessing vertical agreements?

Since the Korean laws regulate vertical agreements by placing restrictions on specific types of practice such as resale price maintenance, the same analytical framework applies to the types of practice that are treated as vertical agreements.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The Supreme Court of Korea held that the standard for defining a market does not vary depending on the type of practice. A relevant market is comprised of (i) a relevant product market, and (ii) a relevant local market. A relevant product market is defined based on the demand substitutability, with other considerations such as supply substitutability and potential competition. A relevant local market is defined based on a comprehensive analysis of product price and characteristics, seller's business ability, transportation cost, awareness of sellers and buyers on the potential change of sales region, ease of change of sales region, the pace of technological development, etc.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Korean law does not specifically regulate dual distribution. There is no prior case where the KFTC and the courts have explicitly treated dual distribution as a vertical or horizontal agreement. However, if a dual distribution practice is determined as an unfair trade practice or abuse of market dominance regulated by the Act or other relevant laws, it is regulated as such.

2.8 What is the role of market share in reviewing a vertical agreement?

When reviewing resale price maintenance, the most typical type of practice that is considered a vertical agreement, the KFTC considers the influential position of a business entity in the market as one of the important standards. The market share of a firm is not a required consideration in the review process.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is used to determine whether there exists active competition among brands in the relevant market or whether the resale price maintenance has restricted competition or functioned as a cartel price.

2.10 What is the role of efficiencies in analysing vertical agreements?

The KFTC does not consider trade practices based on vertical agreements to be illegal when the anti-competitiveness of the practices is outweighed by their effects of increasing consumer benefits or efficiency.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There is no specialised regulation on vertical agreements related to intellectual property under the Korean laws.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The KFTC has the burden to prove anticompetitive effect.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes. If the KFTC and the courts find that potential benefits or efficiencies of a practice outweigh its harm, such a practice is ruled to "have just cause" and its illegality is negated.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

A business entity may first dispute the findings of facts by the KFTC on vertically restrictive practice, and may also raise an argument that it has not forced a vertically restrictive practice on its trading partner. The firm may further argue that there are other just causes which negate the illegality of the practice.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The KFTC has not provided any specific guidelines on vertical agreements, but has provided review guidelines for specific practices that can be treated as vertical agreements, such as the resale price maintenance practice.

2.16 How is resale price maintenance treated under the law?

Korean law prohibits resale price maintenance that sets a certain price and forces it on a trading partner and other trading partners at each level of transaction, unless just cause exists.

2.17 How do enforcers and courts examine exclusive dealing claims?

The KFTC and courts first see whether there exists any exclusive dealing practice, in which a party trades with a trading partner on the condition that the trading partner will not compete against the party or its affiliates. Then, they determine whether such exclusive dealing restricts competition in the relevant market.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

The KFTC and the courts see tying as one of the compulsive trade practices. They determine whether there exists any compulsive action forcing a trading partner to buy products from designated sellers. Then, they determine whether such tying restricts competition and whether it is unfair compared to the normal trading practices.

2.19 How do enforcers and courts examine price discrimination claims?

The KFTC and the courts see price discrimination as one of the wrongful discriminations, and they review whether a party traded at different prices (advantageous or disadvantageous) according to trade area or trading partners. Then, they determine if the price advantages and the disadvantages arising from the price difference are conspicuous. They also determine whether the price discrimination limited competition in the market.

2.20 How do enforcers and courts examine loyalty discount claims?

Under Korean law, there is no clearly established concept regarding loyalty discounts, and it is unclear whether they could be regulated as a type of abuse of market dominance or unfair trade practice. The KFTC and the courts have never clarified which conduct constitutes a loyalty discount or how the illegality of that conduct is examined.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

The KFTC and the courts assess whether the goods or services have been supplied at a price lower than the supply cost, and consider whether such supply practice has been continuous. Then, they assess whether the price is noticeably low based on the manufacturing cost or initial purchase cost. After that, they determine the illegality of the practice by considering whether the practice would exclude competitors.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

The exclusive dealings, tying, price discrimination, and unjust dumping are prohibited as unfair trade practice. Exclusive dealings, etc. of a market-dominant firm are also prohibited as abuse of market dominance.

2.23 How are MFNs treated under the law?

Under Korean law, there is no expressed rule regarding MFNs' treatment in relation to vertical agreements.

2.24 Describe any notable case developments concerning vertical merger analysis.

The KFTC reviews vertical mergers and whether a certain vertical merger effectively hinders competition by considering a comprehensive set of factors, such as the containment effect or cooperative effect it has on the market. Recently, in a business consolidation between Microsoft and Nokia, the KFTC found that the mergers between i) operating systems for smartphone/tablet and relevant devices, ii) mobile-related patents and relevant devices, and iii) mobile applications and relevant devices, were vertical mergers respectively. In making its determination, the KFTC paid particular attention to the following: i) with respect to the potential containment effect of the aforementioned merger, there was a concern that a substantial increase of the royalty on the patents used in operating systems may increase the production costs of manufacturers of Android devices (which are in competition with Windows devices) or may prevent market entry; and ii) with respect to the potential cooperative effect of the aforementioned merger, the potential detrimental effect that business contracts executed between specific device manufacturers before the merger may have on competition was considered.

Microsoft applied for a resolution on agreement (i.e., a subject against which KFTC's investigation is being conducted may voluntarily present remedial measures to the KFTC, and request the KFTC to issue a resolution on agreement that is in line with the remedial measures proposed to the KFTC). The KFTC held that the remedial measures proposed by Microsoft would alleviate the concerns over restriction of competition, and issued a resolution on agreement to that effect.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The KFTC has been continuously scrutinising and restraining the abuse of market dominance. According to the "Statistical Yearbook 2018", there were 330 abuse of market dominance cases from 1981 to 2018, which account for 1.1% of all violations. Twelve cases were handled in 2018, 12 cases in 2017, and nine cases in 2016. Recently, the KFTC has been actively investigating multinational corporations on their abuse of market dominance, such as imposing sanctions such as administrative penalties against Qualcomm and Siemens for their abuse of market dominance, and initiating investigations on potential abuse of market dominance by Google and Apple.

3.2 What are the laws governing dominant firms?

The Act governs the abuse of a market-dominant position.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The Supreme Court of Korea held that the standard for defining a market does not vary depending on the type of practice. A relevant market is comprised of (i) a relevant product market, and (ii) a relevant local market. A relevant product market is defined based on the demand substitutability, with other considerations such as supply substitutability and potential competition. A relevant local market is defined based on a comprehensive analysis of product price and characteristics, seller's business ability, transportation cost, awareness of sellers and buyers on the potential change of sales region, ease of change of sales region, the pace of technological development, etc.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The Act treats a firm(s) as market-dominant if the market share is (i) no less than 50% by one firm, or (ii) no less than 75% by three firms or less (excluding firms with market share of less than 10%). Firms with an annual revenue or purchase amount of less than KRW 4,000,000,000 are excluded from this standard (Article 4 of the Act). In applying this standard, a firm and its subsidiaries are treated as one firm (Article 4, Paragraph 3 of the Act).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

The Act does not consider the formation of market dominance or monopoly itself as a violation but only prohibits the conduct of abuse. The abuse of market dominance is constituted if (a) the firm is market-dominant by law, (b) the conduct of the market-dominant firm is one of the abusive conducts prescribed in each Sub-paragraph of Article 3.2, Paragraph 1 of the Act, and (c) the conduct's unfairness must be admitted.

Article 3.2, Paragraph 1 of the Act enumerates the following six types of conduct as prohibited conduct of abuse of a market dominance position: (i) unjust decision, maintenance, or change of price (Sub-paragraph 1); (ii) conduct of unjust release control (Sub-paragraph 2); (iii) conduct of unjust business activity disturbance (Sub-paragraph 3); (iv) conduct of unjust market entry disturbance (Sub-paragraph 4); (v) conduct of unjust competing business exclusion (initial part of Sub-paragraph 5); and (vi) conduct of unjust hindrance of noticeable consumer benefit (latter part of Sub-paragraph 5).

3.6 What is the role of economic analysis in assessing market dominance?

The economic analysis is used to assess whether a firm is market-dominant or not; it defines the related product market and local market, calculates the market share of the firm in the related market, and considers overall factors such as the degree of entry barriers or the size of competitors to assess whether a firm is in market-dominant position.

3.7 What is the role of market share in assessing market dominance?

Market share is one of the important elements to be considered in determining the existence of market dominance of a firm. Particularly, when the firm is admitted to have more market share than a certain standard rate (market share of 50% or more by one firm, total market share of 75% or more by three firms), the Act treats a firm as a market-dominant firm.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

A firm can argue against the finding of facts admitted by the KFTC that the firm is abusing its dominance of market power. Even if the fact-finding turns out to be true, it can argue i) that the firm did not have any intent to maintain its monopoly in the market, ii) that there is no concern for limiting fair competition in the market, ot iii) that there are just causes for alleged unfair conduct.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

The efficiency brought by an action of a dominant firm, such as promotion of innovation, or an increase in the number and variety of competitors, is one of the elements that the KFTC considers when it decides whether the firm abused its market dominance.

3.10 Do the governing laws apply to "collective" dominance?

The Supreme Court of Korea mentioned that "dominant firms" refers to individual firms which dominate the market in the form of a monopoly or oligopoly, but does not refer to collective dominance created by mutual consent of multiple non-dominant firms. This decision is interpreted to mean that a definition of collective market dominance admitted in the EU is not applicable in Korea.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

If a purchaser has a market position where he/she could independently or collaboratively change the price, amount, quality, and other contract conditions of products or services, it falls under the category of market-dominant firm, and therefore, the KFTC interprets that the relevant laws also apply to the purchaser.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 3.2, Subsection 1 of the Act enumerates the following six types of conduct as market dominance abuse: (i) unfair determination, maintenance or change of the price; (ii) unfair release control; (iii) unfair interference in business activities; (iv) unfair interference in another's market entry; (v) unfair exclusion against competitors; and (vi) extreme contravention of consumer interests.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Pursuant to the "Examination check guideline to unfair exercise of intellectual property rights" of the KFTC, it is a principle that a firm is able to solely exercise its intellectual property rights only if the firm has market dominance. But this does not mean that the possession of an exclusive, monopolistic right to exercise intellectual property by itself proves the firm's market dominance. When the KFTC decides whether or not the firm has market dominance, it comprehensively considers relevant situations such as the corresponding technique's impacts on the market, the existence of alternative techniques, the market competition situation, etc.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The KFTC and the courts have never expressly mentioned their position as to whether they should consider "direct effects" of exclusive strategies; however, these "direct effects" could be considered in any separate issues.

3.15 How is "platform dominance" assessed in your jurisdiction?

The Supreme Court held that "platform dominance" should be determined considering a certain aspect or phase of the problematic abusive practice. In this context, even if it could infer market dominance from the market share of multi-aspect platform firms, this cannot serve as proof of market dominance of multi-aspect platform firms, because it determines market dominance considering the aspects or phase of the problematic abusive acts.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

The KFTC and the courts do not find abuse of market dominance only with the fact that a certain firm suffered disadvantages by trade refusals of a market-dominant firm. Therefore, to find unfair refusals, a market-dominant firm's anti-competitive intention/purpose (subjective) and refusals which have a risk of anti-competitive results (objective) must be found by the KFTC or the courts.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Currently, the National Assembly is actively debating substantial amendments to the Act. The draft amendment of the Act submitted by the KFTC in 2018 included amendments to allow the maintenance of a lowest resale price (a certain type of resale price maintenance) in exceptional cases where justifiable cause exists (e.g., such act having a beneficial effect for consumers). The specific amendments are expected to be finalised after further discussions at the legislature.

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

In the Netherlands, the *Autoriteit Consument en Markt* (ACM) is in charge of investigating and enforcing Dutch competition law. The ACM is the successor of the *Nederlandse Mededingingsautoriteit* (NMa), having merged with the Independent Post and Telecommunications Authority and the Consumer Authority on 1 April 2013. The ACM is tasked with the enforcement of the Dutch Competition Act/DCA (*Mededingingswet/Mw*).

Apart from the ACM, there is a specific authority tasked with the enforcement of healthcare regulations, the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit/NZa*). Under article 20 of the Healthcare Market Regulation Act (*Wet Marktordening gezondheidszorg*), the Dutch Healthcare Authority may assess the dominant position of parties in the healthcare sector.

1.2 What investigative powers do the responsible competition authorities have?

The ACM has far-reaching competences to investigate possible infringements of competition law. The ACM has, amongst others, the power to request information, enter companies' premises, seal business premises and material, conduct interviews, make copies of information and documents and, if the copies cannot be made on the spot, the ACM is entitled to take the information and documents away for this purpose for a short time. Furthermore, subject to the approval of a supervisory judge, the ACM may enter the premises of individuals.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The ACM generally opens an investigation on its own initiative, following a complaint by a third party, based on (anonymous) whistleblowing or following a leniency application.

The ACM has the authority to determine its own priorities and can decline to act on complaints; for example, because of a lack of consumer interest or economic impact. When not pursuing a formal complaint, the ACM will issue a reasoned decision.

If the ACM concludes, based on the investigation, that there is an infringement of competition law, it will draft a report (statement of objections). This report will be handed over to the Legal Department of the ACM (*Juridische Zaken/JZ*). The undertakings concerned will have the opportunity to respond to the allegations in the statement of objections. The Legal Department will subsequently advise the Board of the ACM whether a sanction should be imposed. The Board can subsequently impose a sanction (such as a fine) through an administrative decision.

The decision-making process of the ACM is set out in the Dutch General Administrative Law Act (*Algemene wet bestuursrecht/Awb*).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The ACM can impose the following remedies at the end of the decision-making process:

- Imposition of fines (an administrative fine up to EUR 900,000 or – if this is greater – 10% of the previous year's annual group turnover. For cartels spanning multiple years, the maximum fine can be as high as 40% of the annual turnover. In case of repeat violations, the fine can be doubled).
- Ordering to bring an infringement to an end (subject to a penalty).
- Taking of a commitment decision.

The ACM can also impose sanctions for procedural breaches, for example for a failure to cooperate with the administrative powers of the ACM (generally an administrative fine up to EUR 900,000 or – if this is greater – 1% of the previous year's annual group turnover. In case of repeat violations, the fine can be doubled).

1.5 How are those remedies determined and/or calculated?

The sanction is determined by the specific circumstances of the case.

A fine will be calculated by taking into account the turnover. If the ACM cannot decide on the exact turnover, it will make an estimation.

When determining the amount of the fine, the ACM takes into account the seriousness of the infringement, the circumstances in which the infringement was committed and the duration of the infringement.

The ACM takes into consideration any aggravating or mitigating circumstances. Aggravating circumstances are, for example: the offender committed a comparable infringement before; the offender hindered the ACM's investigation; the offender instigated or played a leading role in the committing of the infringement; or the offender used controlling or coercive methods for the continuation of anticompetitive conduct. Mitigating circumstances could be the following: the offender cooperated (more than legally required) with the ACM; or provided full compensation to the parties injured by the infringements on its own initiative.

The ACM can also fine natural persons who were *de facto* responsible for the infringement by an undertaking. For those types of fines, the ACM takes into account the level of involvement of the person with the infringement.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The commitments may be offered by the undertaking or initiated by the ACM during a so-called "state of play" meeting. The ACM will assess whether the proposed commitment will be efficient and effective. If the ACM and the undertaking agree on the commitments, the undertaking can request the ACM to make the commitments binding. The ACM will then issue a decision and third parties will have the possibility to appeal.

The commitment decision will be binding for a certain period of time. Failure to comply with a commitment decision may result in the imposition of a fine (see question 1.4).

There is also the possibility of a settlement, which takes the form of a simplified procedure and can lead to a shorter decision and speedier procedure. The ACM could decide to impose a lower fine as a result of the settlement. It is possible to discuss a settlement with the ACM even during the course of the investigation, before the statement of objections is issued, but also at a later stage when the possible sanctions are being determined.

The ACM also has a leniency policy regarding breaches of article 6 DCA and a person or undertaking may submit a leniency request.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No, the ACM has the power to issue sanction decisions. Please also see the answer to question 1.8.

1.8 What is the appeals process?

Any decision of the ACM is an administrative decision against which an objection is possible. It is possible to file an objection within six weeks after the decision. In the objection phase, the parties have the opportunity to present their view on the alleged infringement and fine in a written document and/or in a hearing. The board of the ACM will decide, in the objection phase, whether the objection is founded or not.

It is possible to appeal against this decision at the administrative court in Rotterdam. After this appeal, a higher appeal is possible at the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven/CBb*). The term for appeal at the administrative court in Rotterdam or the *College van Beroep voor het bedrijfsleven* is six weeks.

The ACM has a certain level of discretion in its decision-making. An administrative court will, for example, assess whether the ACM made a plausible claim regarding the application of the competition law provisions, acted in line with the principles of proper administration, fulfilled the substantiation requirement and correctly interpreted the competition law provision.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Yes, it is possible to make a private claim before a court regarding a breach of competition law against an undertaking. Follow-on litigation following a decision by the ACM or another competition authority is also possible.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Article 7(1) DCA provides that the cartel prohibition of article 6 DCA does not extend to agreements where no more than eight undertakings are involved and the combined turnover of the undertakings does not exceed EUR 5,500,000 (for undertakings of which the core activity is the supply of goods) or EUR 1,100,000 in all other cases. Hard-core restrictions also benefit from this exception. This is different under the European *De Minimis* exemption.

Article 7(2) DCA provides an exception to the cartel prohibition for horizontal agreements (between actual or potential competitors).

Parties may claim an individual exemption under article 6(3) DCA and argue that the positive effects of an agreement outweigh the negative effects on competition. Article 6(3) DCA is materially the same as article 101(3) TFEU. The parties will have to prove that the agreement leads to efficiencies that are beneficial for consumers, that it does not restrict competition further than necessary and that it does not eliminate competition completely in respect of a substantial part of the product in question.

Under article 15 DCA, Dutch block exemption regulations may be issued by general administrative orders. There are currently two orders in place:

- Exemption agreements in the retail sector.
- Exemption agreements' protection of branches.

Furthermore, through articles 12 and 13 DCA, the EU exemptions are incorporated into Dutch competition law. If an agreement is exempted under an EU Block Exemption Regulation, it will also be exempted under Dutch competition law.

1.11 Does enforcement vary between industries or businesses?

Article 6 DCA applies to all undertakings, in all sectors. Although the ACM does have policy guidelines for specific sectors, such as the health sector, its enforcement does not generally vary between industries or businesses.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

In general, Dutch competition law is applied in the same way for regulated industries as for other industries. The ACM does take into account the industry's regulatory context during its legal assessment.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The ACM is an independent administrative body.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

Vertical guidelines

On 26 February 2019, the ACM published new vertical guidelines. It published an "extensive" and "brief" version of the guidelines. The extensive version is called "*agreements between suppliers and purchasers*" and the brief version is called "*Suppliers and purchasers are allowed to collaborate, but there are boundaries*". The Dutch guidelines are aligned with the European Commission's Vertical Block Exemption Regulation and Guidelines on vertical agreements, and are further updated based on the latest developments in the (Dutch) market.

Following the publication of the new guidelines, the ACM has taken a stricter approach regarding vertical restraints and has been specifically focusing on vertical price-fixing and online restraints. For example, in December 2018 the ACM carried out dawn raids on several manufacturers and online distributors/retailers of consumer goods because of suspected vertical price-fixing arrangements. As far as we are aware, the investigations are still pending. Furthermore, the new Chairman of the ACM has announced that the ACM has the intention to impose more fines in the context of vertical restraints.

Online platforms

On 19 December 2018, the Ministry of Economic Affairs and Climate initiated an internet consultation regarding its discussion paper "*Future-proof competition policy in relation to online platforms*" to see whether additional national regulations are required to deal with the challenges of big online platforms. Following the submitted responses to the discussion paper, the state secretary of the Ministry of Economic Affairs and Climate informed the Dutch National Parliament on 17 May 2019 that it is undesirable for digital platforms to maintain a permanent dominant position. This would hinder the entry of new undertakings and limit the freedom of choice of consumers and undertakings. The state secretary proposed the following three legislative measures:

1. Authorities must receive powers to intervene *ex ante* in the event a platform is getting a position which influences consumers and companies. Authorities must have the power to (i) force a platform to share data with other companies, or (ii) force a platform to stop manipulating search results.
2. Data must play a role in the assessment of competition issues with platforms, and the competition guidelines must be revised in this respect.
3. The transaction value must become an integral part of the merger notification thresholds. The state secretary stated that the current merger thresholds do not prevent platforms from taking over small potential competitors.

The political process regarding these proposed measures is ongoing.

The digital economy (including online platforms) is one of the ACM's key priorities. In April 2019, the ACM completed a market study into app stores for mobile phones, focusing on the way in which app providers get their apps into app stores, and what influence the app stores have on the selection of apps for users. Following the completion of this market study, the ACM announced, on 11 April 2019, an investigation into the possible abuse of dominance by Apple in its App Store.

1.15 Describe any notable case law developments in the past year.

One of the most notable decisions of 2017 was a civil case relating to selective distribution systems and platform bans (*Nike (NEON)/Action Sport*). The Dutch court ruled that Nike can restrict online sales via online platforms within its selective distribution system. The decision of the Dutch court was issued before the decision in the European *Coty* case, but the court did refer to the Opinion of the Advocate General in the *Coty* case.

In 2018, there was a limited number of cases relating to vertical agreements and their relevance is limited. For example, there was a civil case (*ECLI:NL:RBMNE:2018:1117*) in the funeral industry. The plaintiff claimed nullity of a post-term non-compete clause and the court rejected this claim as it was not sufficiently substantiated, especially regarding the effects of the clause. The Court of Appeals of 's-Hertogenbosch ruled in a civil case (*ECLI:NL:GHSHE:2018:2370*) in the education and training sector. The court acknowledged that a franchise agreement infringed the cartel prohibition of article 6 DCA as it resulted in resale price maintenance. Another example is a civil case (*ECLI:NL:RBAMS:2018:6443*) in the travel sector. The court concluded that the termination of an agency agreement was in violation of the cartel prohibition of article 6 DCA as it constituted resale price maintenance.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

In general, vertical agreements are considered less restrictive to competition than horizontal agreements. However – as stated under question 1.14 – in recent years the ACM has taken a stricter approach than before regarding vertical restraints, specifically focusing on vertical price-fixing and online restraints. In December 2018, the ACM carried out dawn raids on several manufacturers and online distributors/retailers of consumer goods because of suspected vertical price-fixing arrangements. Furthermore, the new Chairman of the ACM announced that the ACM has the intention to impose more fines in the context of vertical restraints.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Dutch competition law follows the same analysis as under European competition law. The ACM regularly refers to the case law of the EU Court and European Commission.

The DCA does not contain a definition of vertical agreements or vertical restraints. However, in the new Dutch vertical guidelines, "*Agreements between suppliers and purchasers*", the ACM states that agreements between suppliers and purchasers should be seen as vertical agreements because suppliers and purchasers are "*active at different levels of the distribution chain*". This is in line with the definition under EU law.

2.3 What are the laws governing vertical agreements?

Vertical agreements are governed by the cartel prohibition of article 6 DCA. The cartel prohibition of article 6 DCA is based on and comparable to article 101 of the Treaty on the Functioning of the European Union (TFEU).

Furthermore, the ACM applies article 101 TFEU if, amongst others, the vertical agreement may affect trade between EU Member States.

The European Commission's Guidelines on Vertical Restraints also apply – through a clause in the DCA – to trade in the Netherlands that has no cross-border effect.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No. The cartel prohibition of article 6 DCA prohibits vertical agreements or restraints if they have an appreciable anticompetitive object or effect. In the new Dutch vertical guidelines, "*Agreements between suppliers and purchasers*", the ACM follows the same approach with regard to hard-core restrictions as stated in the European Commission's Vertical Block Exemption Regulation.

2.5 What is the analytical framework for assessing vertical agreements?

In general, it needs to be established whether the arrangement is an agreement, a decision by an association of undertakings or a concerted practice. Subsequently, it needs to be established whether the agreement has as its object or effect the prevention, restriction or distortion of competition. Object and effect restrictions are assessed in line with European case law. It will also have to be determined whether the agreement has an appreciable effect on competition.

An agreement will still fall outside the scope of article 6 DCA if it: fulfils the criteria of the exception of article 7 DCA (see question 1.10); is concluded by public entities carrying out non-economic activities; is concluded by undertakings within the same single economic unit; or concerns a genuine agency relationship.

Once an agreement falls within the scope of the prohibition of article 6 DCA, it will have to be determined whether it qualifies under an EU or Dutch block exemption or is exempted on the basis of article 6(3) DCA. Under Dutch competition law, both object and effect restrictions can qualify for such an exemption. However, in practice an object restriction will rarely meet the criteria.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The definition of the relevant market with regard to article 6 DCA is in line with the definition of the market under European competition law. The ACM refers to the Commission's Notice on the definition of relevant market for the purposes of European Competition Law (*97/C 372/03*).

The relevant market consists of the relevant product market and the relevant geographical market. The relevant product market "*comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*". The relevant geographical market "*comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*".

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

This is analysed in the same way as under European competition law.

2.8 What is the role of market share in reviewing a vertical agreement?

The market shares of the undertakings are important for determining the application of the European Vertical Block Exemption Regulation (VBER) and to assess the effects of an agreement on the market.

Furthermore, the existence of cumulative effects and the existence of a parallel network of similar restraints are relevant for the assessment of a vertical agreement under Dutch competition law.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is most relevant in assessing the effect on competition of an agreement. It has a lesser impact on the assessment of restrictions by object. Economic analysis also plays an important role when determining the relevant market and the assessment of efficiencies (in the context of an exemption).

In the *ANVR cs/IATA-NL* case, the Dutch Supreme Court ruled that in the event a plaintiff invokes competition law, he or she must support his or her arguments with a thorough market definition of the relevant product and geographic market and an in-depth analysis of the market shares of the parties to fulfil the burden of proof, otherwise he or she will not succeed with his or her competition claim in a civil procedure.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies are not part of the initial research of the ACM in finding competitive restraints in vertical agreements. Parties may claim that the anticompetitive aspects of an agreement are justified by efficiencies, in order to benefit from an exemption under article 6(3) DCA. The ACM will assess the market circumstances and product characteristics to determine whether efficiencies are likely. Examples of efficiencies are solving a "free-rider" problem, opening up or entering new markets, or solving the so-called "hold-up problem".

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no specific Dutch rules for vertical agreement relating to intellectual property. The analysis will be the same as under European competition law. For example, the VBER and the block exemption concerning the transfer of technology might be applicable.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Where the agreement has as its object the restriction of competition, the ACM does not need to demonstrate anticompetitive effects. The ACM must demonstrate those effects for other vertical restraints.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The harm of a vertical restraint will be weighed against potential benefits or efficiencies with regard to an exemption based on article 6(3) DCA or article 101(3) TFEU.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

See questions 1.10 and 2.5. Furthermore, it could also be argued that an agreement qualifies as an ancillary restraint.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

As stated under question 1.14, on 26 February 2019 the ACM published new vertical guidelines.

2.16 How is resale price maintenance treated under the law?

The ACM treats resale price maintenance largely in line with European competition law. This means that minimum or fixed prices (or recommended prices with the same effect) can be prohibited under the cartel prohibition of article 6 DCA.

In the new Dutch vertical guidelines, the ACM defines resale price maintenance/vertical price-fixing as: "*limiting the freedom of the purchaser to define its resale price*". The ACM states in the vertical guidelines that recommended prices and maximum prices are not a hard-core restriction.

As stated under question 1.14, the ACM is taking a stricter approach than before regarding vertical restraints, and is especially focusing on vertical price-fixing and online restraints. For example, in December 2018 the ACM carried out dawn raids on several manufacturers and online distributors/retailers of consumer goods because of suspected vertical price-fixing arrangements. As far as we are aware, the investigations are still pending.

There is one specific type of fixed resale prices mandated by Dutch law. The Dutch Act on fixed book prices mandates publishers in the Netherlands to set consumer prices of new books, and prohibits book dealers from providing discounts on these prices.

2.17 How do enforcers and courts examine exclusive dealing claims?

This is examined generally in the same way as under European competition law.

An example of exclusive dealing is the investigation by the ACM into breweries in 2002 and 2013. Breweries concluded vertical agreements with businesses (such as bars and hotels) containing obligations to purchase beer from only one brewery (exclusive distribution). As a consequence, a bar could not sell competing brands from other breweries. The ACM concluded that the exclusive dealings agreements were not anticompetitive due to the specific dynamics of the beer market. A deciding factor was the finding that the breweries did in fact substantially compete with each other for those sale outlets.

An example of a Dutch court case involving exclusive dealing is *BP/Benschop*. The Dutch court decided that an exclusive purchase obligation for a gas station infringed competition law, because of the duration of 20 years, the market share of the involved parties and network effects. This decision was later confirmed by the Dutch Supreme Court.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

This is examined generally in the same way as under European competition law.

Tying is mostly evaluated under the prohibition of abuse of dominance, but tying could also constitute a vertical restraint under article 6 DCA, for example where it results in a single branding type of obligation for the tied product.

2.19 How do enforcers and courts examine price discrimination claims?

This is examined generally in the same way as under European competition law.

Price discrimination is assessed under the prohibition of abuse of dominance. Price discrimination in vertical agreements is not considered a restriction of competition.

2.20 How do enforcers and courts examine loyalty discount claims?

This is examined generally in the same way as under European competition law.

Loyalty discounts are also assessed within the framework of abuse of a dominant position. Loyalty discounts in vertical agreements are not considered a restriction of competition.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

As with tying, price discrimination and loyalty discounts, multi-product or "bundled" discount claims are assessed in the context of abuse of a dominant position.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Under Dutch law, there is no exhaustive list of vertical restraints that are considered anticompetitive.

As mentioned under question 1.14, the ACM is taking a stricter approach than before regarding vertical restraints, and is especially focusing on vertical price-fixing and online restraints. The ACM has recently been focusing on the digital economy and e-commerce sector. This also means that the ACM has more interest in vertical restraints relating to those sectors. For example, restrictions of online sales, platform bans and, more generally, restraints relating to selective and/or exclusive distribution systems.

An example of a case involving online sales is *Voorne Koi/Oase*. The court found that the contractual requirement for the distributor Voorne Koi to get approval from the supplier Oase to conduct online sales constituted a hard-core restriction.

2.23 How are MFNs treated under the law?

In its 2015 publication, "*ACM's strategy and enforcement priorities with regard to vertical agreements*", the ACM stipulates how it deals with price parity clauses (retail MFNs).

Normally a distinction is made between two types of "most-favoured-nation" (MFN) clauses: wide Across Platform Parity Agreements (APPAs); and narrow APPAs. In a wide APPA, the manufacturer agrees that the price of its product or service on the platform (such as a booking site) is not higher on any other (competing) platform. In a narrow APPA, the manufacturer agrees that the price is not higher on its own platform or own website. The ACM states that APPAs can infringe competition law as it may be difficult for new platforms to acquire market share and APPAs can lead to higher commissions for manufacturers for using the platform.

The ACM stipulates that APPAs could also lead to efficiencies that could counterbalance the possible harm. For example, APPAs could protect platforms against "free-riding" by manufacturers on the platform and APPAs could promote price competition between manufacturers.

In 2016, the ACM decided not to further investigate Thuisbezorgd.nl, an online food ordering platform. Thuisbezorgd.nl required the guarantee from the restaurants on its platform that the prices would not be higher than on their own platform, thus a narrow APPA. According to the ACM, this "same-price guarantee" did not negatively affect consumers.

The ACM was also actively involved in the European investigations by competition authorities in the *Booking.com* case and the ACM agreed with the outcome of this case. The ACM decided not to start a local investigation into Booking.com.

2.24 Describe any notable case developments concerning vertical merger analysis.

The vertical merger analysis of the ACM is in line with the European Guidelines on the assessment of non-horizontal mergers.

In recent years, there has been a limited number of merger cases involving vertical aspects. Most of these cases concerned concentrations between undertakings that are in a horizontal relationship, but whose relationship includes some vertical elements.

An example of such a case is *Sligro/Heineken* (*Case 17.0611.22, 12 September 2017*). The ACM concluded that the partial acquisition of Heineken's wholesale activities by wholesaler Sligro would not lead to a significant restriction of competition, and the ACM cleared the concentration. The ACM noted that, after the concentration, Sligro would still experience competitive pressure on the market, both from the wholesale sector and in its direct deliveries by manufacturers. Furthermore, it would still be possible for buyers to switch to other suppliers.

The ACM also decided on a merger between two waste companies (*Shanks/Van Gansewinkel, Case 17.1044.22, 14 February 2017*). The undertakings concerned were two of the three largest players on the broader market for waste collection and processing. They were in both a horizontal and a vertical relationship. The ACM cleared the concentration and specifically pointed out that in several market segments the undertakings do not really compete with each other, and that there would be no significant effect on competition.

In addition, the cases *Talpa/Sanoma* (*Case 17.0453.22, 10 July 2017*) and *Mediahuis/Telegraaf* (*Case 17.0337.22, 1 May 2017*) contained vertical elements. Both cases concerned mergers between undertakings that are active on the (digital) advertising market. The ACM noted that there is an increasing competitive pressure from the online advertising market. The ACM concluded in both cases that there would be no significant effect on competition on the Dutch market.

Other examples of merger cases that contained vertical elements are *Sonova/AudioNova* (*Case 16.0721.22, 7 September 2016*) and *Holland Pharma/FACO* (*Case 16.0860.24, 12 December 2016*).

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

In the last few years, the ACM has scrutinised unilateral market conduct of dominant undertakings, although the number of investigations and decisions has tended to be lower than cartel investigations. In 2017, the ACM imposed a substantial fine on the Dutch Railways for abuse of dominance in a public procurement procedure relating to public transport. However, in June 2019 this fine was reversed by the Dutch court as it concluded that the ACM had insufficiently substantiated that there was a dominant position.

Sector-specific regulations enable the ACM to impose measures *ex ante* on undertakings that have market power. For example, the Dutch postal service PostNL must allow competitors on its post distribution channel.

3.2 What are the laws governing dominant firms?

Under article 24 DCA, undertakings are prohibited from abusing a dominant position. The Dutch provision is based on article 102 TFEU. The ACM may also apply article 102 TFEU if trade between Member States is affected. Specific provisions apply in regulated industries such as the telecom, transport, energy and postal sectors.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework is the same as under European competition law. The ACM refers to the Commission's Notice on the definition of relevant market for the purposes of European Competition Law (97/C 372/03). The analysis is substantively the same as for defining markets in vertical agreement cases (see question 2.6).

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The market structure is taken into account when considering whether a firm can act independently from its competitors, suppliers, purchasers or consumers. The most important element when considering the market structure is market share. A market share of 50% is regarded as a strong indication of dominance. In this respect, the ACM and the Dutch courts follow European competition law, more specifically European case law and the Commission's Guidelines on article 102 TFEU.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being adjudged "dominant" or a "monopolist" has no legal consequences as such; only the abuse of such a position is prohibited. In contrast to article 102 TFEU, article 24 DCA does not contain a list of abusive behaviour. The ACM considers the concept of abuse as an "open-ended concept" that also encompasses conduct other than the examples mentioned in article 102 TFEU.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis plays an essential role in various aspects of the analysis of dominance: (i) the definition of the product/services and geographical relevant market; (ii) establishing the market share; and (iii) the assessment of elements that could constrain market power (such as potential competition and countervailing buyer power). Economic analysis is also crucial for analysing the restrictive effects of abusive behaviour.

3.7 What is the role of market share in assessing market dominance?

In assessing market dominance, the market share of an undertaking plays an important role and may lead to the strong presumption of dominance if it exceeds 50% (see questions 3.4 and 3.10). Especially in case of market shares below 50%, the ACM and the Dutch courts will also take into account an undertaking's financial strength, access to supply or sales markets, links with other undertakings, legal or factual barriers for market entry by other undertakings, actual or potential competition, the undertaking's ability to shift its supply or demand to other goods or commercial services, and countervailing (buyer) power.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Article 24 DCA does not provide an exemption to the prohibition of an abuse of dominant position, comparable to article 101(3) TFEU or article 6(3) DCA. A dominant undertaking may use the defence that the determination of the relevant market is incorrect, or allege that it does not have a dominant position. It may also defend its behaviour by demonstrating that its conduct is objectively necessary, or by demonstrating that its conduct produces substantial efficiencies for consumers which outweigh any anticompetitive effects. The ACM in this respect refers to the Guidelines on article 102 TFEU.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

See the answer to question 3.8.

3.10 Do the governing laws apply to "collective" dominance?

Yes, article 24 DCA also applies to abuses conducted by several undertakings that collectively hold a dominant position. The definition of a dominant position in article 1(i) DCA refers to a dominant position of one or more undertakings.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The DCA, more specifically article 6 DCA and article 24 DCA, also apply to the behaviour of dominant purchasers. In 2004, the ACM published a policy document regarding dominance of purchasers (*Visiedocument Inkoopmacht*).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 24 DCA relates to both exploitative and exclusionary abuses of a dominant position. Examples of abuse are: imposing exclusive dealing agreements in order to foreclose competitors; tying and bundling; predatory pricing; discriminatory pricing; margin squeeze; and refusal to supply (see question 3.5).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The exercise of an intellectual property right by a dominant undertaking may constitute an abuse of dominant position. For instance, under exceptional circumstances, a refusal to grant a licence may be considered abusive, as may other types of refusals to deal and refusal of access to essential facilities.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The ACM and the Dutch courts may consider "direct effects" evidence of market power, such as price levels, but in practice they rely on criteria relating to the market structure (see questions 3.4 and 3.7).

3.15 How is "platform dominance" assessed in your jurisdiction?

A firm dominant on a two-sided market, so-called "platform dominance", can behave anticompetitively in the same way as other dominant firms do. In 2016, the ACM published a document (*Grote platforms, Grote problemen?*) in which it reflects on the question whether data held by platforms leads to market power. In 2017, the ACM conducted a study into online platforms that stream videos and the competition risks that come with these platforms (*Rapportage Online videoplatforms onder de loep*). The ACM concluded that it had not found violations on the market of online advertisements, nor on the market for online videos.

In February 2018, the ACM published a position paper (*Rondetafelgesprek over de marktdominantie van internet-en technologiebedrijven*) about the market position of big technology companies. The ACM states that it will further develop its own knowledge regarding digital markets and will actively monitor big tech companies.

As stated under question 1.14, the state secretary of the Ministry of Economic Affairs and Climate has proposed specific measures relating to platform dominance. Furthermore, the ACM has launched an investigation into the abuse of (platform) dominance by Apple in its App Store.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Generally speaking, undertakings have the right to choose their trading partners and to dispose freely of their property. Under certain conditions, refusal to deal may be considered abusive behaviour. The ACM and the Dutch courts apply the criteria for refusal to deal and refusal of access to an essential facility as developed in European case law. The criterion that the refusal should lead to exclusion of competition has been interpreted strictly by the Dutch courts (*Curator/NVM, Case LJN BM 1240*).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Please refer to question 1.14 under which we describe recent relevant developments in the Netherlands.

Acknowledgment

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Chapter 14

Philippines

SyCip Salazar Hernandez & Gatmaitan

Rolando V. Medalla, Jr.

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The law governing vertical agreements and dominant firm conduct is Republic Act No. 10667, the Philippine Competition Act (the "Act").

The primary authority which investigates and enforces the Act is the Philippine Competition Commission (the "PCC"). The PCC is composed of four members and one chairman. All the members of PCC are appointed by the President for a term of seven years.

In addition, there is the Office of Competition under the Department of Justice which can initiate criminal proceedings after preliminary inquiry by the PCC. The PCC refers the matter to the DOJ-OFC if the matter may involve criminal liability. However, there is no criminal liability which attaches to violations under the Act involving vertical agreements or abuse of dominant position.

Private injured parties may also institute separate and independent civil actions after the preliminary inquiry by the PCC.

1.2 What investigative powers do the responsible competition authorities have?

The PCC may compel the production of books and records, order persons to appear before it, and issue "show cause" orders and "cease and desist" orders. It may also apply to a court for authority to inspect business premises and other offices, and vehicles for documents related to any matter relevant to the investigation. Finally, the PCC may deputise any and all enforcement agencies of the government or enlist the aid of any private body in an investigation.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The PCC may conduct a preliminary inquiry either *motu proprio*, upon verified complaint by an interested party or upon referral from another government regulatory agency. The preliminary inquiry is the initial fact-finding stage of the proceedings, where the entity concerned may be asked to submit documents. The PCC may also issue a "show cause" order to the entity to respond to the complaint on its alleged violations.

After the preliminary inquiry, the PCC will resolve either to close the case or, if there are reasonable grounds, proceed with a full administrative investigation into the possible anti-competitive effects of the agreement or conduct.

If the PCC proceeds with a full administrative investigation, it may issue a temporary "cease and desist" order against certain acts of the respondent entity. The PCC may also issue a contempt order against any person.

Any decision to be rendered after the investigation shall be made based on substantial evidence and requires the affirmative vote of at least three members of the PCC.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The PCC, after notice and hearing, may issue injunctions or compel divestment and disgorgement of excess profits.

The PCC may impose an administrative fine on an entity for: anti-competitive agreements, anti-competitive behaviour and entering into prohibited mergers and acquisitions; violations of confidentiality of information; failure to comply with any order of the PCC; supplying incorrect or misleading information; and any other violation not specifically covered under the Act.

The PCC may also issue adjustment or divestiture orders, including orders for corporate reorganisation or divestment.

1.5 How are those remedies determined and/or calculated?

For entering into anti-competitive agreements, engaging in anti-competitive conduct or entering into a prohibited merger and acquisition, the fine for a first violation shall not be more than 100 million Philippine pesos, while a second violation would merit a fine between 100 million pesos and 250 million pesos. The fine for violation of confidentiality of information is from 1 million pesos up to 5 million pesos. The fine for failure to comply with an order of the PCC is from 50,000 pesos up to 2 million pesos, and a similar amount per day after a 45-day period from the date of receipt of the order. The fine for supplying incorrect or misleading information can be in an amount not exceeding 1 million pesos. The fine for any other violation will be from 50,000 pesos up to 2 million pesos.

In fixing the amount of the fine, the PCC shall take into account both the gravity and the duration of the violation.

If the violation involves the trade or movement of basic necessities and prime commodities as defined in RA 7581, then the fine imposed shall be tripled.

The PCC shall increase the schedule of fines every five years to maintain their real value from the time they were set.

Structural remedies (adjustment or divestiture orders, including those for corporate reorganisation) may only be ordered when there is no equally effective behavioural remedy or when the alternative remedy would be more burdensome for the enterprise concerned.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

A request for a binding ruling can be made, as well as a proposal for the entry of a consent order.

Where no prior complaint or investigation has been initiated, any entity that is in doubt as to whether a contemplated act, course of conduct, agreement, or decision, is in compliance with, is exempt from, or is in violation of any of the provisions of the Act or its regulations, may request the PCC to render a binding ruling thereon.

A proposal for a consent order may be made although administrative proceedings have already commenced, so long as the PCC's inquiry has not yet concluded. The written proposal for the entry of a consent order should include the payment of a fine, a compliance report, and the payment of damages to injured parties. Such a proposal does not operate as an admission of a violation of the Act.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No. The PCC, in the exercise of its quasi-judicial powers, has the power to hear and determine, on its own, whether violations of the Act with respect to vertical agreements or dominant position have been committed. A finding of a violation must be supported by substantial evidence defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Ang Tibay vs. CIR, G.R. No. L-46496*, February 27, 1940).

1.8 What is the appeals process?

All the decisions made by the PCC are appealable to the Court of Appeals in accordance with the Rules of Court, and eventually to the Supreme Court. A decision of the PCC is immediately executory and not stayed by an appeal, unless directed otherwise by the Court of Appeals.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

For any violation of the Act listed in Sections 14, 15, 17 and 20, a person who suffers a direct injury by reason of the violation may institute an independent civil action after the preliminary inquiry by the PCC. This will likely be a suit for damages. The action is pursued in a judicial proceeding before the regular civil courts and no longer before the PCC. In contrast to the "substantial evidence" standard followed in proceedings before the PCC, in judicial proceedings, the prevailing party must have the "preponderance of evidence" in support of his position.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The PCC may, for a limited time, in whole or in part, forbear the application of the Act or portions of the Act to an entity or a group of entities. The exemption may be granted with conditions and may be withdrawn by the PCC if the basis for the exemption ceases to be valid. The three requisites for a forbearance are that: (i) the enforcement is not necessary for the attainment of the policy objectives of the Act; (ii) the forbearance will not have an anti-competitive effect in the relevant market or related markets; and (iii) the forbearance is consistent with public interest and the welfare of consumers.

There are also block exemptions provided under Section 15 (d) for permissible preferential pricing and under Section 15 (e) for permissible restrictive vertical agreements.

1.11 Does enforcement vary between industries or businesses?

There are no variations in enforcement between businesses and industries which are discernible at present. The Act is a relatively new law.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The PCC has jurisdiction over both competition and non-competition issues if the non-competition issues are necessarily included in the case brought before it. The position of the agency regulating the industry is to be taken into account. However, the PCC's position may differ from, and will prevail over, that of the agency concerned. The Act prescribes that the regulator in that industry must be given a reasonable opportunity to present its opinion and recommended action, before any decision is made. In addition, the PCC should work together with sector regulators to issue rules and regulations to promote competition, protect consumers and prevent abuse of market power by dominant players within their respective sectors.

The PCC is expected to cooperate with the regulator and can receive referrals from the regulatory bodies in the respective industry.

A court would take into account the position of the industry regulator's position, although it would not be bound by it.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The law has been in effect under the term of two presidents. The current composition of the PCC is evenly split, with two of the commissioners having been appointed by former President Benigno Aquino III, while the other two were appointed by now President Rodrigo Duterte.

There is no discernible difference in the enforcement of the Act between the two administrations.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The priority of the PCC is to improve its processes and enforcement procedure. In 2018, there were 40 mergers and acquisitions reviewed in total, while 11 investigations were carried out with regard to cartel behaviour, seven of which were carried out *motu proprio*. The PCC has emphasised its leniency programme and promulgated the guidelines for the same in January 2019. The leniency programme aims to prevent *per se* anti-competitive agreements, through means such as collusion, by encouraging entities to come forward with the information necessary for the successful investigation of a case which would otherwise be difficult to obtain.

Enforcement of the Act with respect to vertical agreements is not yet in full swing, so it is too early to tell what the enforcement trends and priorities would be in this regard.

1.15 Describe any notable case law developments in the past year.

There has been no notable case development in the past year with respect to vertical agreements and firms in a dominant market position.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

At present, the level of scrutiny of vertical agreements is low, with the PCC instead focusing on the review of mergers and acquisitions. The enforcement of the Act only began in 2016.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

An express agreement is not required. At the very least there must be a showing, based on the facts presented, that there was concerted action, pursuant to Section 4 (b) of the Act.

A vertical agreement is one where the parties involved are at different levels of the supply or production chain.

2.3 What are the laws governing vertical agreements?

The Philippine Competition Act is the law governing vertical agreements. Section 15 of the Act covers vertical agreements involving the abuse of dominant market position by one or more entities in the distribution chain through specified acts that are shown or considered to substantially prevent, restrict or lessen competition (the "anti-competitive effect"). Section 15 only applies when the entity concerned has a dominant position. However, even if a vertical agreement does not fall under Section 15, it may still violate Section 14 (c), which disallows, in general, agreements that would have an anti-competitive object or effect.

The specific acts prohibited in Section 15 are as follows: Section 15 (b) prohibits the imposition of barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner. Section 15 (c) and (f) prohibit the act of bundling of unrelated obligations or tying unrelated goods or services. Section 15 (d) prohibits preferential pricing. Section 15 (g) and (h) prohibit the imposition of unfair prices on suppliers.

Section 15 (e) of the Act prohibits restrictive vertical agreements which have the object or effect of preventing, restricting or lessening competition; which include agreements such as giving preferential discounts, resale price maintenance, refusals to deal or exclusivity arrangements.

Notwithstanding the anti-competitive effect, or a finding of an anti-competitive effect, if it is further found that the agreement or activity contributes to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, Section 15 or Section 14 (c) will not be considered to have been violated. The necessity of responding to international competition, and the possible adverse impact of intervention on priority economic areas or industries, will also be taken into account. (Collectively, the "economic gains and consumer welfare benefits".) The anti-competitive effect must be weighed against the economic gains and consumer welfare benefits.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

The block exemptions are: first, permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements; and second, agreements protecting intellectual property rights, confidential information or trade secrets.

Block exemptions for preferential pricing are: socialised pricing; price differentials reflecting the cost of production and delivery of the goods or services; price differentials to compete with competitors; and price changes in response to changes in the market.

2.5 What is the analytical framework for assessing vertical agreements?

The first part of the analysis would be to determine the relevant market. The second part would be to determine whether a vertical agreement involves one of the acts specified in Section 15 of the Act, or would nonetheless fall under Section 14 (c), or both. The third part of the analysis would be to determine whether the entity's conduct is motivated by a reasonable commercial purpose or is a reasonable commercial response to the conduct of a competitor (the "reasonable commercial response"). The fourth part of the analysis would be to determine whether there is an anti-competitive effect. The fifth part of the analysis would be to determine whether there are economic gains and consumer welfare benefits. Finally, the sixth and last part would be to determine whether – after weighing and taking into account whether the conduct involves a reasonable commercial response, the resulting anti-competitive effects and the economic gains and consumer welfare benefits – there should be deemed to be a violation of the Act (the "balancing test").

For violations under Section 15, the entity or entities must: (i) have a dominant position in the market; and (ii) commit any of the acts listed under Section 15. For an entity or entities to be in a dominant position, it must be capable of controlling the relevant market independently from any or a combination of its competitors, customers, suppliers, or consumers. These requirements would not be applicable to violations under Section 14 (c).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The analysis of the relevant market applies at the level of the production chain which is going to be affected by the vertical agreement. The relevant market is the combination of the relevant product market and the relevant geographic market. The relevant product market looks into the substitutability and interchangeability of goods and services. The relevant geographic market is determined by the conditions of competition that are sufficiently homogenous within a specific area and are different from other areas. In determining the relevant product market, the price, nature of the goods and their intended use should be taken into account. In determining the relevant geographic market, the following should be taken into account: access of users or consumers to alternate sources of supply, or the access of suppliers to alternate consumers; as well as the possibility of expansion into, or access to consumers or suppliers in, the neighbouring areas.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

There has been no specific analysis or precedent yet as to dual distribution.

2.8 What is the role of market share in reviewing a vertical agreement?

Market share is important for determining market-dominant position for purposes of a violation under Section 15 of the Act. A 50% market share gives rise to a rebuttable presumption of dominant position. This threshold value can be modified by the PCC.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis plays a central role in assessing vertical agreements. First, it is used to determine whether or not there is an anti-competitive effect. Second, it is used to determine whether or not there is the possibility of efficiency gains from the vertical agreement. In analysing the effects of an agreement, the PCC has adopted the counterfactual approach, where it compares the state of competition and the corresponding welfare of the consumer as if the agreement did not happen or will not be allowed to happen, with the *status quo*.

2.10 What is the role of efficiencies in analysing vertical agreements?

Efficiencies must always be weighed against the alleged anti-competitive effects. The entity claiming that efficiencies have resulted must prove it.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

For violations under Section 15 (e) of the Act, agreements protecting intellectual property rights are a block exemption.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes, the enforcer must show that the agreement results in an actual or potential adverse impact on competition in the relevant market. All prohibited vertical agreements must be demonstrated to substantially prevent, restrict, or lessen competition based on substantial evidence.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes, they must apply a balancing test.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Efficiencies are the likely defence available to an entity against allegations of an anticompetitive vertical agreement. For a party to demonstrate an efficiency, it must be shown that the agreement 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.

For violations under Section 15, the defences are that the entity is not in a dominant market position, and that the barriers to entry or expansion of competitors are the result of or arising from a superior product, process, business acumen, or legal rights or laws. There is also the defence that the conduct is a reasonable response to a competitor's entry into the market or conduct.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

No, the enforcement authorities have not issued any formal guidelines.

2.16 How is resale price maintenance treated under the law?

For there to be a violation of the Act arising from resale price maintenance, it must be demonstrated that the entity concerned has a dominant position and the balancing test must be applied.

2.17 How do enforcers and courts examine exclusive dealing claims?

There has been no case as yet on exclusive dealing claims. A balancing test would have to be applied.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

There has been no case yet on tying/supplementary obligation claims. Tying obligation claims are treated under the "abuse of dominant position" framework, under which it must be shown that there is a dominant position and a balancing test then applied.

2.19 How do enforcers and courts examine price discrimination claims?

There has been no precedent as yet with respect to price discrimination claims. Under the Act, price discrimination is not prohibited *per se*, and can only be committed by a market-dominant player. A balancing test must be applied to determine whether there has been a violation of the Act.

2.20 How do enforcers and courts examine loyalty discount claims?

There has been no precedent yet with respect to loyalty discount claims. Loyalty discount claims are treated in the same manner as resale price maintenance and price discrimination claims.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

There has been no precedent on bundled or multi-product claims. These claims are examined under the "abuse of dominant position" framework, where it must be shown that there is dominant position and a balancing test applied.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Section 14 (c) is broad enough that it can capture any kind of agreement or vertical restraint involved.

2.23 How are MFNs treated under the law?

There is no precedent yet on MFN arrangements.

2.24 Describe any notable case developments concerning vertical merger analysis.

There have been no notable case developments concerning vertical merger analysis, since the Act is a relatively new one and is in the early stages of enforcement.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The law being relatively new and enforcement only beginning in 2016, there have not been many investigations or cases regarding unilateral conduct. The PCC has instead focused on mergers and acquisitions.

3.2 What are the laws governing dominant firms?

Dominant firm behaviour is governed by Section 15 of the Act. There must have been an abuse of dominant position by committing any of the acts specified in Section 15, after a definition of the relevant market, the determination that the entity is a dominant firm, and then the application of a balancing test in deciding whether the act concerned constitutes a violation of Section 15.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analytical framework is the same as for any alleged anti-competitive act under the Act. The relevant market, based on the relevant product and geographic market, will determine the market in which a firm may be considered dominant.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no specific market share threshold for a firm to be considered a dominant firm. However, if an entity or entities have at least 50% of the market share in the relevant market, this gives rise to a rebuttable presumption of market dominance. This market threshold can be adjusted as determined by the PCC. Regardless of market share, a firm is considered dominant when it is capable of controlling the relevant market independently from any or a combination of its competitors, customers, suppliers, or consumers.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being a dominant firm or monopoly is not illegal *per se*. In fact, the Act recognises that acquiring dominant position through having superior production methods, skills or possessing legal rights is not prohibited.

The consequence of being adjudged a dominant firm is that the firm concerned may be found to have violated Section 15 through an abuse of its dominant position, if it commits any of the acts specified in Section 15.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis plays a large role in determining whether a firm has market dominance. The elasticity of demand of consumers, the barriers to entry, the number of competing firms, and the possibility of access by competitors to sources of inputs are just a few factors requiring economic analysis, and that are to be taken into consideration in determining whether or not there is market dominance.

3.7 What is the role of market share in assessing market dominance?

As mentioned above, market share is one of the factors to be taken into consideration in the determination of market dominance, and a 50% market share gives rise to a rebuttable presumption of market dominance.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The firm can claim that it does not have market dominance. The firm may raise the defence that the conduct leads to efficiencies that: improve the production or distribution of goods or services; or promote technical and economic progress; and outweigh the anti-competitive effects. Another defence would be that the conduct is a reasonable response to the conduct of a competitor. For charges under Section 15 (c) and (e), the firm may raise the defence that the conduct falls under the block exemptions.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies must be weighed against the anti-competitive effects of dominant firm behaviour. There is no prohibition on conduct by dominant firms if the conduct leads to efficiencies that outweigh the anti-competitive effects.

3.10 Do the governing laws apply to "collective" dominance?

Yes, the abuse of a market-dominant position can be committed by a group of entities which are acting in concert.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Section 14 (c) can apply to any agreement which has anti-competitive effects and can be applied to dominant purchasers. See question 2.5 above.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Section 15 of the Act, assuming the firm concerned has a dominant position, specifically lists the following acts which could lead to a finding of abuse of dominance: predatory pricing; imposing barriers to entry; tying; bundling; discriminatory pricing; restrictive vertical agreements; exclusive dealing arrangements; preferential discounts; and limiting production or market development. A balancing test would still have to be applied.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Rights under intellectual property are recognised as a legitimate means for acquiring a dominant market position in the relevant market. Agreements to protect intellectual property rights fall under the block exemptions for alleged anti-competitive restrictive vertical agreements under Section 15 (e).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

There has been no case or ruling yet using "direct effects" evidence to prove the market power of an entity.

3.15 How is "platform dominance" assessed in your jurisdiction?

There has been no case or ruling involving platform dominance in the Philippines.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

There is no judicial or administrative precedent. Refusals to deal are not *per se* prohibited in the Philippines. A balancing test must be applied.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The Philippine Competition Act is relatively new (enforcement began in 2016), so there is not yet much precedent which demonstrates how the courts or the enforcement agencies will treat vertical agreements and dominant firms.

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Mr. Medalla's areas of expertise include: taxation; mergers and acquisitions; mining; oil and gas; insurance; foreign investments; joint ventures; gaming; competition law; general litigation; and general commercial law.

In the field of competition law, he has recently provided advice on the acquisition of stock in one airline by another airline, a proposed investment of a foreign bank in a Philippine bank, and to a major automobile company on its sale and distribution of cars in the Philippines.

In his other corporate work, he has provided advice on the structuring of investments and transactions, the establishment by foreign companies of a Philippine presence, and the acquisition of Philippine businesses through stock and asset sales. His clients have included those in the insurance, payment aggregation, banking, gaming, mining, and oil and gas industries.

He advises on the tax aspects of transactions and handles tax litigation before the courts and administrative agencies.

SyCip Salazar Hernandez & Gatmaitan

SyCip Salazar was founded in 1945 by Alexander SyCip, who was later joined by Luciano E. Salazar in 1949. It is now one of the largest Philippine law firms, with 138 lawyers as of May 31, 2019. With talent and merit as its touchstones for choosing associates and partners, in providing service to its clientele, it continuously seeks to meet standards of professional excellence and responsiveness to client needs and concerns.

The firm has a varied law practice. It maintains links with leading firms worldwide. With its head office in Makati City, it also has branches in Cebu, Davao and Subic in the Philippines.

The firm serves a wide range of clients, both Philippine and foreign, in the broadest range of industries. As the business environment changes, it tracks and anticipates those changes to be able to adequately service new industries and business needs, while building on existing expertise.

Chapter 15

Russia

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Federal Antimonopoly Service of the Russian Federation (hereinafter – the "FAS") and its territorial bodies investigate and enforce the laws governing vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The FAS has broad investigative powers in enforcing the competition rules and regulations. In particular, the FAS may conduct scheduled and unscheduled inspections; may receive documents upon motivated request, as well as explanations and information in written or oral form (including information constituting a trade secret, state secret and other legally protected secrets); has powers of unimpeded access on the territory and/or into the premises and buildings of the inspected entity; and has powers of unimpeded examination of the territories, buildings and premises occupied by the inspected entity.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The most common form of antitrust investigation is the initiation of a case of violation of antimonopoly legislation. The FAS initiates the case and analyses all of the circumstances, considering the case over three months (with possible prolongation to six months). As a result, the FAS may resolve the case by issuing a decision. Herewith, before pronouncement of the final decision, the FAS should issue a statement of objections based on the circumstances of the matter. Before the initiation of this procedure, the FAS may conduct scheduled and unscheduled inspections and issue a request for the provision of documents (information). The FAS often applies such preventive mechanism as an institution of warning.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In relation to the abuse of dominant position or conclusion of a vertical agreement, the FAS may impose an administrative fine on legal entities and company officers, or disqualify company officers as remedies. It should be mentioned that individuals or legal entities have a right to claim private damages actions, which may be also considered as a remedy.

1.5 How are those remedies determined and/or calculated?

The FAS determines and calculates an administrative fine in accordance with the provisions of the Code of Administrative Offences of the Russian Federation No. 195-FZ of December 30, 2001 (hereinafter – the "Administrative Code").

For abuse of dominant position, the Administrative Code provides the minimum and maximum amount of the fine. At the same time, if the abuse-of-dominance actions lead or may lead to prevention, restriction or elimination of competition, the FAS will impose an administrative fine based on the sum of the offender's turnover in the market on which the administrative offence has been committed (in the amount of 1% to 5% of the sum of the offender's turnover).

As regards vertical agreements, under the Administrative Code entities that enter into the prohibited vertical agreements may face a "turnover-based fine" in the amount of 1% to 5% of the sum of the offender's turnover from the sale of the product (work or service) in the market on which the administrative offence has been committed.

Russian law provides mitigating and aggravating circumstances that the FAS may take into account when calculating the fine.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Russian competition law establishes such form of voluntary resolution as a leniency programme (only for anticompetitive agreements or concerted actions).

A company can be discharged from liability if all of the following criteria are met: an antitrust authority had no information regarding the committed administrative offence; the legal entity has refused further participation in the agreement; and information and documents provided are sufficient to establish an administrative offence.

By applying for leniency, a company may have the chance to minimise reputational risks and may provide for information confidentiality. The company may also negotiate the commitments imposed by the FAS, but this would not be applied in an obligatory manner.

However, there is no administrative settlement procedure. The company may settle the dispute in a court during the hearings for challenging the FAS decision on antimonopoly violation and/or imposition of an administrative fine. In this case, the commitments between the FAS and the company are set in the official settlement agreement approved by the court.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The entire procedure is internal (please see question 1.3). The decision of the FAS may be appealed to the court. Further, the decision of territorial offices of the FAS may be appealed to the FAS central office, as well as to the court.

1.8 What is the appeals process?

Complaints may be filed to the FAS, its territorial bodies or directly to the court. The limitation period for such claims is three months from the date of issuing the decision or prescription by the FAS. The court procedure is governed by standard procedural rules. The court appellation may also be filed after the internal FAS appeal process. In such case, the limitation period is one month from the date the decision of prescription entered into force.

The Competition Law also provides for the formation of a collegial body as a part of the FAS. This body may give explanations related to the applicability of the antimonopoly legislation and may consider complaints on decisions and/or orders of the territorial antimonopoly authorities. Such complaints may be filed by individuals or legal entities involved in the case on violation of the antimonopoly legislation within one month from the date of making such decision or issuing the order. The collegial body makes the decision within two months from the date the complaint was made.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Individuals or legal entities, whose rights and interests are infringed as a result of violation of antimonopoly legislation, can file lawsuits under the established procedures; particularly, lawsuits to restore the violated rights, including lost profit and compensation of damage caused to property. Unlike government enforcement actions, this legal institute is underdeveloped and practice is quite rare.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Certain anticompetitive agreements and forms of abuse of dominance can be considered admissible if such actions or agreements (i) do not give rise to the possibility of competition being eliminated on the relevant market, (ii) do not impose on the parties or third parties restrictions not corresponding to the purposes of such actions or agreements, and (iii) lead or may lead to the following: (1) improving the production and sale of goods, or promoting technical and economic progress, or an increase of the competitiveness of Russian goods on the world market; or (2) the purchasers obtaining preferences (benefits) commensurable with the preferences (benefits) obtained by companies as a result of actions (or omissions) and agreements. There are also market share thresholds applied to safe harbour during the assessment of dominant position and vertical agreements.

1.11 Does enforcement vary between industries or businesses?

Enforcement of Russian antitrust law does not vary between industries or businesses. However, retail, banking, electricity, communication and some other industries are specially regulated industries.

In particular, special regulation spreads on the dominant position shares of the companies active in the following spheres:

- Banking: the financial organisation having a market share of more than 10% in the only market within the Russian Federation, or 20% in the market, where the goods are also traded on other markets within the Russian Federation, is deemed to be dominant.
- Electricity: the entity which has generating equipment with the share exceeding 20% is deemed dominant.
- Communication: the entity that is active in the market of mobile radiotelephone communication services occupies a dominant position if the share in this market exceeds 25%.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The FAS usually pays additional attention to industries with a regulatory function; for example, tariff regulation industries. The peculiarities of the particular market should be taken into account by the FAS in order to assess the state of competition on the considered market. Special rules are equally as important as general competition rules.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

Practically, the political environment may be a part of a general context that may be taken into account through the consideration of a particular matter in forming the FAS's position. We have observed a tendency to initiate cases against multinational companies, but consider this as the stage of development of the competition authority rather than a political issue.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

(a) Digitalisation of markets and its regulation

Since the end of 2017, the Russian government and the FAS are highly interested in digital solutions, including internet technologies, blockchain and cryptocurrency. A number of initiatives are being debated that relate to regulation of the digital economy.

(b) Supporting local business

The FAS is strengthening antitrust enforcement against global players (Google, Bayer, Apple, LG, Samsung, etc.). We suppose that it may be considered as a part of Russian political strategy aimed at supporting Russian producers.

(c) New approaches to market analysis and merger control

We may also see that the FAS takes new approaches to market analysis and merger control. The aim of this work is to develop new approaches to merger control cases, taking into account the need to solve problems in the conditions of digitalisation of the economy, and the use of the latest information technologies in the implementation of state functions in the field of economic concentration.

(d) Restriction of IP rights to promote competition

The FAS is also considering the potential restriction of IP rights to promote competition. The FAS considers that big data about customers, products and technologies collected by huge IT companies (e.g. Google, Yandex, etc.) create significant entry barriers for their competitors and potentially could restrict competition. Therefore, the FAS is elaborating the mechanisms to minimise anticompetitive effects of abuse of dominant positions by the companies holding substantial volumes of big data.

(e) Enhancing the role of antimonopoly compliance in Russia

Undeveloped antimonopoly compliance is one of the main reasons for antimonopoly violations in Russia. Moreover, it hinders the growth of the national economy substantially.

The FAS has prepared the draft law on the antimonopoly compliance in Russia, which provides a definition of the term "antimonopoly compliance" that is understood as a "set of legal and organizational measures envisaged by the internal act of the business entity [...] and aimed at complying with the requirements of the antimonopoly legislation and preventing antimonopoly violations". According to the current draft, introduction of antimonopoly compliance will become mandatory for state and local government bodies, but voluntary for businesses.

1.15 Describe any notable case law developments in the past year.

MTS, VimpelCom, Tele2, Megafon **case (2018–2019)**

On May 13, 2019 the FAS found that MTS PJSC, T2Mobile LLC and VimpelCom PJSC, the largest Russian telecommunication companies, abused their collective dominant position. Based on the results of the investigation, the FAS established that contract conditions for private companies were different from contract conditions for companies with state participation in their capital. The FAS exposed that the difference could be by up to 10 times, since companies with a state share can pay several times less than private companies. Three days later, on May 16, 2019, the FAS recognised that Megafon PJSC violated the Competition Law by creating discriminatory conditions for consumers of its SMS messaging service.

Samsung **case (2018–2019)**

The FAS considered the case against the Russian subsidiary of the Samsung Electronics Group, a global developer and producer of consumer electronics and mobile devices, on coordination of economic activity of resellers on the market of Samsung smartphones and tablets. The FAS found that coordination included the following activities: the fixing of recommended prices on Samsung smartphones and tablets; and the exertion of pricing control on resellers by Samsung's employees, impacting resellers. Thus, the company was found guilty of violating Part 5 of Article 11 of the Competition Law.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

It is dependent on the type of agreement. However, there is a different approach: resale price maintenance cases are generally approached as "*per se*", while other cases are usually based on the rule of reason. The FAS considers vertical agreements to be less serious violations than cartel agreements. We have seen that the FAS tends to pay more attention to the economic effects of particular transactions and assesses vertical agreements more under the "rule of reason" rather than "*per se*" doctrine.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

(a) The law supposes that vertical agreements may be concluded not only through civil contracts, the subject matter of which includes the transfer of goods from one undertaking to another (contracts of sale, supply agreements, dealer agreements, distribution agreements and other agreements), but also through oral agreements, implied-in-fact contracts or silent agreements.

(b) Vertical agreements are agreements between companies or undertakings at different levels of the technological cycle, containing the conditions under which such entities should acquire, sell or resell certain goods or services.

2.3 What are the laws governing vertical agreements?

Vertical agreements are governed by Articles 11 and 12 of the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition", Clarifications of the FAS Board No. 2 "On vertical agreements, including dealership agreements" (approved by the Minutes of the FAS Board of February 17, 2016 No. 3), and the Decree of the FAS of July 16, 2009 No. 583 "On cases of acceptance of agreements between economic entities", among others.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

The Competition Law provides that the following two types of vertical restraints are regarded as the most harmful and protected by a rebuttable presumption of "*per se*": (1) the obligation not to sell goods of a legal entity who is a seller's competitor; and (2) resale price maintenance. However, in the last few years, we have seen that the FAS tends to use the "rule of reason" doctrine more often than the "*per se*" doctrine.

2.5 What is the analytical framework for assessing vertical agreements?

The general analytical framework is "rule of reason". In contrast to the "*per se*" approach, "rule of reason" needs to prove the restriction of competition. For example, it may be expressed in the reduction of the number of economic entities on the market, or the increase or decrease of prices and other circumstances, which may be considered as a restriction to competition.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Under the FAS Order from April 28, 2010 No. 220 "On approval of the procedure of analysis of competition in the market", the FAS shall use a "hypothetical monopolist" test to define the product and geographical boundaries of the product market.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called “dual distribution”)? Are these treated as vertical or horizontal agreements?

Agreements within “dual distribution” are treated by the FAS as vertical agreements.

2.8 What is the role of market share in reviewing a vertical agreement?

The Competition Law provides “safe harbour” for vertical agreements. According to this rule, vertical agreements concluded between undertakings holding a market share of less than 20% on the relevant market should be regarded as permissible.

2.9 What is the role of economic analysis in assessing vertical agreements?

An increased role for economic analysis in the authority’s assessment of vertical agreements may be observed over the last few months. This tendency is applicable not only to vertical agreements, but also to other facets of the Competition Law, such as merger control, cartel agreements, etc.

2.10 What is the role of efficiencies in analysing vertical agreements?

Improving the production and sale of goods, promoting technical and economic progress, or increasing the competitiveness of Russian goods on the world market may be used by the party as arguments in favour of admissibility of vertical agreements if certain additional requirements are met.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

All the agreements granting the right to use or transfer all the rights to intellectual property (licence agreements, etc.) are exempted from the scope of the Competition Law. Moreover, all vertical agreements are permissible in the case that they are franchising agreements (which should be registered), and exclusive dealership is permissible within vertical agreements aimed at the organisation of sale of goods under the trademark of the relevant wholesaler (producer).

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The FAS is not obliged to demonstrate anticompetitive effects in vertical agreements prohibited *per se*, including (i) resale price maintenance agreements, and (ii) exclusive dealership (distribution, etc.) agreements. To prove any other vertical agreements (imposing territorial restraints, aimed at selective distribution, etc.) the FAS has to show the anticompetitive effects of such restrictions. However, in practice, the authority does not always conduct an analysis to prove the anticompetitive effects of some types of vertical agreements.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The FAS may weigh the harm against potential benefits for the customers or efficiencies according to Article 13 of the Competition Law. It provides that vertical agreements can be considered admissible if they (i) do not create an opportunity to eliminate competition in the relevant product market, (ii) do not impose on the parties or third parties restrictions that do not correspond to the achievement of the purposes of such agreements, and (iii) result or may result in the following:

(1) improving the production and sale of goods, promoting of technical and economic progress, or increasing the competitiveness of Russian goods on the world market; and

(2) receiving of preferences (benefits) by the purchasers commensurable with preferences (benefits) obtained by companies as a result of agreements and concerted practices.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Apart from the “safe harbour” 20% threshold argument, the franchising agreement argument, benefits for customers and economic efficiencies for vertical agreements estimated under the rule of reason, the party may provide the FAS with the results of economic analysis in order to prove that the agreement has no anticompetitive effects.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes; Clarifications of the FAS Board No. 2 “On vertical agreements, including dealership agreements” (approved by the Minutes of the FAS Board from February 17, 2016 No. 3) and Decree of the FAS of July 16, 2009 No. 583 “On cases of acceptance of agreements between economic entities” (amended on April 29, 2014).

2.16 How is resale price maintenance treated under the law?

Minimum or fixed resale price maintenance is prohibited *per se* (with a theoretically rebuttable presumption), while maximum resale price maintenance and communication on recommended resale price are generally permissible.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealership agreements are prohibited by theoretically rebuttable presumption “*per se*”.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligation claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.20 How do enforcers and courts examine loyalty discount claims?

The general approach to loyalty discounts is negative, but there are no strong precedents on this issue.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

There is no exhaustive list of prohibited vertical agreements. However, we may specify the following restrictions: territorial restraints; sales channel restrictions; and other vertical agreements leading to anticompetitive effects.

2.23 How are MFNs treated under the law?

The Competition Law does not prohibit MFN clauses directly. However, within vertical agreements, the FAS may assess such clauses under the rule of reason to check whether they have any anticompetitive effects.

2.24 Describe any notable case developments concerning vertical merger analysis.

There are some general trends in merger analysis, such as:

(1) the conducting of more complex market analysis and more in-depth review of almost all transactions, resulting in extensions to the consideration period;

(2) a strengthening of the cooperation of the FAS with the EAEU (Eurasian Economic Union) and other BRICS (Brazil, India, China and South Africa) competition authorities (waivers);

(3) industry-related concerns irrespective of the existence of any significant competition law issues (e.g. pharmaceuticals, the oil and gas industry, etc.); and

(4) the influence of the sanctions regime on transaction review and remedies.

***Givaudan* case**

Givaudan S.A., a major producer of fragrances and food flavourings, acquired control over Naturex S.A., a large supplier of natural ingredients used in the food, health and cosmetic industries. This vertical acquisition was subject to the FAS's close attention due to the possible competition concerns.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The FAS closely examines the business conduct of firms holding significant market shares with strong market power. Thus, the dominant position imposes many additional compliance obligations on the company. The FAS permanently renders decisions on notable cases of abuse of dominant position, with large turnover fines and broad coverage in mass media.

3.2 What are the laws governing dominant firms?

The Federal Law "On protection of competition" No. 135-FZ of July 26, 2006 (in particular, Articles 5, 6, 7 and 10) is the principal law on this subject.

3.3 What is the analytical framework for defining a market in dominant firm cases?

In accordance with the FAS Order of April 28, 2010 No. 220 "On approval of the procedure of analysis of competition in the market", the FAS shall use a "hypothetical monopolist" test to define the market boundaries.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The dominant position of an entity in a particular market is presumed if the market share of the entity exceeds 50%. The entity having a market share of between 35% and 50% is also deemed to be dominant. In addition, there are some special thresholds set for collective dominance, financial organisations, entities involved in state procurement, and for some other cases (please see question 1.11).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Dominance or monopoly is not prohibited *per se*. The Competition Law prohibits the abuse of dominant position; in particular, any abuse of dominant position which leads or may lead to prevention, restriction or elimination of competition and/or infringement of the interests of other undertakings (economic entities) in the sphere of business activity or of an indefinite range of consumers.

3.6 What is the role of economic analysis in assessing market dominance?

The role of economic analysis is significant enough. Based on economic approaches in relation to definition of product and geographical boundaries of the relevant market, the FAS may define the market share and, therefore, may establish dominant position. Moreover, the FAS will consider the influence of the dominant company's actions using economic analysis. It should be noted that the dominant company may use economic justifications as evidence that its actions may not lead to restriction of competition on the Russian market.

3.7 What is the role of market share in assessing market dominance?

Market share is one of the most significant criteria for assessing dominance (please see question 3.4).

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The firm may use as a defence evidence which indicates lack of market power, lack of abuse or lack of restriction of competition. Furthermore, the company can provide economic and technological justifications in order to prove the absence of violation of the Competition Law.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

The role of efficiencies is similar to that of economic analysis. The FAS may weigh the efficiencies according to Article 5 of the Competition Law during the assessment of dominance.

3.10 Do the governing laws apply to "collective" dominance?

In general, collective dominance may be defined if: the aggregate share of a maximum of three companies, with the share of each of them being more than the shares of others in the appropriate commodity market, exceeds 50%; or the aggregate share of, at most, five companies, with the share of each of them being more than the shares of others, exceeds 70%. This provision shall not apply if the share of at least one of the abovementioned companies is less than 8%.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The practice of recognition of purchasers as dominant is equally applicable. At the same time, there have been some cases where both the FAS and the court established a dominant position in relation to a purchaser.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

The Competition Law provides a non-exhaustive list of possible actions that may be qualified as abuse of dominance or market power. For example, the abuse of dominant position includes the following activities:

- setting up and maintenance of a monopolistically high or monopolistically low price;
- withdrawal of a product from circulation which caused the increase of the product's price;
- imposing contractual terms upon a counterparty that are unfavourable or not connected with the subject of an agreement;
- economically or technologically unjustified reduction or cutting off the production of goods in case there is a demand and an ability of profitable production;
- economically or technologically unjustified refusal to enter into a contract with customers in case there is a possibility of production (delivery);
- discrimination (setting economically, technologically or otherwise unjustified different prices or other terms of an agreement for different counterparties);
- creation of barriers which block entry into or exit from the market for other economic entities;
- violation of the procedure of pricing established by applicable legislation; and
- manipulation of prices on wholesale and/or retail markets of electric power (capacity).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The Competition Law provides that actions of a dominant firm may not be recognised as abuse if these actions concern the implementation of exclusive rights for the results of intellectual activity, which creates individualisation of a legal entity or individualisation of production, executed works or rendered services.

However, the FAS, following the trend for introducing new regulation of the digital markets, has launched reforms to the current antimonopoly legislation. According to the FAS's public statements, the reforms are aimed, *inter alia*, at cancellation of these antimonopoly immunities with respect to IP rights.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Direct evidence (such as a "hot document", internal correspondence or press release) might be considered as evidence of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

There are no strong precedents on this issue.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to deal are considered anticompetitive if (i) the supplier is dominant, (ii) such a refusal is economically or technologically unjustified, (iii) there is an economic and technological possibility to produce (supply) goods/render services, and (iv) such a refusal is not provided directly by applicable laws and regulations or judicial acts.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The Russian law details the "abuse of dominant position" quite broadly and the standard of proof of abuse of dominance is relatively low, so it is often applied in practice (in about 2,000–3,000 cases per year). As for anticompetitive agreements, there are approximately 400 cases initiated by the FAS per year.

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ALRUD

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Chapter 16

Singapore

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Competition and Consumer Commission of Singapore ("**CCCS**") investigates and enforces the laws governing such conduct.

1.2 What investigative powers do the responsible competition authorities have?

The CCCS has the power to require the production of specified documents or specified information or to enter premises without a warrant, and to enter and search premises with a warrant. The officer empowered to enter any premises under a warrant may also orally examine any individual on the premises who appears to be acquainted with the facts and circumstances relevant to the investigation and require the individual to answer any question relating to the investigation.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

There are four main phases in the process:

First, when a matter is brought to the CCCS's attention, it may carry out informal checks and enquiries.

Second, if there is reasonable cause to suspect that an infringement of the section 34 prohibition (regarding anti-competitive conduct) ("**Section 34 Prohibition**"), the section 47 prohibition (regarding abuse of dominant position) ("**Section 47 Prohibition**") and the section 54 prohibition (regarding anti-competitive mergers) has occurred, the CCCS launches a formal investigation by issuing notices to the parties concerned to compel them to provide information, documents and answers, and/or by entering premises to seize evidence.

Third, following the investigations, if the CCCS believes that there has been an infringement, it will issue a Proposed Infringement Decision ("**PID**") setting out the basis for its decision, and invite parties to make representations, inspect evidence, or provide other information for consideration before the CCCS finalises its decision. The party receiving the PID may request a meeting with the CCCS to make oral representations.

Finally, after considering the parties' representations, the CCCS will finalise its infringement decision.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

Upon reaching a decision that there is an infringement, the CCCS may issue fines and give any directions necessary to bring any infringement to an end, such as requiring parties to cease or vary their infringing conduct. As regards interim measures, if the CCCS has reasonable grounds to suspect that there is an infringement but has not completed its investigations, the CCCS is empowered to give directions to protect the public interest or to prevent serious, irreparable damage to a particular person or category of persons.

1.5 How are those remedies determined and/or calculated?

The fines are determined by considering:

(a) the seriousness of the infringement;

(b) the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement;

(c) the duration of the infringement;

(d) aggravating or mitigating factors;

(e) other relevant factors, e.g. deterrent value;

(f) whether the fine to be imposed exceeds the statutory maximum penalty (i.e. 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years); and

(g) immunity, leniency reductions and/or fast-track procedure discounts.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

A firm may offer legally binding voluntary commitments to the CCCS before the CCCS makes a decision. The case will be closed if the voluntary commitments satisfy the CCCS's concerns.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No, unless there is an appeal against its decision.

1.8 What is the appeals process?

Upon receiving a decision, a party may lodge a notice of appeal to the Competition Appeal Board ("**CAB**"). The notice should contain a concise statement of the facts, a summary of the grounds for appeal, and a succinct presentation of arguments supporting each ground of appeal. After receiving the notice, the CCCS must submit its defence to the CAB. The appeal is generally heard in public unless there are good reasons against it. If a party is not satisfied with the decision of the CAB, it may further appeal to the High Court and ultimately to the Court of Appeal.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Private rights of action are available for parties who have suffered loss or damage arising directly from an infringement. They differ from enforcement actions by the CCCS in that the actions are civil proceedings rather than being regulatory in nature, and the private litigant has to prove loss or damage whereas the CCCS does not have to show any loss or damage.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

A number of exclusions are available in relation to both the Section 34 Prohibition and the Section 47 Prohibition. They include the following:

(a) if the undertaking is entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, and the prohibition would obstruct the performance of the particular tasks assigned to that undertaking;

(b) if the allegedly infringing act was done to comply with a legal requirement;

(c) if a finding of infringement would be in conflict with international obligations;

(d) if there are exceptional and compelling reasons of public policy why the prohibition ought not to apply;

(e) if the allegedly infringing act relates to any goods or services which are regulated by other competition law and another regulatory authority;

(f) if the allegedly infringing act relates to a specified activity (such as the supply of piped potable water or the supply of scheduled bus and rail services);

(g) if the allegedly infringing act relates to clearing houses;

(h) if the allegedly infringing act is directly related and necessary to the implementation of a merger; and

(i) if the allegedly infringing act results in a merger.

The following three exclusions are available only in relation to the Section 34 Prohibition:

(a) if the agreement provides net economic benefit;

(b) vertical agreement; and

(c) a block exemption in relation to liner shipping agreements.

1.11 Does enforcement vary between industries or businesses?

No, it does not.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

On cross-sectoral competition cases, the CCCS will work out, with the relevant sectoral regulator, which regulator is best placed to handle the case in accordance with the legal powers given to each regulator.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

Singapore has a strong and stable pro-business government which promotes competition law to spur firms to be more efficient, innovative, and responsive to consumer needs. Competition law is seen as a means to achieve market efficiency and innovation. Accordingly, the CCCS is given strong powers of enforcement to achieve these objectives.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The CCCS places particular focus on enforcing against cartels and abuse of dominance and continues to fine-tune its investigative processes and powers. Singapore's Competition Act was amended in 2018 to:

(a) allow entities under investigation for the infringement of the Section 34 Prohibition or Section 47 Prohibition to offer legally binding commitments to the CCCS to address the anti-competitive conduct; and

(b) allow CCCS officers to orally examine any individual on the premises who appears to be acquainted with the facts and circumstances relevant to the investigation.

1.15 Describe any notable case law developments in the past year.

There have been no notable case law developments concerning vertical agreements and dominant firms over the past year.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

There is a low level of concern and scrutiny given to vertical agreements. They are perceived to be mostly beneficial or benign, especially if there is effective competition at both the upstream and downstream levels.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

"Agreement" has a wide meaning and may be written or oral, enforceable or non-enforceable. All that is required is that parties arrive at a consensus on the action which each party will, or will not, take.

An agreement is vertical if the parties to that agreement operate on different levels of the production or distribution chain for the purposes of the agreement (e.g. an agreement between a manufacturer and a retailer). A vertical agreement also includes provisions contained in an agreement which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that the provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of products by the buyer or its customers.

2.3 What are the laws governing vertical agreements?

Vertical agreements are governed by the Section 47 Prohibition but not by the Section 34 Prohibition.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

No, there are not.

2.5 What is the analytical framework for assessing vertical agreements?

Where a vertical agreement involves a dominant firm, the CCCS will adopt a two-step test: (a) decide whether the firm is dominant in a relevant market, either in Singapore or elsewhere; and (b) if it is, whether it is abusing that dominant position in a market in Singapore.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

To date, there have been no vertical agreement cases which set out an analytical framework for defining a market specifically in relation to vertical agreements. Generally, for cases dealing with the Section 47 Prohibition (which include vertical agreements), the market is defined as having two dimensions: the relevant product and the geographic scope of the market.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

While a dual distribution agreement may generally be considered to be a vertical agreement, a horizontal concerted practice may also be found in such an agreement which is of a hub-and-spoke nature.

2.8 What is the role of market share in reviewing a vertical agreement?

Market share is an important factor in assessing dominance in respect of a vertical agreement but does not, on its own, determine whether a firm is dominant. It is also important to consider the positions of other firms operating in the same market and how market shares have changed over time. A firm is more likely to be deemed to be dominant if its competitors have relatively weak positions and it has enjoyed a persistently high market share over time.

2.9 What is the role of economic analysis in assessing vertical agreements?

The role of economic analysis is to assess whether a dominant position exists in respect of the vertical agreement and whether there has been abuse of the dominant position. In the latter regard, an economic effects-based assessment is used in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition.

2.10 What is the role of efficiencies in analysing vertical agreements?

A vertical agreement will be considered to be benign or beneficial if it can generate benefits through the promotion of efficiencies. However, a dominant firm must still show that its conduct is proportionate to the benefits produced.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Yes. The Section 34 Prohibition does not apply to vertical agreements relating to intellectual property (e.g. a franchise agreement where the franchisor sells to the franchisee products for resale) or containing intellectual property provisions (e.g. trade mark or know-how licence provisions). The prohibition would, however, apply to such agreements which have as their primary object the assignment or the licensing of intellectual property rights for the manufacture of products.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes. In particular, the CCCS has to demonstrate likely anticompetitive effects in the Section 47 Prohibition context.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes. The harm must be proportionate to the potential benefits or efficiencies produced by the vertical agreement.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

See questions 1.10 and 2.10 above.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes, in the context of the Section 34 Prohibition and Section 47 Prohibition.

2.16 How is resale price maintenance treated under the law?

It is treated like a vertical agreement from the Section 47 Prohibition perspective.

2.17 How do enforcers and courts examine exclusive dealing claims?

They would consider whether the exclusive dealing would foreclose competition in the relevant market and thus infringe the Section 47 Prohibition. For instance, there may be such a foreclosure if a dominant manufacturer imposes a requirement that its retailers must purchase a minimum quantity of its products, which is set close to each retailer's total input requirement.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligations would be examined in the same manner as vertical restraints. For example, a firm which leverages its dominance in a market to attempt to gain a foothold in another market in which it is not dominant by tying products together is likely to infringe the Section 47 Prohibition.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination would infringe the Section 47 Prohibition if it is used to harm competition, such as if a dominant firm engages in predatory pricing or if it offers discounts in a way that forecloses competition in the relevant market.

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discounts will be examined for their effect on competition. They may constitute abuse of dominance if the discounts are used to bring prices down to predatory levels, are conditional on buyers making all or a large proportion of their purchases from the dominant firm, or are conditional on the purchase of tied or bundled products.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

See question 2.20 above.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Other types of vertical restraints which may be prohibited include quantity forcing, refusals to supply and refusals to allow access to essential facilities, tying and full-line forcing.

2.23 How are MFNs treated under the law?

There is no specific guidance on MFNs in Singapore. In general, however, they would infringe the Section 47 Prohibition if they involve an abuse of a dominant position.

2.24 Describe any notable case developments concerning vertical merger analysis.

There are no notable case developments concerning vertical merger analysis.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The level of concern and scrutiny is high.

3.2 What are the laws governing dominant firms?

The laws are provided in Section 47 of the Competition Act which prohibits "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore". The section cites several examples of such conduct, including:

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

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

3.3 What is the analytical framework for defining a market in dominant firm cases?

A market is defined in terms of the product and the geographic scope of the market.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

As a starting point, a market share above 60% is considered to indicate that a firm is dominant in the relevant market. However, a firm with a market share below 60% may also be considered dominant depending on the presence of other factors, such as entry barriers, the degree of innovation in the market, product differentiation, the responsiveness of buyers to price increases, and the price-responsiveness of competitors.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Being "dominant" or "monopolist" *per se* is not illegal. However, it does mean that the dominant firm must be careful not to fall foul of the Section 47 Prohibition by engaging in conduct which harms, or is likely to harm, competition.

3.6 What is the role of economic analysis in assessing market dominance?

The role of economic analysis is to assess dominance through factors such as market power, extent of existing competition, entry barriers and other constraints (e.g., buyer power).

3.7 What is the role of market share in assessing market dominance?

Market share is an important factor in determining the extent of competition and hence market dominance.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The Act does not provide for any specific defences for the Section 47 Prohibition. In general, a dominant firm may argue that it is not abusing its dominant position because of its efficiencies, successful innovation or economies of scale, or that it behaved in a proportionate manner in defending its legitimate commercial interest.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

See question 3.8 above.

3.10 Do the governing laws apply to "collective" dominance?

Yes, they do.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

They apply in the same manner as the laws for dominant sellers.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

The following practices count as abuse of dominance or exclusionary or anti-competitive conduct:

(a) predatory behaviour towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

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

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The legitimate exercise of an intellectual property right, even by a dominant undertaking, will not, in general, be regarded as an abuse. However, the way in which an intellectual property right is exercised may give rise to concerns if it goes beyond the legitimate exploitation of the intellectual property right. Examples of such illegitimate exploitation include a firm attempting to use an intellectual property right to extend its market power into another market (such as by tying products together) and refusing to grant a licence where the intellectual property right concerns an essential facility which has no substitutes and which is indispensable to the exercise of the activity concerned.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

There are no cases or guidelines which suggest that enforcers and/or legal tribunals in Singapore would consider "direct effects" evidence of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

There are no cases or guidelines which specifically discuss "platform dominance".

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to supply may be considered anticompetitive if they are likely to substantially harm competition (such as if they remove an efficient competitor or prevent competitors from entering the market) and cannot be objectively justified.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The unique aspect is that vertical agreements are generally excluded from the Section 34 Prohibition.

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Lee & Lee is one of Singapore's leading law firms, with around 100 lawyers. The firm provides a comprehensive range of legal services to individuals, companies, financial institutions as well as governmental organisations.

The firm's philosophy is to serve its clients' needs with an approach that is innovative and forward-looking and that is in step with the trends of the future while relying on the experiences of the past.

The firm's Intellectual Property & Competition Practice provides an integrated service advising on both contentious and non-contentious matters, such as brand protection, prosecution and enforcement of trade marks and patents, drafting technology transfer and licence agreements, and filing representations in relation to competition infringement decisions and leniency applications.

Spain

Pedro Callol

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The National Markets and Competition Commission (**CNMC**) is the authority responsible for guaranteeing, preserving and promoting the correct functioning, transparency and existence of effective competition.

According to Law 1/2002 of 21 February 2002 on the coordination of the jurisdictions of the State and the Autonomous Communities in the field of defence of competition, regional competition authorities are responsible for exercising their powers in their territory when business conduct alters or may alter free competition within the scope of the respective region.

1.2 What investigative powers do the responsible competition authorities have?

The responsible competition authorities are entitled to:

- Conduct inspections at the undertaking's premises:
  a. Access any premises, facility or vehicle of the company.
  b. Access company directors' homes (with a court warrant).
  c. Review books, records and documents.
  d. Require the production of, examine, copy or even seize any documents relevant to the investigation (with the exception of confidential, privileged documents).
  e. Retain books, records or documents for a maximum of 10 days.
  f. Seal filing cabinets or rooms.
  g. Require on-site explanations of relevant documents or practices.
- Address information requests.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The process is initiated *ex officio* by the Directorate of Investigation of the CNMC, either on its own initiative or by order of the Council of the CNMC or upon a third-party (natural or legal person) complaint.

First, the Competition Directorate may start a preliminary (confidential) inquiry to assess if there are sufficient reasons to open antitrust proceedings. Once the antitrust proceeding is formally open, the procedure is divided into two phases: *(i)* the investigation phase, led by the Competition Directorate; and *(ii)* the decision phase before the Council of the CNMC. An antitrust administrative decision must be issued no later than 18 months from the formal opening of the antitrust proceedings.

The antitrust proceedings may be closed without fines or declaration of infringement if no evidence of an infringement is found, or if the parties submit a request for a commitments termination, which is allowed by the CNMC. Otherwise, a fining antitrust decision can be expected. The decision of the Council of the CNMC may be appealed before the administrative courts.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The CNMC may impose penalties for any infringement of Law 15/2007 of 3 July 2007 for Defence of Competition (**LDC**) without permission or confirmation by another entity or court.

Regional authorities may fine on the same basis regarding conduct within their jurisdiction.

The CNMC and regional authorities have powers to issue interim measures decisions, including injunctions to stop any given conduct as a matter of urgency.

Note: substantive law applicable to the CNMC is also applicable to regional authorities.

1.5 How are those remedies determined and/or calculated?

According to Article 62.3.a) LDC, vertical restraints are categorised as a serious infringement that can be fined by up to five per cent of the turnover of the infringing party in the business year preceding the imposition of the fine.

If the turnover cannot be determined, the infringing parties may be exposed to a fine ranging from €500,000 to €10 million.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

In the case that the CNMC considers that the agreement would not produce negative effects on competition if it were modified, the CNMC could welcome commitment proposals by the parties. If the commitments are considered appropriate, the CNMC could close the proceedings with a commitments termination decision without a fine and without express admission of guilt.

The CNMC monitors parties' compliance with those commitments and keeps the execution of commitments under review.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

No. Decisions of the CNMC are self-executive. Only if CNMC decisions are appealed in court does the CNMC appear in court to defend the legality of its actions.

1.8 What is the appeals process?

Decisions of the Council of the CNMC amount to final agency action and may be appealed only before the High Court (*Audiencia Nacional* in Spanish) within two months from the notification of the Decision.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Commercial courts have authority to declare the existence of infringements of Article 1.1 LDC (which prohibits, for instance, resale price maintenance) as well as to declare an agreement exempt from that prohibition pursuant to Article 1.3 LDC, always within the boundaries of the petition addressed to the competent court. The same applies, *mutatis mutandis*, in connection with Articles 101.1 and 101.3 of the Treaty on the Functioning of the European Union (**TFEU**), which have direct effect and can therefore be invoked before national courts.

Parties to a vertical agreement are entitled to seek declaratory judgments or injunctions and bring damages claims. Theoretically, third parties could seek damages if such parties can prove that they have suffered a loss as a result of the anti-competitive agreement. These forms of order must be sought from the commercial courts, except where the party is simply seeking damages from a previously declared infringement (follow-on actions), in which case it must do so before the ordinary civil courts. Consumer associations have standing to sue on behalf of consumers.

The remedies available are those typical of any other civil claim, ranging from cease-and-desist orders to the award of damages.

Assuming that a private enforcement action goes through all the possible appeals up to the Supreme Court, a final judgment may be rendered after several years. For example, in the *Sugar* case (a follow-on damages claim for damages arising from a sugar cartel), the claim was filed in 2007 and, after several appeals, the Supreme Court decided on the case in 2012 (Judgment of the Supreme Court of 8 June 2012, case 2163/2009).

1.10 Describe any immunities, exemptions, or safe harbours that apply.

Pursuant to Article 1.4 LDC, Commission Regulation (EU) No 330/2010, Article 101.3 of the Treaty of the Functioning of the European Union on categories of vertical agreements and concerted practices (**Vertical Block Exemption**) is applicable in Spain.

Consequently, safe harbour applies when the market share held by the supplier does not exceed 30% of the relevant market in which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market in which it purchases the contract goods or services. As previously indicated, this safe harbour does not apply in case of hard-core restraints, in which case the parties can seek to be covered under the exemption provided for in Article 101.3 TFEU and/or Article 1.3 LDC, as explained above. For these purposes, the case law and guidance both of the Spanish courts and agencies, and the European Commission guidelines and practice, as well as case law of the European courts, are of relevance.

1.11 Does enforcement vary between industries or businesses?

No, although there has been a focus on retail, supermarkets and vehicle distribution in recent years.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

Along with the functions of competition enforcement of the CNMC, this agency also acts as a regulatory authority in certain sectors and regulated markets. These sectors or areas are the following: electronic communications and audiovisual communication; the electricity and natural gas markets; the postal sector; airport tariffs; and certain aspects of the railway sector.

Generally, the CNMC and the courts will look at and bear in mind the entire legal and regulatory landscape. In particular, the LDC provides immunity from antitrust scrutiny conduct carried out in observance of another law (Act of Parliament).

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The Council of Ministers (*i.e.*, the government) may intervene in the merger review process in those circumstances when the Council of the CNMC has decided: *(i)* to ban a concentration; or *(ii)* to subject the merger clearance to conditions. In those circumstances, the Council of Ministers may decide to lift a prohibition or alter the merger conditions on the basis of a number of public interest-related grounds. The existence of this procedure could, by its very nature, alter the review of sensitive mergers in the future, as the grounds on which the Council of Ministers must decide are non-competition-related grounds. However, this is very rarely used and so far has only been used in the television mergers of a few years ago (*vid.* Decision of the Council of Ministers of 24 August 2012, file C/0432/12, *Antena 3/La Sexta*).

Otherwise, members of the Council of the CNMC are ultimately chosen on the basis of parliamentary majorities, but their designation is staggered, so the CNMC is generally perceived as being fairly independent.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

In the past, the CNMC was inclined to fine mostly suppliers. This is because it was considered that, although both suppliers and customers were parties to the vertical agreement, responsibility for the infringement fell on the party with a higher bargaining power, usually the supplier. This trend has changed over time due to a broader knowledge and awareness of buyer power. Thus, in June 2007 the CNMC fined both the supplier and the buyer on the basis that both parties had obtained an unlawful benefit from the agreement and both parties had countervailing bargaining power (*vid.* Decision of the CNMC of 21 June 2007 in case 612/06, *Aceites 2*). In 2010, the CNMC ruled that exclusive contracts for the acquisition and resale of football broadcasting rights lasting for more than three seasons for Spanish league and cup matches are anticompetitive and fined four buyers (broadcasting operators) but none of the suppliers (football clubs). Two years later, the CNMC fined Suzuki and five of its authorised dealers in Spain for agreeing minimum resale prices for Suzuki motorbikes (*i.e.*, the CNMC again fined both the supplier and the buyer) (*vid.* Decision of the CNMC of 27 March 2012 in case S/0237/10, *Motocicletas*).

1.15 Describe any notable case law developments in the past year.

On 22 November 2018, the CNMC opened an antitrust proceeding for restrictive practices against Adidas Spain (case S/DC/0631/18). The investigation relates to clauses in the contracts applicable to some of its franchisees that could be restrictive for competition, by prohibiting certain types of sales, such as online sales and cross-selling, and imposing non-compete obligations that could be disproportionate. Also, Adidas could have indirectly set the resale price of its franchisees.

Spain seems to have generally been less active in areas such as online sales and distribution than other countries. It is to be expected that more decisions will take place in the coming years in connection with online markets. Another area of focus is that of food and consumer goods distribution, where large purchasers (*e.g.*, supermarket chains) have in recent years been perceived as wielding great economic power from the purchasing side. There is to that extent a study from the CNMC in that particular sector, and some sectoral law in the area of food production and distribution seeking to protect suppliers against large retail organisations.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The CNMC has, in theory at least, a high level of concern over vertical agreements. In practice, there are substantially less enforcement cases than in other European jurisdictions.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The concept of agreement covers anything that enables identifying a meeting of minds of two or more independent companies. Arguably, the concept may be even wider under Spanish law than under EU competition law, as conscious parallelism is also included as conduct enabling characterisation under Article 1 LDC.

The concept of "vertical" implies that the companies which are parties to the agreement are situated at different levels of the production chain.

2.3 What are the laws governing vertical agreements?

The laws applicable to vertical restraints in Spain are: *(i)* the LDC; *(ii)* Royal Decree 261/2008 of 22 February 2008 approving the Defence of Competition Regulation (RDC); and *(iii)* European competition law.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

There are two types of exemptions, which do not appreciably restrict competition (*de minimis*): if the aggregate market share held by (competing) parties to an agreement does not exceed 10% of any of the relevant markets affected by the agreement; or if the market share held by (non-competing) parties to an agreement does not exceed 15% of any of the relevant markets affected by the agreement. This *de minimis* exemption does not apply to hard-core agreements, which include resale price maintenance, absolute territorial protection and generally the other hard-core restrictions blacklisted in the Vertical Block Exemption.

2.5 What is the analytical framework for assessing vertical agreements?

Article 1.1 LDC prohibits vertical agreements between two or more parties, which have the object or the effect of preventing, restricting or distorting competition within the national market.

Pursuant to Article 1.3 LDC, the prohibition contained in Article 1.1 LDC shall not apply to agreements *(i)* generating efficiency gains by contributing to improving production or distribution, or to promoting technical or economic progress, *(ii)* from which consumers must obtain a fair share of these efficiency gains, *(iii)* which do not impose on the undertakings concerned any vertical restraints not essential for reaching the sought efficiency benefits, and *(iv)* which do not allow the participating companies to eliminate competition with regard to a substantial part of the considered products or services. It is worth highlighting that the criteria contained in Article 1.3 LDC are almost identical to those contained in Article 101.3 TFEU.

In addition, as pointed out above, Article 1.4 LDC provides that the prohibition foreseen in Article 1.1 shall not apply to the agreements or collective recommendations meeting the criteria of any EU block exemption regulation, which in the case of vertical restraints is the Vertical Block Exemption.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Market definition criteria on the demand and supply side must generally be followed based on precedent. The European Commission methodology followed in the Notice on market definition is authoritative, but national practice, precedent and local market idiosyncrasies are looked at.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Each practice is looked at on a case-by-case basis, bearing in mind exactly in which companies (other competitors, customers) the practice has effects.

2.8 What is the role of market share in reviewing a vertical agreement?

Article 1.4 LDC refers directly to the Vertical Block Exemption, incorporating its text into national competition law. The Vertical Block Exemption establishes that the exemption foreseen applies when the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services.

However, outside the scope of the Vertical Block Exemption, vertical agreements should be analysed individually according to the rules set out in Article 1.3 LDC.

2.9 What is the role of economic analysis in assessing vertical agreements?

It is relevant in theory, although less so in practice.

2.10 What is the role of efficiencies in analysing vertical agreements?

It is relevant in theory, although less so in practice.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no special rules for intellectual property. The block exemption is only applicable to the licence directly related to the use, sale or resale of goods and services when those intellectual property rights provisions do not constitute the primary object of the agreement.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The CNMC has to demonstrate anticompetitive effects in principle, but it must be borne in mind that some vertical restraints are considered unlawful *per se* when they contain hard-core restrictions such as: *(i)* price-fixing; *(ii)* non-competition clauses for a duration longer than five years; and *(iii)* restrictions on passive sales.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

As mentioned in question 2.5, the prohibition of Article 1.1 LDC shall not apply to agreements, decisions of practices that contribute to the production or marketing and distribution of goods and services or to promoting technical or economic progress, without any prior decision being necessary due to compliance with the requirements of Article 1.3 LDC.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Legal exemption defences may be available; see question 1.10 above.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The CNMC and the LDC incorporate the Vertical Block Exemption.

2.16 How is resale price maintenance treated under the law?

According to the CNMC, resale price maintenance is *per se* restriction of competition (*vid*. Decision of 29 February 2008 in case 647/08, *Distribuciones Damm*).

Resale price maintenance can be executed by any means or devices which have as their object or effect the restriction of the distributor's freedom to set end-prices. This can take place, for instance, by establishing the margin that dealers must offer to their respective agents (*vid*. Decision of 11 January 2012 in case S/0154/09, *Montesa Honda*); fixing maximum discount levels (*vid*. Decision of 5 October 2006 in case 599/06, *Maquinaria agropecuaria*); or by means of a finalist strategy aimed at monitoring discounts applied by a distributor (*vid.* Decision of 19 October 2004 in case 619/04, *Técnicas Ganaderas*).

The CNMC also considers minimum resale prices an infringement of Article 1 LDC (*vid*. Decision of 2 November 2004 in case 578/04, *EKO-AMA Mondáriz*).

The CNMC does not regard recommended resale prices as contrary to Article 1 LDC (*vid*. Decision of 3 November 2008 in case 2765/07, *Animales de compañía*). However, and depending on the specific context and means employed, price recommendations have been considered by the CNMC as fixed resale prices. For instance, in the *Repsol/Cepsa/BP* case (*vid*. Decision of 30 July 2009 in case 652/07, *Repsol/Cepsa/BP*), the CNMC fined three petrol companies for notifying recommended and maximum resale prices to petrol stations which were, in practice, applied as fixed retail prices. The CNMC relied on, *inter alia*, the following indicia:

- high compliance (in more than 80 per cent of the cases) with the suggested or maximum retail prices;
- reduction of incentives to apply discounts by reducing the retailers' margins; and
- the IT system communicating the suggested resale prices hampered in practice the ability of petrol stations to deviate from the suggested resale prices.

Regarding maximum resale prices, the CNMC considers this practice to be compliant with the LDC (*vid*. Decision of 30 November 1998 in case 389/96, *Cervezas Mahou*).

2.17 How do enforcers and courts examine exclusive dealing claims?

This type of restraint can be acceptable except in circumstances that lead to market foreclosure. See, for instance, the reference to the *football rights* investigation, above at question 1.14, which concerned a network of exclusive agreements which foreclosed competition.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

See question 2.17.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination may be contrary to applicable national rules on retail trade or unfair trade. Discrimination can also be contrary to Article 1 LDC and may also amount to an abuse of dominant position under some circumstances.

2.20 How do enforcers and courts examine loyalty discount claims?

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

In addition to resale price maintenance, exclusive dealing, tying arrangements, price discrimination, loyalty discount and multi-product discount, we may find other types of vertical restraints:

- Exclusive supply, where the supplier is required to exclusively or mainly distribute the products to only one purchaser.
- Exclusive customer allocation, where the supplier agrees to sell its products only to one distributor for resale to a particular group of customers.
- Selective distribution, where distribution systems are based on quality criteria.
- Single branding, concerning agreements which have as their main element that the buyer is obliged or induced to exclusively or mainly sell products from a single brand.
- Category management agreements, whereby a distributor entrusts the supplier with the marketing of a category of products including, in general, not only the supplier's products, but also the products of its competitors.
- Franchising agreements, generally containing licences to intellectual property rights related, in particular, to trademarks or signs and know-how for the use and distribution of goods or services.

2.23 How are MFNs treated under the law?

The CNMC analyses most-favoured-nation (**MFN**) clauses in accordance with the Vertical Block Exemption and the Vertical Guidelines, as well as under Article 102 TFEU and its national equivalent, Article 2 LDC, when applicable. The case on pharmaceutical studies cited under question 1.15, above, concerned in part an MFN clause, which IMS Health (currently Iqvia) agreed to drop from its pharmaceutical marketing data purchasing agreements as a result of the investigation.

2.24 Describe any notable case developments concerning vertical merger analysis.

Interesting vertical mergers dealt with by the CNMC in the last few years include: the acquisition by Fresenius of Grupo Quiron, at the time the largest private hospital group in Spain, where potential issues of foreclosure to alternative hospital suppliers were raised (Decision of 22 December 2016 in case C/0813/16, *Helios/Quironsalud*); and the acquisition of Telefonica of the pay-TV business of Canal+ in Spain (Decision of 23 April 2015, file C/0612/14, *Telefonica/Digital+*), dealing with interesting media content matters in the context of the vertical integration between the largest communications platform owner and the largest owner of media content in the country.

More recently, an operation consisting of the acquisition of control by Catalana Occidente Group through the acquisition of 100% of the capital stock of four funeral homes sparked some concern that the vertical integration between the life insurance and funerary services could pose problems in the insurance market. Finally, the CNMC considered that the vertical overlap derived from the operation did not pose a problem for the maintenance of effective competition (Decision of 12 April 2018, file C/0928/18, *GRUPO CATALANA OCCIDENTE/SOCIEDADES ADQUIRIDAS*).

The acquisition by ORPHAN EUROPE S.a.r.l. of exclusive control over a series of assets necessary for the manufacture and commercialisation of an "orphan drug" called Cystagon in all countries of the world with the exception of the United States, Australia and Japan (Decision of 22 March 2018 in case C/0925/18, *RECORDATI/MYLAN*) raised some concerns regarding the distribution of orphan drugs in Spain. However, the CNMC considered that, given that ORPHAN was already the exclusive distributor of the medicine Cystagon in Spain pre-merger, there would be no substantial modification to the structure of the existing distribution of the product.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The CNMC has a high level of concern and is active in the enforcement of the prohibition of abuse of dominant position.

3.2 What are the laws governing dominant firms?

The LDC regulates the abuse of dominant position in line with EU law.

3.3 What is the analytical framework for defining a market in dominant firm cases?

Article 2 LDC prohibits any abuse by one or more undertakings of their dominant position in all or part of the national market. The abuse may consist in:

a. The direct or indirect imposition of prices or other unfair trading or services conditions.
b. The limitation of production, distribution or technical development to the unjustified prejudice of undertakings or consumers.
c. The unjustified refusal to satisfy the demand for purchase of products or provision of services.
d. The application, in trading or service relationships, of dissimilar conditions to equivalent transactions, thereby placing some competitors at a disadvantage compared with others.
e. The subordination of the conclusion of contracts to acceptance of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

Much as under EU law, showing a dominant position depends on the particular circumstances of the allegedly dominant company and the relevant market. As a rule of thumb, dominant position requires a stable market share of around 40 per cent or higher, with no competitors with similar market shares, in markets with significant barriers to entry and expansion, preferably mature and with a low elasticity of demand. However, this is no mathematical rule and a number of factors must be looked at to determine the existence of a dominant position: the entry barriers; the degree of market concentration; the elasticity; the degree of vertical integration, etc.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Generally, dominant companies are subject to a stricter test when behaving in the market, as some courses of conduct that would not be objectionable for the majority of companies may be considered abusive when carried out by a dominant company.

3.6 What is the role of economic analysis in assessing market dominance?

The importance of economic analysis when studying a possible abuse of dominant position is key, both in establishing that a dominant position exists and in evidencing the abuse, more so perhaps after the landmark *Intel* case at the European Court of Justice.

3.7 What is the role of market share in assessing market dominance?

As mentioned in question 3.4, the market share close to 40 per cent or higher may indicate that there is a dominant position, although this figure may change depending on the market, plus there are other factors to be taken into account in assessing market dominance.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Economic defences of various types, such as absence of foreclosure in exclusionary abuses, for instance, are available. One example of this is the recent Supreme Court Judgment of 5 February 2018 (*vid*. case 2808/2015) where Correos (which owns the public postal network and provides the universal postal service in Spain) was sanctioned by the CNMC for a margin-squeeze that prevented competitors from competing effectively in the segment of large postal service customers, constituting an abuse of dominant position.

Spanish courts upheld the appeal filed by Correos, considering that, even acknowledging the existence of a margin-squeeze, the CNMC had not demonstrated that such practice had exclusionary effects for companies. The Supreme Court concluded that alternative operators can and must make optimal use of their own capacity to compete.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

The rules of the European Union on this matter are to be followed.

3.10 Do the governing laws apply to "collective" dominance?

Article 2 LDC prohibits abuse of dominant position both by a single undertaking and several undertakings.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Buyer power can be a source of dominance, much in the same way as supplier power.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Spanish law does not make any express distinction between abuse of dominance and exclusionary abuses. However, in the framework of the investigation of potential breaches of the relevant provision prohibiting unilateral anticompetitive conduct, when identifying the specific abuse committed by the undertaking enjoying a dominant position in the market, both the decisional practice of the CNMC and the case law assess the conduct and identify conduct as being exclusionary (such as predatory pricing, margin-squeeze practices or refusal to supply) or exploitative (such as imposing excessively high prices or imposing discriminatory conditions), largely in line with EU competition law.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

There is in Spain a very substantial body of precedents related to intellectual property collective management societies. Some cases have led to damage actions before the Spanish commercial courts. In most of the cases, the claims challenged exploitative excessive pricing (*vid*. Decision of the CNMC of 6 November 2014 in case S/460/13, *SGAE Conciertos*) and the imposition of statutory and contractual conditions that unjustifiably restrict the freedom of the collective management societies' members to withdraw their rights management (*vid*. Decision of the CNMC of 30 May 2019 in case S/DC/0590/16, *DAMA/SGAE*). There are other important IP rights-related cases such as various matters related to IP licensing of premium content (football rights and movie rights; output deals).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The courts tend not to consider these as much as the enforcer.

3.15 How is "platform dominance" assessed in your jurisdiction?

Foreseeably, it would be assessed largely in line with EU law.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Generally, only refusals to supply regular customers or refusals to supply a product or service essential to operate in the market are considered to restrict competition, unless the refusal is objectively justified. However, in the case that a potential or actual, economically viable, supply alternative exists, it will be difficult to conclude that an abuse has taken place (*vid*. Decision of the CNMC of 15 June 2009 in case S/0034/08, *Olympus Medical Systems Europa*).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

The *HmR/Iqvia* case is of particular note.

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Laura has participated in antitrust cases (infringement proceedings under Articles 101 and 102 TFEU and Articles 1 and 2 of the Spanish Competition Act, general advice to companies, and self-assessments) in the sectors of car distribution, bus transportation services and the chemical industry. She has worked in the drafting and preparation of merger filings before national competition authorities in connection with online advertising platforms. Additionally, Laura has assisted in connection with the judicial review of cartel decisions in Spain.

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We are a specialist team devoted to antitrust law and providing our professional services in a zealously independent and professionally demanding environment. We provide services to private equity and investment funds, media, technology, consumer goods, pharmaceutical, distribution and industrial corporations mostly from the EU, America and Asia.

In the area of merger control, we have intervened successfully in the main transactions of the last few years where approval has been required in Spain (*e.g.*, *Telefonica/Digital+*, *Fresenius/Quiron*, *Cerberus/Renovalia*, *Glintt/Pharmaplus* or *HIG/Dominion*, to name but a few).

In the area of investigations, we have in the past succeeded in persuading the authorities to close investigations without fines (Barcelona harbour, dyestuffs, insecticide equipment investigations) or with symbolic fines (ice cream manufacturers, football broadcasting rights). We have top credentials in administrative investigation, having succeeded in recent years in annulling or reducing fines, such as in the case of the Supreme Court litigation on behalf of Mediterranean Shipping Company in the Valencia harbour case. We have recently successfully taken a cartel case in the paper recycling sector to the Supreme Court, which ultimately reversed the CNMC's fining Decision. We have a flourishing distribution law practice and also advise and represent our clients in connection with antitrust damages claims, both in non-contentious (settled) matters (*e.g.*, an EU food packaging cartel), as well as in court litigation (where we have assisted in litigation ending with a declaratory judgment exonerating our client, a member of the sodium chlorate cartel, of civil liability). Our unfair trade litigation experience spans matters dealing with poaching of workers, sales at a loss, economic dependence or unfair competition through breach of regulations, amongst others.

Chapter 18

Turkey

Gönenç Gürkaynak

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Hakan Özgökçen

1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The national competition authority for enforcing competition law in Turkey is the Competition Authority ("**Authority**"), a legal entity with administrative and financial autonomy. The Authority consists of the Competition Board ("**Board**"), presidency and service departments. As the competent body of the Authority, the Board is responsible for, *inter alia*, investigating and enforcing the laws governing vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board.

Article 15 of the Law No. 4054 on Protection of Competition ("**Competition Law**") authorises the Board to conduct on-site investigations. Accordingly, the Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same and request undertakings and trade associations to provide written or verbal explanations on specific topics.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The Board is entitled to launch an investigation into alleged anti-competitive conduct *ex officio* or in response to a complaint. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. The preliminary report of the Authority experts will be submitted to the Board within 30 calendar days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 calendar days whether to launch a fully-fledged investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 calendar days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Authority and once it is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 calendar days (second written defence). The investigation committee will then have 15 calendar days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed. An oral hearing may be held *ex officio* or upon request by the parties. The Board will render its final decision within 15 calendar days of the hearing, if an oral hearing is held, or within 30 calendar days of completion of the investigation process, if no oral hearing is held.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In the case of proven anticompetitive conduct or agreement, the undertakings concerned shall be separately subject to administrative monetary fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision. Employees and/or managers of the undertakings or association of undertakings that had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking or association of undertakings.

The Board is also authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed as legally invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution of the matter, in case there is a possibility of serious and irreparable damages.

1.5 How are those remedies determined and/or calculated?

The Competition Law makes reference to Article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and the amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings and compliance with the commitments, etc., in determining the magnitude of the monetary fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance, which applies to restrictive agreements, concerted practices and abuse of dominance, sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. Accordingly, fines are calculated by first determining the basic level, which is between 2% and 4% for cartels and 0.5% and 3% for other violations; aggravating and mitigating factors are then factored in. The Regulation on Monetary Fines also applies to managers or employees who had a determining effect on the violation, and provides for certain reductions in their favour.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The settlement procedure is not regulated under the Turkish competition law regime. The commitments are available only for concentrations. Article 14 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board enables the parties to provide commitments to remedy substantive competition law issues of a concentration.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

If a Board decision is appealed, the Board has a right to defend its decision before the administrative courts by way of submitting response petitions to the plaintiff's claims.

Article 2/1(a) of Law No. 2577 on Administrative Procedure provides for "annulment actions concerning administrative acts that are brought by a person whose interests were violated by the act, with the claim that the act is illegal due to a mistake made in one of the elements of competence, form, reason, subject and purpose". In other words, an administrative act must be in compliance with the law in terms of all of the following five elements: (i) jurisdiction; (ii) form; (iii) reason; (iv) subject matter; and (v) purpose.

1.8 What is the appeals process?

According to Article 55(1) of the Competition Law, administrative penalty decisions of the Board can be submitted for judicial review before the administrative courts in Ankara by filing an appeal within 60 calendar days on receipt of the Board's reasoned decision. The Board's decisions are considered administrative acts, and thus legal actions against them must be taken in accordance with the Administrative Procedural Law.

According to Article 27 of Law No. 2577 on Administrative Procedure, filing an administrative action does not automatically stay execution of the Board's decision. However, on request by the plaintiff, the court may stay execution if the decision is likely to cause irreparable damage or contravene the law.

The judicial review period before the Ankara administrative courts usually takes about 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the Council of State. As the regional courts are newly established, it has not yet been evidenced how long it takes for a regional court to finalise its review on a file. Accordingly, the Council of State's review period (for a regional court's decision) should also be tested before providing an estimated time period. The appeal period before the Council of State usually takes about 24 to 36 months.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

The Board does not decide whether the victims of anti-competitive conduct merit damages. These aspects are supplemented with private lawsuits. Articles 57 *et seq.* of the Competition Law permit any party injured in its business or property by reason of a competition law violation to sue the violators for up to three times its actual damages or the profits gained or likely to be gained by the violators, plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple-damages principle exists in the law. In private suits, the incumbent firms are adjudicated before regular civil courts. Most of the civil courts wait for the decision of the Board in order to build their own decision on the Board's decision.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption issued by the Board and/or an individual exemption. The applicable block exemption rules are: (i) Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"); (ii) Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) Block Exemption Communiqué No. 2016/5 on R&D Agreements; (iv) Block Exemption Communiqué No. 2008/3 for the Insurance Sector; (v) Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; and (vi) Block Exemption Communiqué No. 2013/3 on Specialization Agreements.

1.11 Does enforcement vary between industries or businesses?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law (i.e. a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of the Competition Law.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Board, in particular in the telecommunications and energy sectors, takes into account the regulatory context within its competitive analysis (e.g. in terms of entry barriers) in order to assess the nature of the market and if the investigated undertaking could justify its conduct based on these regulations.

The decisional practice of the Board and the court decisions indicate that if the conduct of professional organisations remains in the framework of powers granted by law and the related legislation, the Board will not establish any decisions regarding the relevant conduct (e.g. *Türkiye Barolar Birliði*, November 13, 2003, 03-

73/876(a)-374; and *Türk Tabipler Birliði*, September 22, 2005, 05-59/877-236). However, in terms of competition advocacy, the Board could send an opinion to the relevant institutions regarding the conduct which has legal grounds and the potential to restrict competition.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The current political climate in Turkey does not have an impact on the Turkish competition law regime as the Authority continues to function in the usual manner.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The recent enforcement trend of the Competition Authority shows that the Authority has directed its attention towards refusal to supply and exclusive dealing cases. The Competition Authority has conducted several pre-investigations and investigations with regard to refusal to supply. These instances include: the *Daichii Sankyo* (May 22, 2018, 18-15/280-139) and *Türkiye Petrol Rafinerileri* (June 12, 2018, 18-19/321-157) pre-investigations; and the *Zeyport Zeytinburnu* (March 15, 2018, 18-08/152-73) and *Kardemir Karabük Demir Çelik* (September 7, 2017, 17-28/481-207) investigations.

As for exclusive dealings, the Competition Authority has conducted several pre-investigations, including *Mars Media* (January 18, 2018, 18-03/35-22), *Frito Lay* (June 12, 2018, 18-19/329-163) and *Trakya Cam* (December 14, 2017, 17-41/641-280).

1.15 Describe any notable case law developments in the past year.

The Board has imposed a fine in the amount of TL 17,497,141.63 in the investigation conducted against Trakya Cam for *de facto* application of the exclusive distribution agreements as of 2016, which have been determined to be in violation of Articles 4 and 6 of the Competition Law through the Board's decisions of December 2, 2015 (15-42/704-258) and December 14, 2017 (17-41/641-280).

Most recently, the Board has concluded its preliminary investigation into Çiçek Sepeti (March 8, 2018, 18-07/111-58), an online retailer active in the sale of flowers, edible flowers ('bonnyfood') and gifts ('bonnygift'). The Board cleared Çiçek Sepeti of charges laid out in a complaint with respect to (i) applying predatory prices, (ii) spending significant amounts on advertising (and thus raising its rivals' marketing costs), and (iii) initiating unfair lawsuits against its rivals.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

According to the Authority's Activity Report of 2018, the difference between the number of decisions based on vertical and horizontal agreements reduced considerably between 2014 and 2018. In addition, the Report states that out of 65 Board decisions taken in 2018, 28 of them were with regard to vertical agreements.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The Competition Law avoids providing a complete definition of 'agreement', since an agreement may occur in various ways. Reasoning of the Competition Law indicates that, for the purposes of the Competition Law, the term 'agreement' refers to all kinds of compromise or accord to which the parties feel bound, even if these do not meet the conditions for validity as regards the Civil Law. For instance, the Board decided that nonbinding gentlemen's agreements are deemed 'agreements' where the parties comply with rules that restrict competition (*12 Banks,* March 8, 2013, 13-13/198-100; and *Private Schools Association,* March 3, 2011, 11-12/226-76).

Article 2 of Communiqué No. 2002/2 defines vertical agreements as agreements which are concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services.

2.3 What are the laws governing vertical agreements?

Article 4 of the Competition Law prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption issued by the Board (please see the answer to question 1.10 above) and/or an individual exemption.

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

The Board's established practice adopts a very sensitive approach in connection with all resale price maintenance arrangements. Indeed, Communiqué No. 2002/2 does not exempt agreements that directly or indirectly restrict the buyer's ability and freedom to determine its own resale prices.

Despite certain decisions where the Board somehow signalled "rule of reason" analysis by considering the market structure, competition level and effect on consumers (e.g. *Duru*, March 8, 2018, 18-07/112-59; *Bimpeks*, October 16, 2015, 15-38/620-212; and *Çilek,* August 20, 2014, 14-29/597-263), the Board's established precedent clearly points towards viewing resale price maintenance as a *per se* violation (e.g. *Sony*, November 22, 2018, 18-44/703-345; *Henkel*, September 19, 2018, 18-33/556-274; *Anadolu Elektronik*, July 23, 2011, 11-39/838-262; *Akmaya*, May 20, 2009, 09-23/491-117; and *Kuralkan*, May 27, 2008, 08-35/462-162).

2.5 What is the analytical framework for assessing vertical agreements?

Article 4 of the Competition Law is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**"). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The Board issued the Guidelines on the Definition of the Relevant Market ("Guidelines on Market Definition") on January 10, 2008. The Guidelines on Market Definition are closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03), and consider demand-side substitution as the primary standpoint of market definition, and supply-side substitution and potential competition as secondary factors.

Pursuant to paragraph 59 of the Guidelines on Vertical Agreements, the Guidelines on Market Definition are taken into consideration in terms of market definition regarding vertical agreements. In addition, certain specific conditions of vertical restrictions which might concern market definition are discussed under the Guidelines on Vertical Agreements.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Similar to Article 2(4) of the European Commission's Block Exemption Regulation, Article 2 of Communiqué No. 2002/2 covers agreements where the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a manufacturer of the competing products of the buyer. Article 2 of Communiqué No. 2002/2 considers these agreements as vertical agreements and, accordingly, they could benefit from block exemption under Communiqué No. 2002/2.

2.8 What is the role of market share in reviewing a vertical agreement?

Vertical agreements could qualify for block exemption under Communiqué No. 2002/2 if the market share of the supplier is below 40% in the relevant market. However, for cases of exclusive supply obligation, both the buyer's and the supplier's market share are taken into consideration.

2.9 What is the role of economic analysis in assessing vertical agreements?

The Authority has in recent years established an economic analysis division where case handlers with a background in economics are devoted solely to the economic analysis of antitrust matters. The establishment of this new division can be viewed as a positive step towards more economics-oriented competitive analyses.

2.10 What is the role of efficiencies in analysing vertical agreements?

Pursuant to paragraph 47 of the Guidelines on Vertical Agreements, vertical agreements falling outside the scope of Communiqué No. 2002/2 are not automatically deemed to be in violation of the Competition Law and the undertakings may plead the efficiencies defence.

The conditions for an individual exemption set out under Article 5 of the Competition Law are similar to the conditions existing under the EU law, and are namely: (i) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) the agreement must allow consumers a fair share of the resulting benefit; (iii) the agreement should not eliminate competition in a significant part of the relevant market; and (iv) the agreement should not restrict competition more than what is compulsory for achieving the goals set out in (i) and (ii).

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

As per Article 2 of Communiqué No. 2002/2, if a vertical agreement concerns sale and resale of goods and services and also includes provisions on the transfer of intellectual rights to the buyer or the exercise of such rights by the buyer, the relevant vertical agreement might benefit from block exemption under Communiqué No. 2002/2 provided that the relevant intellectual rights directly concern the use, sale or resale, by the buyer or the customers of the buyer, of the goods or services which constitute the substantial matter of the agreement, and that the transfer or use of such intellectual rights does not constitute the main purpose of the agreement.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

According to Article 4 of the Competition Law, it is sufficient for either the effect or the object to exist in order for there to be an infringement within the meaning of Article 4 of the Competition Law. That said, the investigated parties might argue that a restrictive agreement could benefit from an individual exemption under Article 5 of the Competition Law (please see the answer to question 2.10 above).

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The Board takes into account potential efficiencies or benefits for consumers to decide whether a restrictive agreement could be subject to an individual exemption. Pursuant to Article 5 of the Competition Law, restrictions should not be more than what is necessary to reach efficiencies and benefits and the agreement should not eliminate competition in a significant part of the relevant market.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

The Guidelines on Vertical Agreements do not refer to any specific defences in addition to the "efficiency defence". To that end, possible defence scenarios would heavily depend upon the circumstances of each case.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The Board issued the Guidelines on Vertical Agreements by its decision of June 30, 2003 and updated these Guidelines by its decision of March 29, 2018 (No. 18-09/179-RM). The amendment was made within the scope of the ongoing re-evaluation studies of Communiqué No. 2002/2 and mainly focused on (i) most-favoured-nation (i.e., customer) clauses, and (ii) online sales. The Board published the final version of the Guidelines on its official website on March 30, 2018.

2.16 How is resale price maintenance treated under the law?

See the answer to question 2.4 above.

2.17 How do enforcers and courts examine exclusive dealing claims?

If a vertical agreement qualifies for the block exemption under Communiqué No. 2002/2, the supplier can automatically benefit from certain privileges, such as conducting exclusive dealing. Provisions that extend beyond what is permissible under an appropriately defined exclusive distribution system, such as the restriction of passive sales and restriction on the sales of customers of the buyers, cannot benefit from the block exemption provided under Communiqué No. 2002/2 (e.g. *Mey Ýçki*, June 12, 2014, 14-21/410-178; and *Novartis*, July 4, 2012, 12-36/1045-332).

In addition to *Trakya Cam*, explained in question 1.15 above, the Competition Board fined Luxottica (February 23, 2017, 17-08/99-42) for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems. In a more recent decision, the Board conducted a preliminary investigation to examine whether Frito Lay had abused its dominant position through*, inter alia*, rebate schemes, and ultimately concluded that that there were no grounds or factors leading the Board to initiate a full-fledged investigation against Frito Lay in connection with its rebate systems (June 12, 2018, 18-19/329-163).

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Paragraph 208 of the Guidelines on Vertical Agreements states that tying may constitute vertical restriction under Article 4 of the Competition Law if it results in a single branding type of obligation for the tied product. If the supplier's market share does not exceed the 40% threshold, both for the tied and the tying product, a vertical agreement which contains tying obligations could benefit from the block exemption under Communiqué No. 2002/2.

2.19 How do enforcers and courts examine price discrimination claims?

The Guidelines on Vertical Agreements state that exclusivity clauses and exclusive customer allocation in a vertical agreement might constitute price discrimination by reducing intra-brand competition and market partitioning. According to the Guidelines on Vertical Agreements, a combination of exclusive distribution and exclusive buying might also create the same competition law concerns. The Board has, in the past, found incumbent undertakings to have infringed article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions (*MEDAŞ*, March 2, 2016, 16-07/134-60; *Türk Telekom/TTNet*, November 19, 2008, 08-65/1055-411; and *TTAŞ*, October 2, 2002, 02-60/755-305).

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty rebates are not considered *per se* illegal under the Competition Law. The protective cloak of Communiqué No. 2002/2 also applies to arrangements containing loyalty-inducing rebates, if the undertaking applying loyalty rebates has a market share lower than 40%. The Board does not tend to forbid implementation of rebate systems altogether, without engaging in a market analysis to assess their potential or actual foreclosing effects. All in all, loyalty discounts and their potential impacts are analysed on a case-by-case basis.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Bundled rebates can cause competition law concerns where they permit the dominant undertaking to leverage a wider portfolio to the disadvantage of competitors who are only able to compete with respect to one, or at least a narrower, portfolio of products. In *Doðan Yayýn* (March 30, 2011, 11-18/341-103), where the dominant undertaking, which owned a different set of newspapers, provided a rebate for those customers who advertised with multiple newspapers owned by it, the Board regarded the relevant rebate as loyalty-inducing, as competitors were deemed to possess narrower portfolios of publications and therefore unable to respond with similar bundles.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Non-compete obligations could be considered as restrictive under the Turkish competition law regime. As per Article 5 of Communiqué No. 2002/2, non-compete obligations for more than five years and non-compete provisions that are designed to remain in effect post-termination cannot benefit from the block exemption (e.g. *Takeda*, April 3, 2014, 14-13/242-107; and *Sanofi Aventis*, November 22, 2012, 12-59/1570-571). However, as per paragraph 45 of the Guidelines on Vertical Agreements, non-compete obligations for the buyer could be maintained for one year, at most, following the expiration date of the agreement, provided that certain conditions are fulfilled.

Also, Article 4 Communiqué No. 2002/2 provides that restrictions on (i) a wholesaler's sales to end-users, and (ii) the sales by the member of a selective distribution system to unauthorised distributors could be considered as restrictive and cannot benefit from the block exemption provided under Communiqué No. 2002/2.

2.23 How are MFNs treated under the law?

Under the current Turkish Competition Law, there is no statutory provision explicitly allowing or disallowing MFNs. On the other hand, the Guidelines on Vertical Agreements recognise the pro-competitive nature of MFN clauses and adopt a rule-of-reason approach to the analysis of the anti-competitive effects of these clauses. The relevant guidelines provide that in the analysis of these clauses, factors such as (i) the relevant undertakings' and their competitors' position in the relevant market, (ii) the object of the MFN clause in the relevant agreement, and (iii) the specific characteristics of the market, should be taken into consideration. However, MFNs, especially when used by a strong market player, might raise competition law concerns if and to the extent they "artificially increase market transparency", "raise barriers to entry" or "raise the rivals' costs".

The Board's *Booking.com* (January 5, 2017, 17-01/12-4), *Yemek Sepeti* (June 9, 2016, 16-20/347-156) and *Yataş* (September 27, 2017, 17-30/487-211) decisions could be indicated as significant examples regarding the practice of MFN clauses within the Turkish Competition Law (for details of the *Booking.com* decision, see the answer to question 1.15).

The Board concluded that Yemek Sepeti holds a dominant position in the online meal order-delivery platform services market. The Board has further decided that preventing restaurants from offering better/different conditions to rival platforms through MFN practices creates exclusionary effects in the relevant market and thus constitutes an abuse of dominant position.

2.24 Describe any notable case developments concerning vertical merger analysis.

The transaction concerning the acquisition of sole control over Migros Ticaret A.Ş. ("**Migros**") by Anadolu Endüstri Holding A.Ş. ("**AEH**"), which controls and operates major food and beverages companies in Turkey, including Coca Cola Turkey and Anadolu Efes, was granted conditional approval by the Board (July 9, 2015, 15-29/420-117). Considering that AEH is operating in the supply market and is dominant within the market for beer, the vertical effects of the transaction were thoroughly evaluated. In the decision, it was concluded that AEH could strengthen its dominant position in the beer market by engaging in customer restriction. In addition, the Board stated that, if AEH were to use its control over Migros to obtain information from its competitors who were working with Migros, the market would become transparent and coordination risks would consequently rise. The Board ultimately approved the transaction subject to the remedies, including behavioural remedies as well.

Similarly, the Competition Board conditionally approved the transaction concerning the acquisition of sole control by Migros over Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gýda San. A.Þ, which is controlled by Tesco Overseas Investments Limited, following its Phase I review. The commitment package included both structural and behavioural remedies. The behavioural remedies were submitted in order to eliminate the competition law concerns arising from the fact that the transaction may strengthen the dominant position of Efes as one of the subsidiaries of AEH in the market for beer.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

According to the decisional practice of the Board, the dominant undertakings have a "special responsibility" not to allow their conduct to restrict competition and, therefore, the Board continuously monitors the conduct of the dominant firms.

3.2 What are the laws governing dominant firms?

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of the Competition Law. It provides that "any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited". The article does not define what constitutes "abuse" *per se*, but paragraph 22 of the Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings ("**Guidelines on Exclusionary Abuses**") articulates that "abuse" may be defined as when a dominant undertaking takes advantage of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare. Article 6 provides a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to Article 102 of the TFEU. Accordingly, these examples include the following: (i) directly or indirectly preventing entries into the market or hindering competitor activity in the market; (ii) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties; (iii) making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price; (iv) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and (v) limiting production, markets or technical development to the prejudice of consumers.

3.3 What is the analytical framework for defining a market in dominant firm cases?

The Guidelines on the Definition of the Relevant Market (see the answer to question 2.6 above) also apply to dominance cases.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50% may be presumed to be dominant. The Board's precedents and the Guidelines on Exclusionary Abuses indicate that an undertaking with a market share lower than 40% is unlikely to be in a dominant position (e.g. *Media-Markt*, May 12, 2010, 10-36/575-205; and *Pepsi Cola*, August 5, 2010, 10-52/956-335).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

In similar fashion to Article 102 of the TFEU, dominance itself is not prohibited, only the abuse of dominance. Article 6 of the Competition Law does not define what constitutes "abuse" *per se*, but it provides five examples of forbidden abusive behaviours (see the answer to question 3.2 above).

3.6 What is the role of economic analysis in assessing market dominance?

The answer to question 2.9 above is also applicable to Article 6 enforcement.

3.7 What is the role of market share in assessing market dominance?

The Board's decisions and the Guidelines on Exclusionary Abuses are clear that market shares are the primary indicator of a dominant position, but not the only one. The barriers to entry, the market structure, the competitors' market positions and other market dynamics, as the case may be, should also be considered.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The chances of success of certain defences and what constitutes a defence depend heavily on the circumstances of each case. It is also possible to invoke efficiency gains, as long as it can be adequately demonstrated that the pro-competitive benefits outweigh the anti-competitive impact.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

As per paragraph 32 of the Guidelines on Exclusionary Abuses, when assessing the efficiency justification put forward by the investigated undertaking, the Board will expect the undertaking to prove that all of the following four conditions are fulfilled: (i) the efficiencies should be realised or likely to be realised as a result of the conduct; (ii) the conduct should be indispensable to the realisation of those efficiencies; (iii) the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets; and (iv) the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition.

3.10 Do the governing laws apply to "collective" dominance?

Collective dominance is also covered by the Competition Law. However, precedents concerning collective dominance are not abundant and mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance (e.g. *Turkcell/Telsim*, June 9, 2003, 03-40/432-186; and *Biryay*, July 17, 2000, 00-26/292-162).

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

While the Competition Law does not contain a specific reference to dominant purchasers, dominant purchasers may also be caught by the legislation, if and to the extent that their conduct amounts to an abuse of their dominant position, as the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (e.g. *ÇEAS*, November 10, 2003, 03-72/874-373).

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 6 of the Competition Law does not define what constitutes "abuse" *per se*; it provides five examples of forbidden abusive behaviour, which comes as a non-exhaustive list and falls, to some extent, in line with Article 102 of the TFEU (see the answer to question 3.2 above).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The market power in relation to intellectual property rights is discussed in secondary legislation, although the discussion is limited and relates mainly to the assessment of the effects of agreements on competition and does not directly relate to the application of rules on unilateral conduct.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Market shares are the primary indicator of a dominant position, but not the only one. The Board would assess the market power of an undertaking in terms of the dynamic structure of the relevant product market and consider various market characteristics as indicators of competitive pressures in the market which can potentially offset or abate the effects of high market shares and concentration levels.

3.15 How is "platform dominance" assessed in your jurisdiction?

"Platform dominance" has not been categorically assessed by the Board so far. Although, in *Yemek Sepeti* (June 9, 2016, 16-20/347-156), the Board found that Yemek Sepeti was in a dominant position in "the online meal order-delivery platform services", it did not mention "platform dominance".

3.16 Under what circumstances are refusals to deal considered anticompetitive?

As per paragraph 43 of the Guidelines on Exclusionary Abuses, the Board looks for the presence of all of the following three conditions in order to find a violation through refusal-to-deal conduct: the refusal should: (i) relate to a product or service that is indispensable in order to be able to compete in a downstream market; (ii) be likely to lead to the elimination of effective competition in the downstream market; and (iii) be likely to lead to consumer harm (e.g. *Sanofi*, March 29, 2018, 18-09/156-76; *Lüleburgaz Þoförler ve Otomobilciler Esnaf Odasý*, August 7, 2017, 17-28/477-205; *Congresium*, October 27, 2016, 16-35/604-269; and *Türk Telekomünikasyon*, June 9, 2016, 16-20/326-146).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Unlike the TFEU, the Competition Law does not refer to "appreciable effect" or "substantial part of a market" and thereby excludes any *de minimis* exception.

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ELİG GÜRKAYNAK Attorneys at Law

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our Competition Law and Regulatory department is led by our partner, Mr. Gönenç Gürkaynak, and consists of four partners, two counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before the courts on issues of private enforcement of competition law, along with appeals against administrative decisions of the Turkish Competition Authority.

During the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence project investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing.

United Kingdom

Ajal Notowicz

Dickson Minto

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The main competition authority in the UK is the Competition and Markets Authority ("CMA"). The CMA was formed on 1 April 2014 as the successor to the Office of Fair Trading ("OFT") and Competition Commission ("CC").

The following sectoral regulators also have concurrent powers to enforce competition law (including regarding vertical agreements and abuse of dominance): Civil Aviation Authority ("CAA"); Financial Conduct Authority ("FCA"); Gas and Electricity Markets Authority ("Ofgem"); Northern Ireland Authority for Utility Regulation ("NIAUR"); Office of Communications ("Ofcom"); Office of Rail and Road ("ORR"); Payment Systems Regulator ("PSR"); Water Services Regulation Authority ("Ofwat"); and NHS Improvement ("Monitor"). In the remainder of this contribution, any mention of the CMA's powers should be read as including powers which may be exercised by these sectoral regulators, unless stated otherwise.

The UK's substantive competition law provisions (outside the merger control and market investigations sphere) are enshrined in Chapters I and II of the Competition Act 1998 ("CA98") and are closely based on Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), respectively. Where a UK court, the CMA or any of the above-mentioned sectoral regulators apply the Chapter I and/or Chapter II provisions, they must also apply the equivalent EU provisions, provided the conduct in question may affect trade between EU Member States.

The future application of EU law in the UK is uncertain as a result of the UK's stated intention to leave the EU ("Brexit"). In this regard, see question 1.13.

1.2 What investigative powers do the responsible competition authorities have?

The CMA has the power to open an investigation if it has "reasonable grounds for suspecting" that there has been a breach of competition law.

The CMA has the power to request information from companies and natural persons, as well as to enter and search business and domestic premises for documents and other materials relevant to the investigation ("dawn raids"). Depending on the nature of the premises, a warrant from a judge may first be required.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

A typical CMA investigation into an alleged infringement of the rules regarding vertical agreements (in practice, most likely resale price maintenance ("RPM")) or abuse of dominance consists of the following key steps:

1. Prior to opening a formal investigation, the CMA will gather and consider information on an informal basis, and apply its published prioritisation principles to decide whether or not to open an investigation.
2. If there is a reasonable suspicion of an infringement and the case falls within the CMA's casework priorities, the CMA will open a formal investigation.
3. The CMA will then be able to use its formal information-gathering powers, such as issuing information requests, searching premises and conducting interviews.
4. If the CMA has sufficient evidence of an infringement, it will issue a Statement of Objections, and give the parties access to the file and the opportunity to make representations.
5. The CMA will close its investigation by either:
   - deciding that there are no grounds for action;
   - issuing an infringement decision which includes certain actions (e.g. penalties and/or an order to bring the infringement to an end); or
   - accepting binding commitments (see question 1.6 for more information regarding the commitments process).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The CMA may:

- Impose penalties of up to 10% of the company's worldwide group turnover.
- Give directions to bring an infringement to an end.
- Order the disqualification of an individual from holding company directorships.
- Impose interim measures where it has begun an investigation, and considers it necessary to take urgent action to prevent significant damage or to protect the public interest.

An agreement (or a clause from the agreement – see question 2.3) which infringes competition law will be unenforceable. Whilst criminal sanctions may be imposed on individuals in cartel cases, such sanctions are not available in the event of an infringement of the rules on vertical agreements or abuse of dominance.

The courts may award damages, grant an injunction (e.g. an order to cease certain conduct) or make a declaration (e.g. a confirmation that an exclusivity clause in a vertical agreement is unenforceable).

1.5 How are those remedies determined and/or calculated?

The CMA issued guidance as to the appropriate penalty amount in April 2018 (with the CMA considering some limited revisions in light of a possible "no deal Brexit" – see question 1.13). The document sets out a six-step approach. The main factors taken into account are the relevant turnover of the company involved, the seriousness and duration of the infringement, aggravating and mitigating circumstances, and a possible adjustment for deterrence and proportionality. At the end of the determination, the CMA will also need to ensure that the penalty cap of 10% of worldwide group turnover is not exceeded by the proposed fine, and that any discounts for leniency and settlement are fully reflected. The Competition Appeal Tribunal ("CAT") has unlimited jurisdiction to review the amount of a penalty imposed by the CMA.

In a limited set of circumstances, businesses may qualify for immunity from fines (see question 1.10).

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

The CMA can accept binding commitments from parties suspected of having infringed competition law in the UK. It is up to the parties to decide whether they would like to offer commitments. The main advantage for them is that the case is closed without a penalty and without a finding of an infringement. Commitment decisions are also beneficial to the CMA, as they normally result in a quicker and more efficient resolution of a case. Commitments can only be accepted by the CMA after it has started an investigation, but before it has issued a decision. The CMA has stated that it is very unlikely to accept commitments in cases involving cartels or a serious abuse of a dominant position (including predatory pricing). Nevertheless, there have been several instances of alleged abuse of dominance cases where commitments were accepted (e.g. by the OFT in 2014, in relation to the long-term exclusive supply of road fuels in the Western Isles of Scotland).

The commitments procedure is different from the settlement process under which the parties admit a breach of competition law in exchange for a penalty discount of up to 20% (which happened, for example, in the 2017 *Light Fittings* case). The CMA's administrative process in settlement cases is more streamlined than in non-settlement cases, resulting in efficiencies for both the CMA and the parties. The CMA has discretion in determining which cases to settle.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Unless a decision is appealed (see question 1.8), the CMA does not need to substantiate or defend its case in judicial proceedings. The relevant legal standard which applies to CMA decisions is the "balance of probabilities" (as in civil cases), confirmed by the CAT in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading (2002)*. However, in that case the CAT also said that Chapter I and Chapter II cases involving penalties require "strong and convincing evidence" before they are found to be proven.

1.8 What is the appeals process?

Decisions by the CMA and sectoral regulators may be appealed to the CAT, both on liability and on the penalty amount. The appeal needs to be lodged within two months of the date on which the appellant was notified of the decision, or the date of the publication of the decision, whichever is earlier.

CAT judgments may be appealed to the Court of Appeal, from where a further appeal to the Supreme Court may be possible. For example, National Grid appealed to the Court of Appeal in relation to a CAT judgment in an abuse of dominance case relating to domestic gas meters, originally investigated by Ofgem (*National Grid plc v Gas and Electricity Markets Authority et al (2010)*). The Court of Appeal dismissed the appeal regarding liability but substantially reduced the penalty amount. National Grid's attempts to appeal further were rejected by the Supreme Court.

The CAT may uphold the original decision, set it aside, remit it to the CMA or regulator to reconsider, or make any decision that the CMA or regulator could have made. An example of the latter approach was a CAT judgment in 2005, which found that a Hertfordshire funeral firm held a dominant position and abused this position by refusing a competitor access to its crematorium, despite the OFT's decision to the contrary (*J.J. Burgess & Sons v The Office of Fair Trading (2005)*).

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Whereas historically in the UK the emphasis has been more on public enforcement, in the past few years the interest in private enforcement of competition law has increased. The Consumer Rights Act 2015 introduced several important changes, including a fast-track procedure intended to facilitate access to justice for SMEs in private competition law actions. This legislation introduced a new collective proceedings regime for damages cases, covering both opt-in and opt-out actions, thus going beyond the requirements of the EU Directive regarding actions for damages for infringements of competition law of 2014. For example, in 2016, a collective damages action was launched on an opt-out basis on the back of a CMA decision which found unlawful restrictions regarding the advertising of discounts for mobility scooters. The case was dropped in May 2017 following difficulties in assessing the claimants' losses (the CAT refused to grant a collective proceedings order ("CPO") to allow the case to continue to trial) and mounting litigation costs (*Dorothy Gibson v Pride Mobility Products Limited*).

By contrast, in a landmark ruling in April 2019, the Court of Appeal overturned the CAT's refusal to grant a CPO in the £14 billion Mastercard collective damages action (*Walter Hugh Merricks CBE v Mastercard Incorporated and Others*). This action was launched on the back of the European Commission's finding in December 2007 that Mastercard's multilateral interchange fees breached EU competition law by setting a minimum price merchants had to pay their bank for the acceptance of Mastercard cards. The CPO application has been remitted to the CAT for a re-hearing.

Private enforcement actions may be brought on a stand-alone or follow-on basis.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

The CMA operates a corporate leniency policy, with full immunity or partial reduction of the fine available in appropriate cases. Leniency is only available in relation to cartel activity (which, for these purposes, includes RPM), but not with regard to other vertical agreements or abuse of dominance cases. The CMA has adopted the OFT's Guidance regarding applications for leniency and no-action in cartel cases of 2013.

The CA98 provides immunity from fines for so-called "small agreements" (excluding price-fixing arrangements) between SMEs whose combined group turnover does not exceed £20 million. For example, in 2013 and 2014 the OFT found that suppliers and retailers of mobility scooters had agreed on restrictions regarding online sales and advertising, but was unable to impose penalties as the parties' combined turnover did not exceed £20 million.

A company with a turnover of not more than £50 million that abuses its dominant position also qualifies for immunity from fines, as it is considered to be "conduct of minor significance". For example, in 2007 the OFT found that Cardiff Bus had abused its dominant position by engaging in predatory conduct, but the OFT was unable to impose a penalty as a result of Cardiff Bus's turnover not exceeding £50 million.

It is worth noting that the immunity from fines only applies to infringements of CA98, but not of the corresponding EU provisions (which, as outlined in response to question 1.1, the CMA is obliged to apply in certain circumstances). Furthermore, the CMA may withdraw the immunity for arrangements or conduct which occur after the date of such a withdrawal decision (as it did in 2017 in relation to a supplier of mobility scooters). Finally, the immunity does not provide protection against other consequences of competition law breaches; in particular, possible private damages actions and unenforceability.

1.11 Does enforcement vary between industries or businesses?

The Chapter I and II prohibitions (and corresponding EU provisions) apply across all industries in the UK, with limited exceptions for the agricultural, defence and planning sectors. Whereas the CMA's enforcement powers apply across virtually all parts of the economy, the sectoral regulators have concurrent enforcement powers in their respective sectors (see question 1.1). The Competition Act 1998 (Concurrency) Regulations 2014 contain rules for the co-ordination of the enforcement actions by the CMA and sectoral regulators.

The CMA is not particularly focused on one sector of industry, and indeed noted in its 2019/2020 Annual Plan that it intends to send a signal that competition matters, regardless of the location or size of the business involved. The CMA has identified the protection of vulnerable consumers as one of its strategic themes, which may be seen as a sign of what is now known in academic circles as "hipster antitrust", affecting the CMA's casework. See also question 1.14 below.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The rationale behind sectoral regulators enforcing competition law is that they are normally best placed to take account of the regulatory context in the sector which they oversee. Before taking regulatory action, the sectoral regulators are legally required to consider whether it would be more appropriate to proceed on the basis of the general competition law powers under the CA98.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The UK's political stage continues to be dominated by the Brexit process. As the UK Government gave notice under Article 50 of the Treaty on European Union (also known as the Lisbon Treaty) on 29 March 2017, the UK was expected to leave the EU on 29 March 2019, but further to an extension agreed between all EU Member States, the leaving date has been postponed to 31 October 2019. Due to the current lack of clarity as to the UK Government's future direction, it is unclear which of the following Brexit scenarios is most likely to occur:

- the UK Parliament votes to ratify the Withdrawal Agreement negotiated between the UK and EU, leading to a "transition period" that would most likely last until 31 December 2020, during which EU competition law would continue to apply in the UK;
- the UK opts for a "no deal Brexit", immediately resulting in EU competition law no longer applying in the UK;
- the UK opts to revoke Article 50, resulting in Brexit being "stopped" and EU competition law continuing to apply in the UK as per the *status quo*; or
- the EU Member States grant the UK another extension past 31 October 2019.

The CMA is an independent, non-ministerial government department. At present, the CMA and courts must interpret the Chapter I and II prohibitions consistently with the corresponding provisions under EU law. If this requirement is repealed, it is likely that in the short term the CMA and courts will continue to follow EU precedents, but in the longer term a divergence is expected to materialise in certain areas.

One particular area where divergence is most likely relates to the EU's internal market integration objective. For example, the EU has traditionally objected to clauses in distribution agreements which restrict parallel trade between Member States, and dominant companies discriminating between trading partners based on the trading partners' Member State of origin. In a post-Brexit world, the CMA is unlikely to take the market integration objective into account in its enforcement practice.

As the CMA will also likely no longer form part of the European Competition Network post-Brexit, a new system for cooperation in key areas such as the launch and conduct of investigations will need to be agreed upon. It remains to be seen whether Brexit will have an impact on the UK's current status as a favoured jurisdiction for launching antitrust private damages actions, or whether a shift will take place to other jurisdictions (e.g. the Netherlands and Germany).

Assuming that the UK will no longer be covered by the "one stop shop" regime of the EU Merger Regulation, a very substantial increase in the number of merger cases handled by the CMA is expected. This would normally require a reallocation of resources at the CMA. In its Annual Plan for 2019/2020, the CMA acknowledged that, as it is under a statutory obligation to investigate all qualifying mergers that raise competition concerns, the CMA's post-Brexit discretion to carry out other work (including enforcement action with regard to abuse of dominance and vertical agreements) would narrow considerably. However, the CMA has been awarded an extra £2.8 million a year by the Government in order to deal with the increased caseload, as well as £20 million for "no deal Brexit" planning preparation.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The CMA's 2019/2020 Annual Plan highlighted a number of areas of interest that form the basis of its current investigative and enforcement efforts.

Of particular interest is the CMA's increased focus on vulnerable consumers and "trust-based" markets, including tackling breaches of competition law in the supply of pharmaceuticals to the National Health Service ("NHS"). Indeed the CMA has recently opened more excessive pricing and "pay-for-delay" cases against pharmaceutical companies (see also questions 1.15 and 3.1).

Another area of ongoing interest to the CMA relates to digital commerce. In September 2018, the CAT handed down its judgment upholding the CMA's finding that Ping, a supplier of golf clubs, infringed competition law by banning its retailers from selling the clubs online (and incidentally, the CAT also reduced the CMA's £1.45 million penalty imposed on Ping by £200,000). The CMA is conducting several investigations relating to online conduct (e.g. restrictions on online discounting in the musical instruments sector, as well as most favoured nation clauses used by a price comparison website in the home insurance sector). In June 2019, Andrea Coscelli (the CMA's Chief Executive) gave a speech to an OECD/G7 conference in which he emphasised the CMA's growing focus on the digital economy.

In February 2019, Lord Andrew Tyrie (the CMA Chair) put forward a number of reform proposals for the UK competition law regime. For example, he suggested changing the CMA and courts' statutory duties so that "the economic interests of consumers, and their protection from detriment, are paramount". The aim would be to increase the scope and speed at which the CMA could act to address new and emerging forms of market detriment.

1.15 Describe any notable case law developments in the past year.

- On 7 September 2018, the CAT upheld the CMA's finding that golf clubs supplier Ping had infringed competition law by imposing an online sales ban on its retailers (*Ping Europe Limited v Competition and Markets Authority*). In reaching its decision, the CAT relied on the European Court of Justice's reasoning in *Pierre Fabre* (2011). The CAT's judgment is on appeal.
- On 7 June 2018, the CAT partially upheld Flynn Pharma and Pfizer's appeal against the CMA's decision which found that they had abused their dominant position by charging excessive prices for phenytoin sodium capsules (*Flynn Pharma Limited and Flynn Pharma (Holdings) Limited v Competition and Markets Authority* and *Pfizer Inc and Pfizer Limited v Competition and Markets Authority*). Whilst the CAT held that the CMA had correctly concluded that both Flynn Pharma and Pfizer held dominant positions, it found that the CMA had not applied the correct legal test in relation to the question of abuse. The CAT's judgment provides useful guidance for the assessment of excessive pricing cases, and needs to be seen against the backdrop of a renewed interest at the EU level in excessive pricing. The CMA has been granted permission to appeal to the Court of Appeal.
- On 8 March 2018, the CAT handed down an intermediate judgment on appeals lodged by GlaxoSmithKline ("GSK") and various generics pharma companies against the CMA's decision in *Paroxetine* (involving c.£45 million in penalties) finding that these companies had entered into anti-competitive pay-for-delay agreements regarding the supply of anti-depressants, and that GSK had abused its dominant position (*Generics (UK) Limited and GlaxoSmithKline plc et al v Competition and Markets Authority*). On 7 May 2018, the CAT referred questions to the Court of Justice of the European Union ("CJEU") regarding the correct legal standard, and ordered that proceedings be stayed pending the CJEU's response (which remains outstanding). It is worth noting that the CMA is currently pursuing at least three new pay-for-delay cases (two of which also involve allegations of abuse of dominance), and that this is therefore an area of particular CMA interest.
- In March 2019, the CMA imposed its first penalty (£25,000) on a company (Fender Europe) for concealing documents during a CMA dawn raid.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Price fixing, market allocation and bid rigging are generally considered the most egregious examples of competition law infringements in the UK. Such cartel conduct is subject to civil and potentially also criminal sanctions. Only slightly lower in the pecking order are RPM (see question 2.16) and abuse of dominance (see section 3), which are both areas of substantial CMA enforcement action. With the exception of RPM and internet sales bans, the CMA tends to be less keen on pursuing other vertical arrangements (such as exclusive purchasing or distribution), and instead these areas are more likely to be raised in private disputes.

The general approach to vertical agreements is reflected in the OFT's guidelines on vertical agreements of 2004 (the "UK Vertical Guidelines"), adopted by the CMA in 2014, which state that "vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements".

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The UK Court of Appeal made it clear in *Toys and Football Kits (2006)* that for an agreement to exist as a matter of competition law, a "concurrence of wills" is required. An agreement does not need to have been formalised between the parties, or written down. Indeed, an agreement can arise as a result of an oral understanding between two or more parties, or if one party's unilateral actions are tacitly accepted by the other. The Chapter I prohibition also covers "concerted practices", which occur when companies co-ordinate their behaviour, without entering into a binding agreement. Finally, the prohibition also covers decisions by associations of undertakings, such as trade bodies. Genuinely unilateral conduct, however, is not captured by the prohibition (but may be covered by the prohibition on abuse of a dominant position, as discussed in section 3 below).

For an agreement to be vertical in nature, it needs to be entered into by companies which, for the purposes of the agreement, operate at different levels of the supply chain.

Examples of vertical restraints are exclusive purchasing, exclusive supply, exclusive distribution, export restrictions and RPM.

2.3 What are the laws governing vertical agreements?

The CA98 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK (the "Chapter I prohibition"). Whilst in RPM cases fines are the main sanction, in other vertical cases unenforceability is likely to be the main risk for the parties. A vertical agreement that infringes the Chapter I prohibition is void and unenforceable, unless the offending clause is severable from the agreement under the "blue pencil" approach (in which case only that clause would be unenforceable, with the remainder surviving).

As set out in response to question 1.1, at present the Chapter I prohibition needs to be interpreted consistently with its EU equivalent, Article 101 TFEU. The CA98 operates on the basis of a parallel exemption system which ensures that the EU Vertical Agreements Block Exemption Regulation (the "VABER", discussed in more detail below) automatically exempts certain types of vertical agreements from the Chapter I prohibition. The European Commission is evaluating the need for possible changes to the VABER, prompted by the VABER's upcoming expiry in May 2022. The status of any new VABER in the UK's competition law regime will be informed by the outcome of the Brexit process (see question 1.13).

Since 2004, it has been up to companies to self-assess as to the compliance of their vertical agreements with UK and EU competition law. No prior exemption or clearance can be granted by the authorities. There is an option of seeking a non-binding Short-Form Opinion from the CMA by way of guidance, but this route is rarely used in practice. It is therefore important to emphasise that, when the remainder of this contribution discusses the criteria for an individual exemption, this does not entail an actual prior exemption or consent granted by the CMA or another authority, but rather an exemption based on self-assessment by the parties (which may ultimately be tested before the CMA or in court proceedings).

2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

There are no vertical agreements which qualify for absolute or "*per se*" protection. However, it is clear that certain types of agreement do not cause competition law concerns. There is established EU case law that certain restrictions (such as an obligation on a franchisee to sell only products in an environment which meets certain standards set by the franchisor) fall outside the scope of Article 101 TFEU and its national equivalents, such as the Chapter I prohibition. Furthermore, if an agreement meets the conditions of the VABER (the main one being that the parties' market shares do not exceed 30%), the agreement is protected from further competition law scrutiny. Under certain conditions, arrangements between a principal and an agent, and between a contractor and a subcontractor, also fall outside the scope of the rules regarding vertical restraints.

See also question 1.10 in relation to the immunities which may be available.

2.5 What is the analytical framework for assessing vertical agreements?

The first step in the analysis is to assess whether a vertical agreement has an anti-competitive object or effect, along the same lines as under EU competition law (Article 101(1) TFEU). If this is the case, the second step is to consider whether the agreement may qualify for exemption in order to escape illegality, along the same lines as under Article 101(3) TFEU. For example, in its *Ping* judgment of September 2018 the CAT followed this two-step approach (see questions 1.15 and 2.13).

An exemption may result from the application of either the VABER or the rules regarding an individual exemption. If an agreement cannot be exempt under the VABER (for example, because the parties' market shares exceed 30%), it does not automatically mean that the agreement is unlawful, but rather that it will be necessary to assess whether the restrictions may be justified by way of an individual exemption on the basis that the economic benefits of the agreement outweigh its anti-competitive effects.

In order to qualify for an individual exemption, the parties must be able to prove that the restrictions in the agreement are indispensable and contribute 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 at the same time not eliminating competition. As mentioned under question 2.3, this exemption is not one which can be obtained in advance from the CMA, but rather requires the parties to self-assess as to the position when they enter into the agreement.

The European Commission's Guidelines on Vertical Restraints (the "EU Vertical Guidelines") as well as the UK Vertical Guidelines will assist in the determination of the steps outlined above. The CMA and the UK courts may also take these guidance documents into account (as was done by the CMA in, for example, its June 2016 *Commercial Catering Equipment* decision).

2.6 What is the analytical framework for defining a market in vertical agreement cases?

Market definition is used as a tool to identify the competitive constraints which a business faces. In the context of vertical agreements, its main practical relevance lies in the consequential ability to determine the parties' (and if necessary, competitors') market shares. Relevant markets have a product and a geographic dimension.

Whilst both demand substitution and supply substitution are taken into account, in practice more weight tends to be given to the former than to the latter. The main tool for assessing demand substitution involves asking whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere, in response to a hypothetical small (5–10%) but permanent price increase in the products and areas being considered. If substitution is enough to make the price increase unprofitable, additional substitutes and areas are included in the relevant market, until the set of products and geographical areas is such that a small, permanent increase in prices would be profitable.

The CMA is only required to define the relevant market if, without such a definition, it is not possible to determine whether the agreement is liable to affect trade in the UK, and whether it has as its object or effect the prevention, restriction or distortion of competition. As most cases pursued by the CMA are hard core infringements (such as cartels and RPM), there is a dearth of cases where the CMA has needed to define the relevant market (other than for penalty purposes). Somewhat unusually, in 2003 the OFT proceeded to define the relevant market in an RPM infringement decision regarding the supply of luxury ornamental ware in the UK (*Lladró Comercial S.A.*).

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

Though the VABER does not, in general, apply to vertical agreements between competitors, there is a limited exception for non-reciprocal agreements which requires that one of the following two conditions be satisfied (in addition to the standard requirements under the VABER, such as market shares not exceeding 30% – see question 2.5):

- the supplier is a manufacturer and a distributor, while the buyer is a distributor and not a competitor at the manufacturing level; or

- the supplier is a service provider at several levels of trade, while the buyer sells its products at the retail level and does not compete at the level of trade where it purchases the contract services.

If the agreement falls outside the VABER, it may still be lawful based on the criteria for an individual exemption (see question 2.5).

2.8 What is the role of market share in reviewing a vertical agreement?

Market power plays a key role in the assessment of vertical agreements. The VABER only provides a safe harbour if the supplier's market share does not exceed 30% of the relevant market on which it sells the contract goods or services, and the buyer's market share does not exceed 30% of the relevant market on which it purchases the contract goods or services.

If an agreement falls outside the VABER (e.g. because one of the parties' market share exceeds 30%), the EU Vertical Guidelines provide guidance as to whether the buyer's or the supplier's market share is considered more important to the analysis. For example, when assessing a non-compete obligation (e.g. exclusive purchasing) in a vertical agreement, the supplier's market share will be key, while in the case of an exclusive supply obligation, the buyer's market share on the downstream market will carry more weight.

Generally, the higher the market shares of the parties involved, the more difficult it will be for the parties to justify the agreement under the criteria for an individual exemption. In *Calor Gas Ltd v Express Fuels (Scotland) Ltd (2008)*, the supplier's high market share (c.50%) in a mature market was one of the main factors taken into account by the Scottish Court of Sessions in its assessment of a single branding obligation.

If a party to a vertical agreement has sufficient market power to be considered dominant, that party's conduct may also be scrutinised under the abuse of dominance provisions (see section 3 below).

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is integral to the assessment of vertical agreements (e.g. in defining the relevant market and establishing market shares), as well as in the competitive assessment of the effects of an agreement. Even in cases which are pursued as so-called "object" infringements (where anti-competitive effects do not need to be proven – see question 2.12), economic expertise is frequently required for the analysis of the available evidence. In practice, the CMA's project teams investigating potential infringements tend to include economists.

2.10 What is the role of efficiencies in analysing vertical agreements?

The rationale underlying the VABER is that certain types of vertical agreements can improve economic efficiency. Where such agreements (which do not contain hard core restrictions) are entered into by parties with market shares not exceeding 30%, there is a presumption that efficiencies will outweigh any negative effects.

However, if a vertical agreement falls outside the VABER, efficiencies are not presumed, and it is then for the parties to adduce evidence that the agreement will result in efficiencies that will be passed on to end-consumers, thus qualifying for an individual exemption (see questions 2.5 and 2.13).

In *Pirtek (UK) Ltd v Joinplace Ltd (2010)*, the High Court determined that a post-termination non-compete in a franchise agreement qualified for an individual exemption. The court agreed that a business has a legitimate need to protect its goodwill against ex-franchisees when establishing a new franchising agreement with a replacement retailer or distributor, as otherwise the ex-franchisees would have an unreasonable advantage over the new ones.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

There are no special UK rules for vertical agreements regarding intellectual property ("IP") rights. A vertical agreement that contains IP provisions will be able to benefit from the VABER's safe harbour, as long as those IP provisions do not constitute the primary object of the agreement, and they are directly related to the use, sale or resale of the goods or services by the buyer or its customers.

By contrast, the EU Technology Transfer Block Exemption Regulation exempts IP licensing agreements concluded between companies that have limited market power. Further discussion of that block exemption falls outside the scope of the contribution.

IP rights do not tend to feature prominently in assessments of vertical agreements by the CMA or by UK courts. Nevertheless, they have occasionally been discussed in the context of RPM investigations (see question 2.16), where suppliers withdrew copyright consent for resellers to use official photos of products on their websites, unless the resellers agreed to follow the suppliers' retail pricing schemes (e.g. in the CMA's 2017 *Light Fittings* decision).

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The CMA may be required to demonstrate anti-competitive effects, depending on whether the agreement in question is anti-competitive by object or not. If it is, there is no need to prove harmful effects, as they will be presumed to exist. By contrast, if the agreement's object is not anti-competitive, harmful effects need to be proven.

An agreement is anti-competitive by object if it is, by its very nature, harmful to the proper functioning of competition. The main example in a vertical context is RPM, but there are other examples, such as restrictions on passive or online sales (as confirmed by the CMA's penalty decision regarding Ping's online sales ban, upheld by the CAT – see questions 1.14 and 1.15). If such "hard core" restrictions are contained in an agreement, the parties can no longer avail themselves of the VABER's safe harbour (though an individual exemption is still a possibility).

Whilst the CMA is not legally required to carry out a full effects analysis once it has established an anti-competitive object, in decisions raising particularly complex or novel questions, the CMA may choose to do so in any event. The CMA took this approach, for example, in 2016 in its first pay-for-delay decision, involving agreements between GSK and generics manufacturers in relation to paroxetine (see question 1.15).

Another example of a "by object" restriction of competition with a vertical dimension is information-sharing by way of a so-called "hub and spoke" arrangement. This may occur when retailers coordinate their pricing behaviour by using a common supplier as an intermediary, and can result in significant fines. For example, in 2003 the OFT imposed a £22.7 million fine on retailers Argos and Littlewoods for having engaged in price fixing with toy manufacturer Hasbro, who escaped a fine of £15.6 million due to a successful leniency application. The penalties were upheld by the CAT and the Court of Appeal (*Toys and Football Kits (2006)*).

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

As outlined in the response to question 2.5, if a vertical agreement which restricts competition is unable to benefit from the safe harbour of the VABER (e.g. due to the parties' market shares exceeding 30%), then the pro-competitive benefits of the agreement need to outweigh its anti-competitive harm for it to qualify for an individual exemption. In *Ping* (see questions 1.14 and 1.15), the CAT agreed with the CMA's rejection of Ping's "objective justification" for its ban on retailers selling Ping golf clubs online. The CAT found that the ban was neither necessary nor proportionate to its stated aim (which was to ensure that customers are always provided with a custom-fitting service for newly-purchased golf clubs). There were a number of alternative and less restrictive measures which Ping could have employed instead, according to the CAT. The judgment is on appeal.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

There are no meaningful defences and immunities available, beyond those discussed above (see, in particular, questions 1.10, 2.4 and 2.5).

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

The EU Vertical Guidelines of 2010 provide the most authoritative guidance in this area, although this may no longer be the case post-Brexit. Whilst the 2004 UK Vertical Guidelines are older, they may still be taken into account.

2.16 How is resale price maintenance treated under the law?

RPM is one of the hard core restrictions mentioned in the VABER, and is considered a "by object" restriction as a matter of UK and EU competition law (i.e. its anti-competitive effects do not need to be proven – see question 2.12). Its inclusion in a vertical agreement will remove the agreement from the VABER safe harbour, and enforcement action by the CMA might result in substantial financial penalties.

For example, in 2017 the CMA imposed a £2.76 million fine on a supplier of light fittings in connection with a finding of RPM. The supplier was granted several penalty reductions, including in recognition of its new staff compliance training programme and cooperation with the investigation.

Recommended resale prices ("RRPs") and maximum resale prices ("MRPs") are generally permitted, as long as these prices do not in practice amount to fixed or minimum sale prices as a result of pressure or incentives. There may also be a residual concern regarding RRPs and MRPs turning into "focal prices" adhered to by retailers, particularly when these are set by a supplier with market power.

The highest individual fine imposed on a single company for straightforward RPM conduct in the UK was a £5 million penalty imposed on Hasbro in 2002 (reduced from £9 million on leniency grounds). Penalties have tended to be higher in "hub and spoke" cases (discussed in question 2.12). For example, in 2011 the OFT imposed a £10.4 million penalty on Tesco in relation to conduct in the dairy and cheese sector (subsequently reduced to £6.5 million by the CAT in *Tesco Stores Limited et al v Office of Fair Trading (2012)*). Cumulatively, the fines imposed on the parties (prior to the reductions on appeal) amounted to almost £50 million.

It is illustrative for the CMA's current enforcement priorities that nearly all of the cases in which the CMA sent warning letters in 2018 related to suspected RPM practices.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusivity provisions in vertical agreements are considered under the VABER in the first place, but will only benefit from the VABER's safe harbour if the parties' market shares do not exceed 30%.

Exclusive purchasing and single branding obligations fall within the definition of "non-compete obligations" in the VABER. Therefore, in addition to the 30% market share requirement, the duration of the obligation should not exceed five years or be indefinite (which includes tacitly renewable obligations beyond five years). An exclusive purchasing obligation which does not meet these conditions may qualify for an individual exemption (see question 2.5).

In *Calor Gas Ltd v Express Fuels (Scotland) Ltd (2008)*, the Scottish Court of Sessions was asked to decide whether a five-year exclusive purchasing obligation imposed by Calor Gas on customers breached competition law. The VABER did not apply, as Calor Gas' market share exceeded 30%, and so the Court took into account the EU Vertical Guidelines. The Court decided that the obligation was unenforceable, emphasising "the importance of the twin factors of market power and the duration of the single-branding obligation".

Exclusive supply agreements are generally considered unproblematic under the VABER, as long as the parties' market shares do not exceed 30%. Outside the VABER, the market position of the buyer (that is, the beneficiary of the exclusivity) is key.

As far as exclusive distribution is concerned, the distinction between active and passive sales is relevant. A supplier may be able to prevent an exclusive distributor from actively selling into other territories or other customer groups, whereas restrictions on passive sales are not allowed.

If a party to a vertical agreement holds a dominant position, exclusivity provisions in the agreement may also be scrutinised under the abuse of dominance provisions (see section 3).

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying is considered potentially problematic in situations where the company engaging in tying conduct holds a dominant position in the market. It could also give rise to concerns in the absence of dominance if it resulted in single branding (see question 2.17), depending on the duration of the agreement and whether market foreclosure is likely.

In *Socrates Training v The Law Society of England and Wales (2017)*, the CAT found that the Law Society had breached the Chapter I and Chapter II provisions by engaging in tying conduct. The infringement arose due to the Law Society having forced law firms who were members of an accreditation scheme to obtain certain mandatory training exclusively from the Law Society (see also question 3.4).

In *Punch Taverns (PTL) Ltd v Moses (2006)*, a pub tenant was under a contractual obligation from the pub owner to purchase all his beers from the owner's list of available brewers. The tenant argued that the obligation was anti-competitive, and therefore unenforceable. However, the High Court ruled that since the obligation was to purchase from the list rather than from any specific brewer, and the available brewers on the list changed regularly, there was no real risk of foreclosure of new entrants at the brewer level.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination is normally seen as problematic conduct for businesses with a dominant position (see section 3 below).

There is a particular sensitivity under EU competition law with regard to price discrimination in the form of charging different prices to customers depending on their nationality or location in the EU. For example, several hotel industry players are under investigation by the European Commission under Article 101 TFEU due to suspected price discrimination practices of this kind. However, it is unlikely that the CMA would take enforcement steps aimed at avoiding a partitioning of the EU's internal market, particularly with Brexit looming (see question 1.13).

2.20 How do enforcers and courts examine loyalty discount claims?

Loyalty discounts are primarily considered problematic when the company engaging in the discounting holds a dominant position (see section 3 below). Outside a dominance context, a loyalty discount granted by a supplier to a retailer in exchange for not discounting below RRPs would be unlawful (see question 2.16).

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discounts may be considered problematic in situations where the company engaging in the discounting holds a dominant position (see section 3 below).

2.22 What other types of vertical restraints are prohibited by the applicable laws?

See question 2.12 for the main examples of vertical restraints which are problematic under UK and EU competition law. An area of practical importance which has not yet been addressed relates to selective distribution. Based on EU case law, a selective distribution system will generally fall outside the Chapter I prohibition if the products are of a kind that need a selective distribution system to be in place (e.g. technically complex products where after-sales service is important), the distributors are selected on the basis of non-discriminatory qualitative criteria, those criteria do not go beyond what is necessary, and the system's purpose is pro-competitive. The VABER requires that cross-supplies between distributors in a selective distribution system remain unrestricted.

Internet sales bans have also recently received attention. The EU Vertical Guidelines state that "dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet". In its 2017 decision in *Online sales ban in the golf equipment sector* (largely upheld by the CAT in *Ping* – see questions 1.14 and 1.15), the CMA made it clear that retailers should be permitted to advertise and sell products online, and that an internet sales ban imposed on retailers could not be justified by the need for an assessment to take place in the presence of the end-consumer. By contrast, in its long-awaited judgment in *Coty*, the CJEU ruled that suppliers may ban selective distributors of luxury products from selling on third-party platforms (e.g. Amazon, Ebay), if the purpose of the ban is to preserve the products' luxury image.

2.23 How are MFNs treated under the law?

Most favoured nation ("MFN") clauses are sometimes known as "most favoured customer" clauses, "best price" clauses or "price parity" clauses. MFNs used by internet platforms engender diverging views between the various EU National Competition Authorities ("NCAs") and the European Commission. This divergence famously came to light in 2015 when the Italian, Swedish and French competition authorities accepted commitments in relation to the use of MFNs by Booking.com, followed by other competition authorities wrapping up investigations and the European Commission announcing a moratorium on new investigations.

At the heart of the investigations lies the difference between so-called "wide" MFNs (which oblige hotels to give the platforms the lowest room prices relative to all other sales channels) and "narrow" MFNs (which allow hotels to offer lower room prices on other platforms and on offline sales channels, but the platforms may still stop the hotels from publishing lower room prices on the hotels' own websites) in the platforms' contracts with hotels. The above-mentioned 2015 commitments package removed wide MFNs but left narrow MFNs in place. However, several countries (including Germany, France and Italy) have gone further, and seen legislative and judicial steps banning narrow MFNs.

The CMA released a statement in April 2017 regarding its ongoing monitoring of pricing practices by hotel booking platforms, concluding that the scrapping of wide MFNs by both Booking.com and Expedia increased competition in the market.

In its final report on the private motor insurance market investigation in 2014, the CMA also concluded that wide MFNs between price comparison websites and car insurers would need to be banned. In November 2018 the CMA issued a Statement of Objections to four companies as part of its investigation into the use of MFNs by a price comparison website in the home insurance sector.

2.24 Describe any notable case developments concerning vertical merger analysis.

CMA in-depth investigations of vertical mergers are relatively rare. There are a couple of recent exceptions to this.

- In *Intercontinental Exchange (ICE)/Trayport* the CMA forced the purchaser to divest the entire acquired business, resulting in a disposal two years after completion. Although vertical mergers are usually viewed as competitively benign, the CMA found that the merged entity would have the ability and incentive to foreclose ICE's competitors from input software (provided by Trayport) vital to their supply of execution and clearing services for certain derivatives trades. ICE appealed to the CAT, resulting in the CMA's decision being largely upheld.
- By contrast, *Tesco/Booker (2017)* was a vertical merger that was cleared unconditionally by the CMA despite multiple industry complaints. Despite Tesco and Booker being the UK's largest grocery retailer and wholesaler respectively, the CMA found that benefits obtained by the merged entity would likely be passed on to consumers, and that customers would be able to switch readily in response to any price increases or quality degradation by the merged entity.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Abuse of dominance investigations are relatively high on the CMA's enforcement agenda, especially in relation to the pharmaceutical sector. The CMA imposed a record fine of £84.2 million on Pfizer in 2016 in relation to an abuse of dominance finding (although the judgment is on appeal – see question 1.15). The CMA is also pursuing two pay-for-delay cases regarding the supply of hydrocortisone tablets which involve allegations of abuse of dominance, and has an additional three ongoing investigations (excluding the ongoing Pfizer and GSK cases – see question 1.15) into other suspected instances of abuse of dominance by pharmaceutical companies.

In March 2019, the CMA published its "no grounds for action" decision on its investigation regarding Merck Sharp & Dohme's ("MSD") suspected abuse of dominance by means of an allegedly loyalty-inducing discount scheme for the drug Remicade. Interestingly, the CMA concluded that although MSD had designed its discount scheme to have an exclusionary effect, and the scheme's rules showed the potential to have such an effect, the market reality at the time the scheme was introduced removed the likelihood of any such effect.

Dominant businesses are expected to remain under close scrutiny in the foreseeable future.

3.2 What are the laws governing dominant firms?

The CA98 provides that "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom" (the "Chapter II prohibition"). As with the Chapter I prohibition, the interpretation of the Chapter II prohibition should be consistent with its EU equivalent, Article 102 TFEU.

3.3 What is the analytical framework for defining a market in dominant firm cases?

Where the CMA and courts pursue an abuse of dominance case under the Chapter II prohibition, they are also obliged to apply Article 102 TFEU if trade between EU Member States may be affected.

The framework for defining the relevant market is the same as in other competition law cases, including regarding vertical agreements. See question 2.6.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no market share threshold above which dominance is certain, and no threshold below which dominance can definitively be ruled out. In its 2016 decision in *Paroxetine* (see question 1.15), the CMA cited EU case law that "very large shares (such as a market share of 50%) are, except in exceptional circumstances, in themselves evidence of the existence of a dominant position".

Generally, a market share greater than 40% will require a thorough analysis as to whether dominance arises. Dominance may more exceptionally exist below a 40% market share if other relevant factors which provide strong evidence are present.

Whilst market shares are an important factor in the dominance assessment, the CMA and courts regularly look beyond market shares in their assessments. In *Socrates* (see question 2.18), the CAT attached importance to the fact that the Law Society's accreditation scheme in question had become a "must have" product for law firms, before concluding that the Law Society held a dominant position.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

It is not unlawful for a business to hold a dominant position. It would, however, be unlawful to engage in conduct which amounts to an abuse of such a position (in the absence of any objective justification – see question 3.8).

Dominant companies are considered to have a "special responsibility" according to EU case law. This mantra was repeated by the CMA's Senior Director of Antitrust Enforcement in relation to the excessive pricing case against Pfizer and Flynn Pharma (*Phenytoin Sodium Capsules*, see question 1.15), when she stated publicly that businesses "that hold a dominant position have a special responsibility to ensure that their conduct does not impair genuine competition and that their prices are not excessive and unfair".

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis plays an important role in determining both dominance and abuse. As with CMA analysis of vertical restraints, the CMA's project team investigating a potential infringement tends to include one or more economists. In private litigation, the court will regularly rely on economic expert evidence in abuse of dominance cases. See also question 2.9.

3.7 What is the role of market share in assessing market dominance?

See question 3.4.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Abuse of dominance allegations may be refuted by establishing that the business has a justification for the conduct in question. The company can demonstrate that its conduct is objectively necessary, or that it produces substantial efficiencies which outweigh any anti-competitive effects on consumers.

The objective justification defence may be argued in all cases, but in practice the CMA adopts a strict approach, setting a high bar for a successful defence. Whilst the burden of proof as to the abusive conduct lies with the CMA (or the claimant, in private litigation), it is up to the dominant business to provide evidence of a justification.

For example, in 2010 the OFT examined alleged predatory pricing by Flybe on the domestic route between Newquay and London Gatwick airports. The OFT concluded that there was an objective justification for Flybe's decision to enter this route despite projecting and experiencing initial losses, as such losses were normal commercial practice for an airline, and were due to the need to stimulate market demand for the route. See question 3.9 in relation to efficiencies.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Potentially abusive conduct may be justified if an efficiencies defence is available. In 2016, Google successfully invoked efficiencies as a defence in response to Streetmap's allegations that Google had abused its dominant position. The High Court accepted that Google had implemented a "technical efficiency" by presenting its own online maps in the search results of geographic queries (*Streetmap.eu Limited v Google Inc. et al*).

In cases involving price-based exclusionary conduct (e.g. loyalty discounts, predatory pricing) the European Commission has made it clear (in its Guidance on enforcement priorities regarding abuse of dominance) that it will focus on an "equally efficient competitor" of the dominant business to assess whether that competitor would be foreclosed from the market.

In its March 2019 "no grounds for action" decision on *Remicade*, the CMA also referred to the "as efficient competitor" test.

3.10 Do the governing laws apply to "collective" dominance?

Yes. The statutory wording of the Chapter II prohibition covers "conduct on the part of one or more undertakings". Conduct by collectively dominant businesses may therefore be abusive, although cases are rare in this area.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

The CA98 applies to all businesses, including those that hold a dominant position on a purchasing market.

Enforcement action against dominant purchasers is rare in the UK. In *BetterCare (2003)* the OFT found that the North & West Belfast Health & Social Services Trust had not infringed the Chapter II prohibition by purchasing care services at low rates.

In the *Groceries* market investigation in 2008, the CC (the CMA's predecessor) concluded that the grocery retailers' exercise of buyer power *vis-à-vis* suppliers could be anti-competitive. This resulted in the creation of the Groceries Supply Code of Practice ("GSCOP") in 2010, which sets out rules for how retailers with groceries sales of more than £1 billion are expected to deal fairly with their suppliers. GSCOP is enforced by the Groceries Code Adjudicator, who has the power to impose fines on groceries retailers of up to 1% of UK-wide turnover. Currently 12 supermarket groups are subject to the GSCOP obligations.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Abuse under the Chapter II prohibition may be either:

- Exclusionary (e.g. refusal to supply, predatory pricing, margin squeeze, fidelity-inducing discounts); or
- Exploitative (e.g. excessive pricing, imposition of unfair trading conditions).

Over the past two decades, most of UK and EU enforcement action has related to the former. However, the latter category has recently made a comeback, particularly in the pharmaceutical sector where high prices are now being regularly challenged (see questions 1.14 and 1.15).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Ownership of IP rights does not necessarily give rise to a dominant position. However, dominance may result from such ownership if there are no or limited substitutes for the product, process or work to which the IP relates. The exercise of IP rights may in certain circumstances amount to abuse.

In *Unwired Planet International Ltd and another v Huawei Technologies Co Ltd and another (2018)* the Court of Appeal held that, where the holder of a standard essential patent ("SEP") applies for injunctive relief in respect of another company's alleged infringement of the SEP, as long as the SEP holder gave prior notice of its intention to apply for an injunction, said application does not amount to an abuse of a dominant position. The Court of Appeal referred to the CJEU's judgment in *Huawei v ZTE*.

In 2011, the OFT found that Reckitt Benckiser had abused its dominant position by removing Gaviscon Original Liquid from the NHS prescription channel after expiry of its patent but before publication of the product's generic name. The purpose was to stop doctors writing prescriptions which allowed pharmacies to give out generic alternatives to the original Gaviscon Liquid product. Reckitt Benckiser was fined £10.2 million (reduced from £12 million on settlement grounds).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Market definition tends to be an integral part of Chapter II cases in the UK, as the CMA will normally first want to establish that the company in question holds a dominant position before scrutinising the conduct. The use of shortcuts such as the "direct effects approach" is rare. However, a company's market conduct will sometimes be taken into account as one of several factors in the assessment of dominance (see question 3.4), as for example the CAT did in a margin-squeeze case against pharmaceutical manufacturer Genzyme (*Genzyme Limited v The Office of Fair Trading (2004)*).

It is not uncommon in private litigation that, mainly for efficiency and cost reasons, the scope of the litigation is limited to the question of abuse, and the question of dominance is left open or dominance is assumed. In *Unlockd Limited and Others v Google Ireland Ltd and Others (2018)*, the High Court's transfer order to the CAT directed an expedited trial of the preliminary issues of abuse and objective justification, whilst making the assumption that Google was dominant.

3.15 How is "platform dominance" assessed in your jurisdiction?

Most eye-catching platform cases (such as those involving Google, Amazon and Apple) have been or are being handled at the EU level. See question 2.23 for the CMA's involvement in the hotel bookings investigations.

In 2014, the CMA closed its *Service, Maintenance and Repair Platforms* investigation after it received commitments from an allegedly dominant business, Epyx Limited. Epyx had used restrictive terms in its contracts with customers and suppliers, resulting in an exclusionary effect on competitors. Epyx promised not to include such restrictive terms in its contracts for a period of five years.

In a June 2019 speech, Andrea Coscelli (the CMA's Chief Executive) announced that the CMA is developing its views on the design of *ex ante* regulation of digital platforms. Significant work has already been carried out in this area by the UK Digital Competition Expert Panel, chaired by Professor Jason Furman. These developments will likely affect the assessment of future platform dominance cases in the UK.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Businesses are generally free to choose with whom they want to deal. However, in certain circumstances, a dominant company may be required to maintain its business dealings with another party or to grant access to certain facilities, as a refusal might amount to an abuse of dominance.

In *Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited (2011)*, the High Court found that Heathrow Airport had abused its dominant position by forcing two independent valet parking operators to move their "meet and greet" services from the airport forecourts to the short-stay car parks, whilst Heathrow's own operation was permitted to work from the forecourts, without any objective justification for doing so.

In another case involving access to an airport's forecourt facilities, in 2014 the High Court determined that the concession agreement between Luton Airport and National Express granting National Express a seven-year exclusivity period on the Luton-Central London route was abusive, as it seriously distorted competition between coach operators who wished to provide bus services from the airport. The court rejected the airport's defence that it had an objective justification for its grant of exclusivity (*Arriva The Shires Ltd v London Luton Airport Operation Limited*).

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

Two unique features of the current British competition law scene, Brexit and GSCOP, are discussed in response to questions 1.13 and 3.11, respectively.

Another uniquely British aspect relates to the CMA's power to conduct market investigations. The aim of such investigations is to examine the workings of markets to identify any competition concerns, and to establish whether the markets are working well for consumers. If the CMA concludes that markets are not working well, it has far-reaching remedies powers, which may also impact on parties to vertical agreements and operators with a dominant position.

Such market investigations could result in the break-up of businesses. In 2009 the CMA's predecessor, the CC, identified a number of features of the market for the supply of airport services by BAA which gave rise to an adverse effect on competition. It considered that competition was distorted by BAA's common ownership of the three largest London airports (Heathrow, Gatwick and Stansted), and of Edinburgh and Glasgow airports. BAA was therefore required to divest two of its London airports (Gatwick and Stansted) to different purchasers and either Glasgow or Edinburgh airport (with BAA choosing to dispose of the latter).

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Dickson Minto is a boutique law firm that specialises in corporate and commercial law matters. The firm is known for developing long-term client relationships by providing clear, concise and commercial advice. Dickson Minto places a high value on its partner-led quality of service, its agility, its integrity, its discretion and value to clients. The firm is a trusted advisor for the long haul.

Dickson Minto's competition law practice assists clients on a wide range of competition law matters, including competition investigations by the UK's Competition and Markets Authority, the European Commission and other competition authorities across the world. The competition law practice's client base includes many major international private equity houses as well as listed and private corporates. In addition, many overseas law firms regularly call on Dickson Minto's experience in handling EU and UK merger filings and behavioural antitrust investigations. *The Legal 500* recently described Dickson Minto's competition law team as "very responsive" and "practical".

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

Two separate federal agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct: the Antitrust Division of the Department of Justice (DOJ); and the Federal Trade Commission (FTC). State attorneys general and private plaintiffs may also bring actions under federal antitrust laws or state equivalents.

The DOJ's Antitrust Division is led by an Assistant Attorney General appointed by the President and confirmed by the Senate. Division staff are assigned to various civil sections: Healthcare and Consumer Products; Defense, Industrials, and Aerospace; Media, Entertainment, and Professional Services; Technology and Financial Services; Telecommunications and Broadband; and Transportation, Energy, and Agriculture. There are also several criminal sections and an economic analysis group.

The FTC is led by a five-member commission, with each commissioner appointed by the President and confirmed by the Senate to a staggered seven-year term. No more than three commissioners may be from the same political party. The President also designates the Chairman of the Commission. The FTC's Bureau of Competition has several enforcement divisions: Mergers I, II, III, and IV; Health Care Products & Services; and Anticompetitive Practices. The FTC also has consumer protection and economics bureaus.

1.2 What investigative powers do the responsible competition authorities have?

The DOJ and FTC both have the power to issue subpoenas and civil investigative demands (CIDs) for documents and testimony prior to filing a complaint. The agencies may seek information from both targets and third parties. In addition to the use of compulsory process, the agencies frequently request information on a voluntary basis.

Within the Department of Justice, a CID must be approved by the Assistant Attorney General in charge of the Antitrust Division. At the FTC, the Commission must first vote to approve the compulsory process to investigate a matter. Individual CIDs and subpoenas must be signed by a commissioner assigned to review such requests. This duty rotates among the commissioners.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The antitrust agencies frequently open an investigation in response to a complaint by a party claiming to be injured by the conduct at issue or another interested party. The agencies may also initiate investigations based on information obtained from press reports, foreign antitrust authorities, Congressional oversight committees, or other information.

The agencies often begin an investigation with a voluntary request for information, but they may also use subpoenas and civil investigative demands to obtain information and conduct investigational hearings or depositions.

If the agency staff believes there is sufficient evidence to prove a violation after reviewing the investigation materials, the staff issues a recommendation to the decision-maker at the agency. At the FTC, final decisions are taken by the five commissioners, who vote on whether or not to bring an enforcement action. At the DOJ, the Assistant Attorney General in charge of the Antitrust Division generally makes final enforcement decisions.

Settlement is a common outcome of federal investigations, but the agencies also have the power to prosecute claims through litigation. Both agencies can file an enforcement action in the federal district court, but the FTC also has the option of filing for administrative adjudication before an administrative law judge (ALJ).

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

United States antitrust enforcement authorities can seek equitable relief in the form of injunctions against anticompetitive conduct, restitution for parties injured, or disgorgement of ill-gotten gains. Under the Sherman Act, the DOJ may also recover treble damages for injuries suffered by the United States as a consumer. Both agencies may seek fines or civil penalties for violations of existing consent decrees or orders. The DOJ has the power to prosecute criminal violations under the antitrust laws, but vertical violations are not considered pernicious enough to warrant criminal treatment. The remedies available to State Attorneys General are similar, but in some cases may exceed those available to federal authorities.

1.5 How are those remedies determined and/or calculated?

Injunctive, behavioural, or structural relief is devised so as to directly address the alleged harm. For example, an agreement found to be anticompetitive may be invalidated. If a firm is found to be abusing monopoly power, it may be forced to divest assets or divide its business.

Monetary damages are determined after calculating an estimate of the harm caused by the agreement or conduct. Various measures may be used; overpayment by consumers, ill-gotten profits by the defendant, etc. Under the Sherman Act, these amounts can then be trebled.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

At any point during an investigation or enforcement action, the company under investigation can propose a settlement with the agency staff. The staff will evaluate whether the settlement addresses the competitive concerns and the final decision is made either by the five commissioners at the FTC or the Assistant Attorney General at the DOJ. Settlements with the DOJ are often through the issuance of a consent decree, whereas settlements with the FTC are referred to as consent orders. DOJ consent decrees must be reviewed and approved by a federal court and are subject to a 60-day comment period. The FTC is not required to seek approval from a federal court, but a proposed order must receive preliminary approval by the Commission and then be published for a public comment period of at least 30 days before the Commission grants final approval.

Settlements vary based on the alleged conduct, but vertical settlements can include: a cease-and-desist order; fencing-in provisions to prevent a recurrence of the conduct; monitoring or reporting requirements; and potentially divestments. The agencies view a well-drafted settlement as an avenue to maintain or restore competition without using the time and resources required for litigation.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Yes. Both the Department of Justice and the Federal Trade Commission must prove their allegations before a judge. The Department of Justice may file charges in any federal district court of appropriate jurisdiction. The Federal Trade Commission may bring charges in either a federal district court or before an administrative law judge. Notably, administrative suits brought by the FTC are limited to only injunctive relief.

In order to file a complaint, staff in the Antitrust Division must get approval from the Assistant Attorney General. FTC staff submit recommendations to the Commission, which then takes a formal vote on whether to file a complaint. When an agency brings claims in the federal district court, it must prove its case by a preponderance of the evidence. For FTC administrative trials, the agency must prove that their claims are supported by substantial evidence.

1.8 What is the appeals process?

The appropriate appeals process depends on where the enforcement action was filed. Actions filed in the federal district court are appealable to the appropriate court of appeals under the federal rules. The district court's findings of fact are reviewed under a "clearly erroneous" standard, and conclusions of law are reviewed *de novo*.

In the case of an FTC action in front of an ALJ, the decision is appealable to the full Commission. In this role, the commissioners act as judges and conduct a *de novo* review of the facts and the law. A company can appeal the Commission's final decision to a federal court of appeals within 60 days of the issuance of the order. The standard of review for the Commission's decision is more deferential than that applied to district court judgments. The Commission's facts are reviewed under the lenient "substantial evidence" standard, whereby findings are conclusive if supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951). The Commission's conclusions of law are generally reviewed *de novo*, but are given deference to the extent the agency is interpreting a statute the agency administers, such as the FTC Act.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Private rights of action for violations of the federal antitrust laws are available under the Clayton Act Section 4, which states that any person injured by reason of a violation of the antitrust laws may file a lawsuit in a federal court. The Clayton Act allows successful private plaintiffs to recover treble damages, including costs and attorney's fees. A private plaintiff may also seek injunctive relief for threatened loss or damage caused by violation of the antitrust laws. Plaintiffs must show antitrust injury, meaning injury of the type the antitrust laws were intended to prevent. Under *Illinois Brick*, only direct purchasers have standing to recover antitrust damages in a federal court, but indirect purchasers may be able to seek equitable relief.

State Attorneys General enforce state antitrust laws, but they may also bring what are essentially private actions under the federal antitrust laws to seek injunctive relief or money damages. Private parties often bring claims under state antitrust laws in addition to the federal statutes. State standing law often differs from federal antitrust law, most notably in that a majority of states expressly permit indirect purchasers to recover damages.

1.10 Describe any immunities, exemptions, or safe harbours that apply.

There are no explicit immunities, exemptions, or safe harbours that apply, but courts generally uphold vertical agreements that foreclose less than 20% of the market.

1.11 Does enforcement vary between industries or businesses?

As noted above, the Department of Justice and Federal Trade Commission share enforcement of the antitrust laws in the U.S. To coordinate their overlapping jurisdiction, the two agencies have agreed upon a "clearance" process, by which each agency seeks clearance from the other before opening a new investigation. In addition, in order to facilitate the development of industry expertise and speed up the clearance process, the agencies have informally agreed upon a division of industries.

Occasionally, a merger or conduct investigation arises in which it is not immediately apparent which agency is best suited to handle the matter. In these cases, the back-and-forth between the agencies for clearance can drag on.

While it is uncommon for the FTC and DOJ to have significant disagreements over enforcement policy, variations in emphasis, priorities, and remedies sought may arise, especially as political administrations change. The enforcement priorities of the Department of Justice may change more rapidly because it is headed by a single presidential appointee that can change immediately with each election.

Nonetheless, the two agencies frequently collaborate on antitrust policy guidance and agreements with foreign jurisdictions.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The regulatory environment informs antitrust enforcement in an industry in two ways. First, the incentives, restrictions, and requirements imposed by regulations play an important role in how the agencies understand the competitive dynamics of the market. Whether or not a given course of conduct or agreement is exclusionary or anticompetitive will in large part depend on whether regulations require or amplify the effects of the act in question. For example, in the pharmaceutical industry, legal challenges to "reverse payment" agreements are heavily informed by the regulatory framework put in place by the Hatch-Waxman Act.

At the same time, there is a generally recognised principle that competition policy and regulation should be complementary. Where regulations attempt to govern the competitive dynamics of an industry, antitrust enforcers and courts will be more reticent to add competition oversight on top of this. *See*, for example, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

Antitrust enforcement policy will continue to grab headlines throughout 2019 as campaigning for the 2020 U.S. presidential election ramps up. Several candidates seeking the Democratic Party's nomination have made competition policy a major part of their platform, with a particular focus on "Big Tech" and the pharmaceutical industry. Among the candidates is Amy Klobuchar, Ranking Member of the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy & Consumer Rights.

Then-candidate Donald Trump made waves during the 2016 election when he promised to block AT&T's acquisition of Time Warner and to pursue an antitrust investigation of Amazon. President Trump continues to face allegations that the Department of Justice's decision to sue to block the AT&T/Time Warner deal was politically motivated, and it is likely to be a campaign issue in 2019.

In Congress, members of the House and Senate are working to pass bills intended to expedite entry for generic pharmaceuticals by restricting so-called "pay for delay" reverse settlement agreements and providing a right of action to generics denied samples of drugs subject to distribution restrictions.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

American antitrust enforcers continue to focus on "Big Tech". In February, the FTC launched a Technology Task Force "dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted" (https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology).

The FTC has also continued to put significant resources into antitrust enforcement in the healthcare industry. Most recently, the Commission found that Impax had entered into an anticompetitive reverse payment settlement agreement to delay consumer access to a generic version of Opana ER (https://www.ftc.gov/news-events/press-releases/2019/03/ftc-concludes-impax-entered-illegal-pay-delay-agreement). And in April, the Commission filed suit against e-prescription company Surescripts, "alleging that the company employed illegal vertical and horizontal restraints in order to maintain its monopolies over two electronic prescribing, or 'e-prescribing,' markets: routing and eligibility" (https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription).

1.15 Describe any notable case law developments in the past year.

After losing its bid to block AT&T's acquisition of Time Warner, the Department of Justice appealed the decision. In February, the D.C. Circuit Court of Appeals upheld the trial court's decision, which is discussed in detail below (see question 2.24).

In *Ohio, et al. v. American Express Co. et al.* (585 U.S. ___, 138 S. Ct. 2274 (2018)), the Supreme Court affirmed the Second Circuit's decision upholding American Express's anti-steering provisions, adopting the two-sided market analysis used by the court of appeals. That analysis argued that the anticompetitive effects platform restrictions must be judged by the impact of the challenged conduct on the *net platform* price, rather than by the price effect on only one side of the platform. The Supreme Court further noted that American Express operates a "transaction" platform, in which making a sale on one side of the platform requires making a corresponding sale on the other side of the platform. The application of the two-sided market analysis to other platforms, such as internet and technology platforms, will likely hinge on whether they may be characterised as transaction platforms.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

Vertical agreements raise fewer antitrust concerns than horizontal agreements. The federal antitrust agencies acknowledge that, generally, vertical agreements enhance competition. Absent significant market power, a strong likelihood of anticompetitive effects, or strong intent of anticompetitive conduct, the agencies are unlikely to challenge a vertical agreement. This is in stark contrast to horizontal agreements, where a finding of an agreement itself may be unlawful *per se*. State antitrust enforcers or private plaintiffs may take a more aggressive posture in certain circumstances.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

Evidence of an express agreement is helpful, although not necessary in analysing whether an agreement exists. The Supreme Court established the modern formula for evaluating whether there is an agreement in *Monsanto Co. v. Spray-Rite Service Corp.*, stating "the correct standard is that there must be evidence that tends to exclude the possibility of independent action". An agreement is vertical if it involves different levels in the chain of distribution. Vertically related firms are often in contact and therefore the existence of the agreement itself in vertical cases can be of less importance than agreement in horizontal cases.

2.3 What are the laws governing vertical agreements?

Vertical agreements are generally analysed under Section 1 of the Sherman Act, 15 USC § 1, which declares illegal any contract, combination or conspiracy in restraint of trade. A violation of Section 1 requires proof of three elements: (1) the existence of a contract, combination, or conspiracy among two or more separate entities; that (2) unreasonably restrains trade; and (3) affects interstate or foreign commerce.

Section 2 of the Sherman Act, 15 USC § 2, may also apply to vertical agreements involving distribution. Section 2 applies to unilateral conduct and makes illegal the acquisition and maintenance of monopoly power by anticompetitive conduct. Section 2 applies where the defendant has monopoly power or near-monopoly power and engages in vertical conduct (often tying, bundling, or exclusive dealing) with the intention of foreclosing competition.

Plaintiffs may also bring a case involving exclusive dealing or tying under Section 3 of the Clayton Act, 15 USC § 14. Section 3 of the Clayton Act makes it illegal to condition any sale on the purchaser not dealing with a competitor if the effect may be to substantially lessen competition.

The FTC may also bring a case under Section 5 of the FTC Act, 15 USC § 45, to challenge vertical agreements.

2.4 Are there any types of vertical agreements or restraints that are absolutely (“*per se*”) protected?

There are no vertical agreements that are *per se* protected.

2.5 What is the analytical framework for assessing vertical agreements?

Vertical agreements are typically analysed under the rule of reason. Unlike horizontal agreements, the agreement itself receives little attention. The rule of reason analysis focuses on whether the party seeking to impose the restriction has market power. If there is market power, the court will then evaluate whether competition has been harmed. The court may examine the nature and extent of possible foreclosure, the duration of the agreement, the importance of the input, the impact on entry, evidence of actual effects, the extent of other similar agreements, and any other relevant evidence of harm. This evidence is then balanced against any procompetitive benefits, efficiencies, or other mitigating factors. In the case of vertical agreements, the procompetitive benefits and efficiencies are typically found to be quite substantial. Certain states may analyse certain types of vertical agreements as *per se* violations.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The relevant product and geographic markets for vertical agreements are defined in the same manner as for other agreements or conduct. They are fact-specific inquiries that depend on substitutability of other products or geographies. Because parties to vertical agreements, as the name implies, operate at different levels within commerce, there will be different product markets for each firm.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called “dual distribution”)? Are these treated as vertical or horizontal agreements?

The modern trend is for courts to view agreements between distributors and manufacturers operating as distributors in competition with their distributors as vertical agreements, subject to rule of reason analysis.

2.8 What is the role of market share in reviewing a vertical agreement?

As with other Sherman Act claims, market share is a proxy for inferring market power, and thus harm to competition from exclusionary conduct. In addition, market shares can provide an indication of the potential for foreclosure resulting from a vertical agreement.

2.9 What is the role of economic analysis in assessing vertical agreements?

Economic analysis is central to any analysis of a vertical agreement. Through economic analysis, the court, the enforcer, and the firms must determine whether the agreement has or likely will create or increase market power of the firms involved, whether this will cause anticompetitive harm, and whether the agreement is reasonably necessary to achieve procompetitive results. Each step along the way in this process, and the final balancing of potential anticompetitive harm against potential procompetitive results, requires economic analysis of a variety of factors.

2.10 What is the role of efficiencies in analysing vertical agreements?

The Supreme Court has recognised that certain non-price restrictions may “promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products” (*GTE Sylvania*, 433 U.S. 36, 54 (1977)) and the “market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition”. (*Id.* at 51–52 (1977).) Thus, the Supreme Court and lower courts have considered and upheld various vertical restraints, including territorial restrictions, exclusive distributorships, location requirements, and other non-price restrictions.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Intellectual property licensing arrangements often have a vertical component and, as such, will be analysed accordingly. Although no special rules apply in such situations, the DOJ and FTC have jointly issued Antitrust Guidelines for the Licensing of Intellectual Property. The most recent update, in January 2017, reaffirmed the enforcers’ general position that “intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive”. The update reflects changes and developments in antitrust law that have occurred in the two decades since the guidelines were originally published. The guidelines are available at: https://www.justice.gov/atr/IPguidelines/download.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes. The enforcer must establish that the vertical agreement violates the antitrust laws.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Yes. Courts employing the rule of reason will balance the anticompetitive effect of a restraint against the procompetitive benefits and efficiencies of the same restraint and consider the net impact on competition in the relevant market. A restraint or agreement will only be held to violate the antitrust laws if its harm to competition outweighs the benefits and efficiencies.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Firms have successfully defended vertical agreements on the basis of business justifications including: promoting efficiencies; responding to customer dissatisfaction; preventing confusion, fraud, and deception; ensuring that the product provided to the consumer meets consumer expectations; and ensuring quality. In addition, legal defences, such as lack of proof of a relevant market or market power, can be used. Courts, however, have rejected protection of goodwill and quality control, when there is a less restrictive way of ensuring quality, as business justifications.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Both agencies have issued vertical merger guidelines. As discussed above, the DOJ and FTC recently updated their guidelines related to licensing intellectual property. The FTC has issued informal guidance on vertical arrangements on its website: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain.

Recently, the FTC and DOJ announced that they were looking at revising their vertical merger guidelines.

2.16 How is resale price maintenance treated under the law?

Since the Supreme Court's decision in *Leegin*, resale price maintenance (RPM) has been evaluated under the rule of reason under the federal antitrust laws, rather than being considered *per se* illegal. Rule of reason analysis for RPM cases focuses on the possible relationship between minimum prices and the provision of ancillary services that assist customers, improve quality, or achieve any of the benefits listed above. However, some states have passed "*Leegin* repealer" laws to ensure *per se* liability for RPM agreements under the state's antitrust laws.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements are generally analysed under the rule of reason, balancing any harm to competition with the agreement's procompetitive benefits. This analysis often comes out in favour of the agreement, as exclusive dealing is often a vehicle for substantial efficiencies, including economies of scale and support services for the manufacturer's brand. However, exclusive dealing contracts can be anticompetitive when used by a firm with market power to prevent competition from smaller firms.

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying claims are also generally evaluated under the rule of reason's balancing test. Regulators and courts will assess whether the firm offering the "tied" product has market power in the "tying" product. If so, the arrangement may violate the antitrust laws if anticompetitive effects can be established. On the procompetitive side, tying can reduce costs and increase convenience for consumers.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims typically are reviewed under the Robinson-Patman Act. Robinson-Patman is an older statute that has specific requirements and several exemptions. For example, Robinson-Patman applies to commodities of like grade and quality. Price discrimination conduct may be excused for several reasons, including where the difference in price can be accounted for by different costs in manufacturing, sales, or distribution, and where a price concession was given in good faith to match that of a competitor.

2.20 How do enforcers and courts examine loyalty discount claims?

Enforcers and courts analyse loyalty discount claims under a rule of reason type analysis. Loyalty discounts resemble volume discounts and offer similar benefits, and can lead to lower prices for consumers. They theoretically can also pose similar threats to competition: that a firm with market power will use the discounts to price below cost and drive out smaller competitors.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

As with the each of the previous forms of unilateral conduct, bundled discounts are evaluated under the rule of reason. There are often procompetitive benefits for these provisions, as with loyalty discounts. A key factual inquiry is whether the discounted price of the bundle of goods or services exceeds the aggregate cost of the goods or services in the bundle. If not, there is a greater risk it could be viewed as a pretext for driving rival firms from the market.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

Vertical restraints can take any number of forms, including permutations and combinations of those discussed above. Regardless of the form, the restraints will typically be assessed under the rule of reason, weighing anticompetitive harm against any procompetitive benefits and efficiencies.

2.23 How are MFNs treated under the law?

Although MFNs can have procompetitive benefits, they have come under greater scrutiny in recent years. The price-fixing allegations successfully brought against Apple by the Department of Justice and several states centred around the alleged use of MFNs to ensure uniform pricing for e-books among five different publishers.

The debate over MFNs is ongoing, and legal risk depends on the specific facts and circumstances.

2.24 Describe any notable case developments concerning vertical merger analysis.

In late 2017, the U.S. Department of Justice filed suit to enjoin the merger of AT&T and Time Warner. The District Court denied the DOJ's request for a permanent injunction, and the denial was upheld on appeal in early 2019. *U.S. v. AT&T, Inc., et al.*, No. 18-cv-5214 (D.C. Cir. Feb. 26, 2019). The DOJ's theory of harm was vertical in nature, alleging that "costs for Turner Broadcasting System's content would increase after the merger, principally through threats of long term 'blackouts' during affiliate negotiations". *Id.* at 4. The unanimous court of appeals decision pointed to the defendants' proposed arbitration agreement, designed to protect carriers in the event of a contract or pricing dispute, and the entry of innovative competitors like Netflix in affirming Judge Leon's decision that the DOJ had failed to prove that merger would harm competition. The DOJ announced that it would not appeal the D.C. Circuit's decision.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

Courts and regulators have found that many forms of allegedly harmful unilateral conduct are justified by their economic efficiencies and other benefits. However, there are instances of unilateral conduct enforcement and practitioners are constantly evaluating whether such enforcement is increasing. These are very fact-specific inquiries.

3.2 What are the laws governing dominant firms?

Dominant firm behaviour is governed by Section 2 of the Sherman Act, discussed above, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" any market, and Section 5 of the FTC Act, which prohibits "unfair methods of competition".

3.3 What is the analytical framework for defining a market in dominant firm cases?

The analysis is substantively similar to the "rule of reason" analysis, such as that outlined in response to question 2.16.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

There is no precise threshold as to whether a firm is dominant or a monopolist. Rather, the question of whether or not a firm is dominant in a given market is an intensively fact-specific inquiry. That said, while there is no bright line, it is generally understood that as a firm's market share approaches 70% the firm is increasingly likely to be considered to have monopoly power.

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Under U.S. antitrust law, it is not illegal to *be* a monopolist, only to acquire or maintain a monopoly through exclusionary means. Whether a company has monopoly power or has engaged in exclusionary conduct is a fact-specific inquiry.

3.6 What is the role of economic analysis in assessing market dominance?

Economic analysis can be impactful to antitrust analysis, both with respect to assessing the competitive effects of a course of conduct and in determining whether a firm possesses market power. It can inform every stage of antitrust investigations and litigation, from the decision to prosecute to the calculation of damages.

3.7 What is the role of market share in assessing market dominance?

Market share is the most common means of drawing an inference of monopoly power. As discussed above, typically anything over 70% may be considered monopolistic.

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

Apart from contesting the facts, firms facing allegations of abuse of market dominance can argue several things, including that they do not hold market power, that there has been no antitrust injury, that any competitive harm from their conduct is outweighed by procompetitive benefits and/or efficiencies, or that the conduct is excused by some other legal principle (*e.g.*, no duty to deal with competitors).

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Efficiencies are a fundamental part of the balancing test under the rule of reason and essential to almost every defence put forth by antitrust defendants. They can take the form of arguments, for example that consumers will benefit from lower prices, higher quality, or greater selection; or they may take the form of improved innovation or other synergies that lead to greater competition in an industry.

3.10 Do the governing laws apply to "collective" dominance?

No. Collective dominance is not covered by the antitrust laws in the United States.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Monopsony cases, though less common than monopoly ones, are evaluated under a framework analogous to that of other dominant firm cases.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Generally speaking, an abuse of dominance or anticompetitive conduct is conduct other than competition on the merits. Courts applying the U.S. antitrust laws seek to protect "competition, not competitors", meaning they are more concerned with harm to the competitive *process* than the success or failure of individual firms. Anticompetitive conduct leads to one or more of higher prices, lower quality, reduced innovation, and fewer choices for consumers.

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

Courts and competition authorities view intellectual property as a key incentive to innovate and compete, driving much of the development in most markets. As a government-granted monopoly, however, patents can raise competition concerns depending on the specific facts.

Recent litigation over "reverse payment" pharmaceutical patent litigation settlements highlights the issue: possession of a lawful monopoly in the form of a patent does not permit patent-holders to foreclose competition to their patented product (*e.g.*, by paying a potential competitor not to challenge the patent-holder's patent).

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Yes, courts and enforcers will consider direct effects evidence of market power. These can include: internal business plans describing exclusionary behaviour, past or contemplated; evidence of supracompetitive prices; and complaints from customers.

3.15 How is "platform dominance" assessed in your jurisdiction?

The question of "platform dominance" is an emerging and unsettled issue in U.S. antitrust law. The question of how to balance the efficiencies and benefits created by platforms with the power held by their creators over competitors within the platform is a developing issue in antitrust jurisprudence.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Unilateral refusals to deal can violate the Sherman Act, but are considered to be at the "outer boundary" of Section 2. Three cases have helped outline the claim: *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985); and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In *Otter Tail* and *Aspen Skiing*, the court held that the defendant had violated the Sherman Act by refusing to deal with a competitor, while in *Trinko* it held that the bar had not been met. Comparing the holdings of the three cases identifies some elements that were satisfied in *Otter Tail* and *Aspen Skiing*, but not *Trinko*: 1) the parties ended a prior course of dealing which implied that doing business together had been profitable for the monopolist; 2) the monopolist showed a willingness to forego short-term profit in the hope of obtaining long-term gain; and 3) the monopolist refused to sell something it was already in the business of selling. This kind of difficult-to-establish standard means refusal to deal cases, while possible, are very rare and extremely challenging.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.

This is not applicable.

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