Vertical Agreements

Contributing editor
Patrick Harrison

2019

GETTING THE DEAL THROUGH

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Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Vertical Agreements*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Italy.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick Harrison of Sidley Austin LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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France

Marco Plankensteiner
Kramer Levin

Antitrust law

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

Rules applicable to vertical restraints are set out under article L420-1 et seq of the French Commercial Code. EU antitrust law (ie, article 101 of the Treaty on the Functioning of the European Union) may also be applicable to vertical restraints if they restrict competition within the common market and may affect trade between the EU member states.

Under French law, article L420-1 of the French Commercial Code prohibits concerted practices, contracts, explicit or tacit agreements or coalitions between independent companies having as their object or effect the prevention, restriction or distortion of competition on the market, including in vertical agreements. Vertical restrictions of competition may benefit from an individual exemption if the conditions set out under article L420-4 of the French Commercial Code are met. Article L420-2, paragraph 2 of the French Commercial Code prohibits abuse of economic dominance if it is likely to affect competition, and may also be applicable to vertical agreements if a company abuses the situation of economic dependency of a customer or supplier.

Types of vertical restraint

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

There is no legal definition of vertical restraints. As under EU law, vertical restraints caught by French antitrust law are typically direct or indirect price restrictions, such as resale price maintenance and tying, restrictions on territory and customers, such as exclusive customer or territory allocation, and restrictions on sourcing, such as non-compete obligations and single branding. Direct or indirect restrictions on exports or on parallel imports are sanctioned if they affect the French market. Selective distribution, exclusive distribution and franchise are also monitored.

Legal objective

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

While the first objective is the protection of economic efficiency and free competition, the assessment of vertical restraints will take into account the effect of practices on economic welfare and the wellbeing of the consumer. Article L420-4 I 2 of the French Commercial Code, which exempts certain agreements, explicitly mentions the creation or preservation of employment as a criterion to assess the positive effects of a restrictive practice. The protection of small and medium-sized companies or of weaker parties in their relations with companies with strong market power is also a driving consideration.

Responsible authorities

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

The French Competition Authority is empowered under articles L461-1 of the French Commercial Code to enforce the prohibition of anticompetitive vertical restraints.

Under article L464-9 of the French Commercial Code, if the practices are not already examined by the Competition Authority, the Minister of the Economy has jurisdiction over practices affecting a local market, provided that they do not fall within the scope of EU antitrust law and that the turnover of each of the companies in France does not exceed €50 million and their aggregate turnover does not exceed €200 million. In such cases, the Minister of the Economy has injunction and settlement powers that are exercised by the regional directorates for companies, competition, consumer protection, labour and employment under coordination by the Directorate-General for Competition, Consumer Protection And Repression Of Fraud (DGCCRF). If the companies concerned do not comply with the injunction or the obligations set forth in the settlement, the case is referred to the Competition Authority.

Article L420-7 of the French Commercial Code provides that specialised courts of first instance (eight commercial courts and eight civil courts) and the Paris Court of Appeal have exclusive jurisdiction in disputes relating to the application of antitrust laws (private enforcement).

Jurisdiction

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

Vertical restraints will be subject to French antitrust law when they are likely to affect competition on the French market, according to the 'territorial effect' theory. Article L420-1 of the French Commercial Code covers anticompetitive practices carried out 'even through a company of a group established outside France, directly or indirectly'. Restrictions on exports by companies established in France are not subject to French antitrust law if the effects of the practice occur outside of France (Decision No. 99-D-52) unless there are indirect national effects. The Competition Authority has only intervened in cases where at least one undertaking concerned has had an establishment in France.

Agreements concluded by public entities

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

Antitrust laws fully apply to public entities when they are involved in production, distribution or services activities as set out by article L410-1 of the French Commercial Code. However, the administrative judge will have jurisdiction rather than the Competition Authority if the public entity is exercising a public service mission through acts of public authority. A court decision clarified that the Competition Authority has

jurisdiction over anticompetitive practices conducted by a public entity in the context of public procurement (T confl, 4 May 2009, No. C3714).

Sector-specific rules

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

There are no rules generally assessing vertical restraints in specific sectors. However, specific regulations may apply to address identified restrictions.

Articles L5125-33 et seq and R5125-70 et seq of the French Public Health Code set forth specific provisions concerning the online sale of drugs. Taking into account the Competition Authority's Opinion No. 16-A-09, two orders were adopted on 28 November 2016 setting out Good Practices for the sale of drugs and Technical Rules applicable to online sales sites.

In the hotel sector, article L311-5-1 of the French Tourism Code regulating contractual relations between hotels and online booking platforms provide for full pricing freedom for hotels by prohibiting any form of price parity clauses.

In the retail sector, article L341-2 of the French Commercial Code prohibits post-contractual non-compete clauses, except if they relate to goods and services that compete with the contractual goods and services, in which case:

- they are limited to the premises and territory from which the buyer operated during the contract period;
- they are indispensable to protect know-how transferred by the supplier to the buyer; and
- the duration of the obligation is limited to one year.

Article L420-2-1 of the French Commercial Code prohibits agreements granting exclusive importation rights to a company in certain French overseas territories. In its Decision No. 16-D-15, the Competition Authority applied this provision for the first time and fined a large homecare products manufacturer and five distributors for exclusivities granted after 22 March 2013 in various French overseas territories. A major food company and its distributor in certain French overseas territories were fined by the Competition Authority for having tacitly renewed an exclusive distribution agreement after March 2013 (Decision No. 17-D-14). In 2018, the Competition Authority has fined a wholesaler-importer and its parent company for having benefited from exclusive import rights for an oversea territory for the purchase of consumer goods (Decision No. 18-D-21, appeal pending before the Court of Appeal) and has fined three companies for having maintained exclusive import clauses in their agreements relating to the marketing of termite traps in several overseas territories (Decision No. 18-D-03).

General exceptions

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

Article L464-6-1 of the French Commercial Code provides for a general de minimis exemption under which the Competition Authority can decide not to open proceedings against parties to an agreement if such parties jointly hold a market share not exceeding 10 per cent in one of the affected markets, if they are actual or potential competitors in one of such markets, or not exceeding 15 per cent in one of the affected markets, if they are not actual or potential competitors in any such affected markets. However, the de minimis exception is not applicable to the hardcore restrictions listed in article L464-6-2 of the French Commercial Code.

Agreements

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

There is no definition of agreement under French antitrust law. According to the Competition Authority, an anticompetitive agreement results from the concurrence of wills, which is not necessarily evidenced by a contract or a jointly adopted decision, but only requires a conscious adherence to a collective behaviour (Decision No. 97-D-52).

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

Vertical relationships are generally evidenced by a contract, which, if it contains restrictive provisions, demonstrates in itself the concurrence of wills (eg, Decisions Nos. 05-D-66 and 07-D-04). Absent such contractual provisions, the individual intention of each party to take part in the restrictive agreement must be demonstrated in the form of an offer made by one of the parties and accepted by the other (eg, Decisions Nos. 05-D-70 and 06-D-04). On the contrary, if one party (ie, a supplier or manufacturer) unilaterally adopts a new policy that is not implemented by the other party (ie, the distributor), a concurrence of wills cannot be established (Decisions Nos. 05-D-06 and 05-D-72).

Parent and related-company agreements

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

Agreements between a parent company and its subsidiary or between two subsidiaries of a same parent company are not, in principle, caught by article L420-1 of the French Commercial Code if such subsidiaries do not freely determine their commercial policy. If they act autonomously on the market, antitrust laws are applicable to agreements between related companies. Commercial and financial autonomy of the subsidiary and its parent must be mutual and sufficient to ensure each company takes independent decisions in economic matters (for instance, in Decision No. 94-D-21). The same applies to two subsidiaries of the same group.

Agent–principal agreements

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

It is admitted in France, as under EU case law, that antitrust rules (ie, article L420-1 of the French Commercial Code) do not apply to agreements entered into between commercial intermediaries, such as agents, and the companies they represent, when such intermediaries do not bear the risk of the transactions they negotiate or conclude in the name of and on behalf of their partner (Decision No. 09-D-31).

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

In its annual report for 2006, the Competition Authority considered that:

> *when an agent, while having a distinct legal personality, does not independently determine his behaviour on the market but implements instructions given to him by his principal, the prohibitions set out by article 81 of the treaty [article 101 of the Treaty on the Functioning of the European Union] and by article L420-1 of the Commercial Code are inapplicable to the relations between the agent and his principal, with whom he forms a single economic entity.*

The driving criteria are whether the financial and commercial risks are borne by the agent or by the principal and the determination of an independent commercial strategy by the agent (see Decisions Nos. 06-D-18 and 09-D-23, and Paris Court of Appeal, 12 December 1996, OFUP).

Intellectual property rights

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

Under French law, there are no specific antitrust rules governing IPRs, including in vertical agreements. However, the protection of

IPRs granted to a commercial partner, for instance, the franchiser's trademark in a franchising agreement, is a relevant criterion for the assessment of potentially restrictive obligations imposed on the franchisee in order to safeguard the identity, unity and reputation of the network and the trademark (Decisions Nos. 97-D-51 and 07-D-04).

Analytical framework for assessment

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

The Competition Authority applies EU regulations and guidelines relating to vertical restraints as 'useful guidance' (eg, Decisions Nos. 00-D-82 and 01-D-45) in the implementation of French antitrust rules to vertical agreements and decisions of the EU Commission and the European Court of Justice are taken into consideration. As under EU law, the Competition Authority examines first whether the supplier and the buyer's respective market shares on the relevant market or markets do not each exceed 30 per cent, and second whether the agreement contains one of the hardcore or excluded restrictions listed in Regulation No. 330/2010. If the thresholds are not exceeded and there are no hardcore or excluded restrictions, there is no further scrutiny and the vertical restraint is considered as not raising any competition issue.

If the relevant market share thresholds are met or the agreement contains a hardcore or excluded restriction, the entire agreement, or the excluded restriction, is scrutinised under general antitrust rules in order to assess whether it has as its object or effect to prevent, restrict or distort competition (article L420-1 of the French Commercial Code). If the agreement is considered as restrictive by its object or by its actual or potential effects on competition, the agreement may qualify for an individual exemption under article L420-4 of the French Commercial Code. The exemption is granted to an agreement that either results from the implementation of an applicable law or that fulfils certain conditions (ie, if it creates economic progress and if a fair share of the profit derived therefrom is allocated to consumers, without enabling the companies concerned to eliminate competition for a substantial part of the products concerned, provided that the agreement does not contain restrictions that go beyond what is necessary to reach the claimed economic progress). There are no per se infringements that as such disqualify the agreement from an individual exemption under article L420-4. However, serious restraints such as price fixing or market or customer sharing will usually not satisfy the conditions set out by this article.

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

Supplier market shares are relevant for the assessment of the legality of individual restraints, in particular with respect to the effects on competition of exclusive supply or purchase obligations. The market position of other suppliers is also relevant, since the Competition Authority takes into consideration the potential 'cumulative effect' of similar vertical restraints on a given market. In Decision No. 00-D-82, a cumulative effect was not upheld, since the suppliers applying such agreement only represented 47 per cent of the market. The same solution was adopted in Decision No. 06-D-04 concerning luxury perfumes, where the five main suppliers collectively held only 38 per cent of the market. On the contrary, a cumulative effect was established in Decision No. 05-D-49 for practices carried out by the three main manufacturers of franking machines representing, collectively, over 95 per cent of the market.

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

Buyer market shares as well as market shares of other buyers are relevant parameters for the assessment of the restrictive effects of an individual restraint. In its Opinion of 28 September 2009 on the revision of the EU vertical restraints block exemption regulation, the Competition Authority expressed the view that the buyer power of distributors had considerably increased in recent years and that it was necessary to preserve access by suppliers to these distributors and to protect suppliers from exclusive supply agreements of excessive duration or scope. In Decision No. 08-MC-01 concerning practices relating to the distribution of iPhones, the authority considered that the anticompetitive risks of such exclusive supply agreements were all the more significant since the market power of the beneficiary of the exclusivity was important and competition was already weak on that market. The cumulative effect of vertical restraints may also be taken into account where the buyers hold together an important market share (see Opinion No. 10-A-26 on the food distribution sector).

Block exemption and safe harbour

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

There are no national legal provisions providing for a general block exemption or safe harbour. However, the EU block exemption regulation relating to vertical agreements is applied by the French Competition Authority as a guide in the implementation of French antitrust rules with respect to vertical restraints even if they do not affect the common market.

Article L420-4 II of the French Commercial Code provides that agreements or categories of agreements may be exempted from national antitrust rules by a regulation. There are very few regulations adopted under this provision. For instance, Decree No. 96-500 of 7 June 1996 covers vertical agreements between agricultural producers and distributors in situations of crisis, providing for the reduction of production capacities, the increase of quality requirements and temporary limitation of the quantity of products sold on the market.

Types of restraint

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

Imposed fixed prices or minimum prices are considered to be a restriction of competition by object (Decisions Nos. 06-D-04 and 07-D-50). Article L442-5 of the French Commercial Code specifically prohibits imposing minimum resale prices. In Decision No. 01-D-45, a supplier was sanctioned for having imposed resale prices to its distributors, in particular through the prohibition of discounts and promotions.

Maximum resale prices are not prohibited as such. If maximum prices are uniformly adopted by the distributors, this will constitute an anticompetitive agreement only if there is proof of collusion between the resellers (Decision No. 91-D-31).

Suggested prices are authorised unless they disguise imposed prices, which is the case when the supplier sanctions the distributor, or threatens to do so, if the suggested price is not applied (Decision No. 96-D-16), or if the distributor is contractually bound to do so. In the *Kontiki* case, the French Supreme Court prohibited an agreement whereby a supplier conditioned the referencing of its distributors on its website to the effective application by the latter of suggested retail prices (Cass Com, No. 13-19.476).

In Decision No. 15-D-07, the Competition Authority referred to the conditions necessary to prove a vertical pricing agreement by a consistent body of evidence in the absence of material evidence of an agreement – the mention of a retail price between the supplier and the distributor, the existence of a mechanism to monitor or oversee the pricing and the effective or significant application of the agreed price – which together demonstrate compliance by the distributor with the agreed policy. The 'mention of a retail price', may take any form of communication, including an announcement at a press conference to launch the new product (Decision No. 15-D-18). In Decision No. 16-D-17, the Competition Authority considered that where direct documentary evidence proves the agreement between a supplier and a distributor to effectively apply public 'suggested' prices, there is no need to also search for a consistent body of evidence.

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

To date, no decision has focused on this issue. However, the assessment on such restrictions would be the same as under EU law: resale price maintenance may be justified temporarily for the launch of a new product. In Decision No. 96-D-76, a supplier was found to have violated antitrust law by prohibiting its distributors from selling at 'loss leader' prices, which was analysed as resale price maintenance because distributors were discouraged from reselling the concerned products at prices lower than the suggested retail price.

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

To date, no decisions have addressed a possible link between resale price restrictions and other types of restraints. However, the Competition Authority sanctioned resale price maintenance by a dominant manufacturer under the prohibition of abuse of a dominant position (Decision No. 17-D-02).

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

In the *Luxury Perfumes* case, the efficiency argument was put forward by the companies sanctioned by the Competition Authority that suppliers of luxury products could preserve their image and prestige through high prices and should be able to control retail prices of their products. The Court of Appeal considered that the companies did not demonstrate any concrete efficiency gains (Paris Court of Appeal, No. 2010/23945).

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

Such a pricing relativity agreement will be analysed as a retail price-fixing agreement and thus be considered anticompetitive by object.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

Under French antitrust law, the assessment of the potentially restrictive object or effect of such a clause would be the same as under EU law. Since such an agreement does not restrict the buyers' ability to freely set their retail prices, they may not be considered problematic.

However, under article L442-6 II d) of the French Commercial Code, any clause or contract providing that a trade partner automatically benefits from an alignment on more favourable conditions granted to competing undertakings by its contractual partner is considered void.

This rule is an 'overriding mandatory provision' and thus will apply even if the parties have not chosen French law to govern their contract (Paris Court of Appeal, No. 15/18784, *Expedia*).

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

In its *Booking.com* commitment Decision No. 15-D-06, the Competition Authority, without reaching a final decision on the qualification of such practices, considered through an effects-based approach that while narrow most-favoured nation (MFN) clauses, which restrict the supplier's ability to offer more favourable conditions to users via its direct online sales channels, may have certain pro-competitive effects such as preserving the economic model of online platforms by preventing free-riding by the suppliers, broad MFN clauses are viewed as harmful for competition as they might lessen competition between platforms and raise barriers to entry. The Competition Authority further suggested that such agreements could be analysed under the rules prohibiting abuse of dominance. The Competition Authority continued, with its European counterparts, to monitor the sector, and released a report on Booking.com's commitments in February 2017. According to this report, a certain price differentiation between platforms was noted, but the competitive pressure appears to be still weak on Booking.com.

Also, article L442-6 II d) of the French Commercial Code expressly prohibits these types of agreements, but only as far as they provide for an alignment with conditions granted to competitors of the parties. Applying this rule, the Paris Court of Appeal declared void price parity clauses that prohibit hoteliers from offering better prices on platforms other than Expedia in its judgment of 21 June 2017 (Paris Court of Appeal, No. 15/18784, *Expedia*).

In the same judgment, the Court examined price parity clauses providing for an obligation to grant Expedia with the same better conditions granted by the hotelier on its direct sale channel under article L442-6 I 2 of the French Commercial Code and hold that such clauses are to be considered as illegal as they create, in combination with a last room availability clause, a significant imbalance in the contractual rights and obligations between the parties to the contract.

In the hotel sector, as mentioned in question 7, all price parity clauses between hotels and online platforms in contracts entered into after 8 August 2015 are void under the new provisions introduced by Law No. 2015-990 in the French Tourism Code (articles L311-5-1).

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

In Decision No. 07-D-06 concerning the distribution of games consoles, an agreement between a supplier and its distributors preventing them from advertising a different price than the maximum price suggested by the former when launching the product was sanctioned. Ultimately, it is an analysis of resale price maintenance.

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

Most-favoured supplier clauses will be analysed as set out in question 24. This type of clause is generally viewed as potentially raising wholesale prices, which in turn may raise retail prices and harm end-consumers.

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

The analysis of territorial restrictions under French law is the same as under EU law (see Decisions Nos. 93-D-50 and 91-D-31): contractual provisions preventing the distributor from selling outside the contractual territory, even if such sales are made on request of the customer (passive sales) are unlawful; contractual provisions restricting the buyers' right to offer products or promote sales (active sales) in the contractual territory allocated exclusively to another buyer or to the supplier are, in principle, lawful. While the head of a network cannot prohibit passive sales, it must enforce the exclusivity that it granted in the event of a manifest violation by one of the members of the network of its obligation not to prospect the territory allotted to another member (Cass Com, No. 13-15.935).

Case law insists on the freedom of suppliers to organise their networks, and as such they may resort to poly-distribution by creating exclusive and non-exclusive territories (Paris Court of Appeal, No. 14/10659).

Indirect means of creating absolute territorial protection are also sanctioned (eg, refusal by the supplier to provide technical assistance for passive sales, Decision No. 02-D-57; delivery delays and other unfair measures, Decision No. 97-D-42). Also, article L464-6-2 of the French Commercial Code excludes application of the de minimis rule to agreements containing restrictions on passive sales by a distributor to end-customers outside his or her contractual territory.

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

In two decisions relating to Coty's selective distribution agreements, the Paris Court of Appeal found that two clauses concerning territorial restrictions constituted hardcore restrictions rendering the selective distribution network illicit (Decisions Nos. 14/0318 and 14/00335). The first clause prohibits the resale of goods to unauthorised distributors even if the latter operate outside the territory of the selective distribution network. The clause is deemed restrictive, since Coty did not justify that the network covered all territories. The second clause prohibits active sales of a new contractual product into a territory where Coty has not commercialised it within one year following the launch of the product. These decisions appear to be more severe than the approach favoured by the European Commission Guidelines on vertical restraints (sections 55 and 62).

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

The principles applicable to territorial restrictions (see question 28) also apply to customer restrictions.

Restrictions on the clients to whom a buyer may sell the products is a restriction by object (Decisions Nos. 07-D-24 and 05-D-32) unless an exclusive distribution agreement provides that a supplier agrees to sell products to one exclusive distributor for resale to a specific category of customers, provided that passive sales are not restricted.

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

There is no internal case law on restrictions on the uses to which a buyer puts the contract products. The analysis of this type of restriction under internal law would be the same as under EU law. Such restriction would probably be considered unlawful, except if it is necessary to comply with legal or regulatory provisions, such as with marketing authorisations for drugs.

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

The assessment is the same as under EU law. Additional guidance on the limitation of the buyer's ability to generate sales via the internet has emerged essentially through two landmark decisions: *Pierre Fabre* (Decision No. 08-D-25; ECJ case C-439/09; Paris Court of Appeal No. 2008/23812) and *Bang & Olufsen* (Decision No. 12-D-23; Paris Court of Appeal No. 2013/00714). These decisions set out the key principle, the 'prohibition to forbid'. The supplier may not directly or indirectly prevent the buyer from selling its products online, except if online sales do not respect the conditions required in the selective distribution system for preserving the luxury image of the contractual products (Paris Court of Appeal, Decisions Nos. 17/20787 and 16/02263), the quality of the goods and the consumers' safety (Decision No. 18-D-23).

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

The Competition Authority recently sanctioned a supplier for having imposed disproportionate conditions for online sales on authorised distributors in its selective distribution agreements (Decision No. 18-D-23). Andreas Stihl SAS, a manufacturer of outdoor power equipment, such as chainsaws and brush cutters, required a hand-delivery of this type of product by the distributor to the end-customer. This restriction resulted in a de facto prohibition of the sale of these products on the authorised distributors' websites, since it imposed a collection from a shop or delivery at the buyer's home, even though hand-delivery is not required by any regulation. Nevertheless, the Competition Authority confirmed the principle that the prohibition of online sales on third-party platforms is allowed and considered that such restriction is justified in this case in order to preserve the Stihl brand image and to guarantee consumers' safety. An appeal is pending before the Paris Court of Appeal.

Following the European Court of Justice (ECJ) *Coty* case (C-230/16, *Coty Germany*), the Paris Court of Appeal ruled that a 'platform ban' justified by the conditions set by the ECJ cannot be qualified as a hardcore restriction (*Showroom Privé v Coty France*, No. 16/02263), and that the luxury image of pharmaceutical products may justify such a ban if the platform does not respect the criteria for the sales of the relevant (*Caudalie*, No. 17/20787).

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

The assessment is similar to that carried out under EU law. A selective distribution system does not infringe article L420-1 of the French Commercial Code when the following conditions are met:

- the supplier's and the buyer's respective market shares do not exceed 30 per cent;
- the selective distribution system is justified by the nature of products in question (see question 35); and
- the selection of authorised retailers is made on objective and qualitative criteria, such as the obligation to have suitable premises or skilled staff.

These criteria must be applied to all potential retailers in a uniform and non-discriminatory manner and cannot aim to exclude a form of distribution in itself. Selection criteria must also be strictly proportionate to the objective pursued by the seller.

There is no explicit obligation for the supplier to publish the criteria. However, in order to be able to prove their objective and uniform application to all retailers, it is better to write them clearly and to communicate them to all potential retailers.

In addition, the selective distribution system must not contain any hardcore restrictions (eg, territorial restrictions, resale price maintenance). The Paris Court of appeal ruled that the head of a selective distribution network bringing an action for unfair competition against an unauthorised distributor must first prove the legality of the selective distribution. Such is not the case where the distribution contracts contain hardcore restrictions (Decisions Nos. 14/03918 and 14/00335).

Quantitative criteria limiting the number of distributors admitted or fixing minimum sales targets may apply when combined with qualitative criteria. However, the selective distribution system cannot be a purely quantitative selection system (Decision No. 99-D-78).

The retailer that has not been selected can challenge the refusal in front of the judge who will examine the proper application of the selection criteria by the supplier (see Cass Com, No. 15-15.042). The Paris Court of Appeal has sanctioned two refusals to supply under both abuse of a dominant position and anticompetitive vertical agreements since those refusals to supply, similar to refusals to grant approval in the selective distribution system, were considered discriminatory (Decision No. 15/12365).

However, suppliers are free to organise their selective network as they see fit and may reject a candidate distributor even if the selection criteria are met, and such rejection may not constitute an anticompetitive agreement where competition is not eliminated in the relevant market (Paris Court of Appeal, Decision No. 14/07956). Moreover, the supplier is free to not renew a selective distribution contract with an authorised retailer, even though this retailer still fulfils the selection criteria (Cass Com, No. 15-28.355).

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

Selective distribution is more likely to be lawful for certain types of products if their nature justifies a particular distribution system. For example, luxury products are more likely to be considered as justifying a high quality of distribution to preserve the brand's image (eg, Versailles Court of Appeal, No. 99/07658 concerning luxury cosmetic products). In addition, technically complex products can justify selection criteria such as the requirement for skilled staff.

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

Even if the general rule is the 'prohibition to prohibit', certain limitations on internet sales may be admitted in a selective distribution system under certain conditions. A supplier can require that an approved distributor maintains a bricks-and-mortar point of sale in order to be allowed to sell online, provided this is justified by the objectives sought by the supplier (Decision No. 06-D-24; Paris Court of Appeal No. 13/11588). This restriction enables the supplier to exclude pure internet players. In Decision No. 06-D-28, the Competition Authority approved a contractual provision under which the end-consumer had to prove that he or she received prior advice from a seller in a bricks-and-mortar shop in order to make an online purchase.

Also, the supplier can impose online sale criteria that do not have to be strictly identical, but must be equivalent to the criteria imposed for offline sales. This means that they must pursue the same objective and achieve comparable results and the difference between the criteria must be justified by the different nature of these two distribution modes. Thus, in Decision No. 07-D-07, the Competition Authority ruled that suppliers could require the distributors to respect criteria relating to the graphic charter of the website, the use of specific descriptions of each product or the availability of a hotline. However, these restrictions must not exceed what is necessary to protect the supplier's legitimate interests.

As mentioned in question 33, in two decisions (*Showroom Privé v Coty France* and *Caudalie*), the Paris Court of Appeal applied the *Coty* case law: in the first, the Court considered that a clause that prohibits the sale of luxury products by pure players in order to support investment in store design and quality of service for consumers can be necessary in preserving the luxury image of the products. In the second case, the Court ruled that the prohibition on authorised distributors to use, in a discernible manner, third-parties' online platforms is proportionate to the objective of preserving the luxury image of these products if such third-party platform does not respect the sales conditions required for the sale of such products.

In the *Andreas Stihl* decision mentioned in question 33, the Competition Authority considered that the restriction of online sales on third-party platforms may also be justified by the objective of preserving consumers' safety and brand image. However, the hand-delivery clause in Stihl's selective distribution agreements, imposing the collection from a shop or delivery at the buyer's home, was held as too restrictive because it removed any interest in online sale for distributors and consumers.

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

In Decision No. 05-D-50, the Competition Authority admitted that a supplier can control its distributors' invoices in order to ensure that no sales are made to unauthorised buyers. However, this control cannot be systematic and must be limited to situations where there are suspicions of such sales.

If an authorised buyer is selling products in an unauthorised manner the supplier can also terminate the contract on the ground of a breach of contract which entails its exclusion from the network.

The supplier can also seek damages or injunction measures against unauthorised retailers in court. Such action is based on tort law (article L442-6 I 6 of the French Commercial Code) so the buyer must prove that its selective distribution system is lawful and that the unauthorised retailers committed a fault. Selling a product outside a selective distribution network is not as such considered as a fault. The fault is constituted when an unauthorised retailer refuses to disclose the source of supplies (Cass Com, No. 90-15.831).

The supplier might also obtain an interim injunction in order to stop the selling by approved distributors of its products on an unauthorised online platform.

The French Supreme Court considered that sales by private users on eBay could not constitute unauthorised sales outside a selective network (Cass Com, No. 11-10.508). The same court judged that the resale of Chanel goods purchased at an auction organised following the judicial liquidation of an authorised distributor to which Chanel was opposed, and without the latter's prior approval, constitutes a violation of the prohibition to sell outside the network. The liquidation had not affected the selective distribution contract that was binding on the liquidator (Cass Com, No. 14-13.017).

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

Cumulative restrictive effects of multiple selective distribution systems are taken into account by the Competition Authority in line with the approach of the EU Commission Guidelines on vertical restraints in order to assess, based on the market share covered by the selective distribution systems, whether their cumulative restrictive effect leads to market foreclosure (Opinion No. 12-A-20 and Decision No. 07-D-07). This may be the case if the market share covered by the multiple selective distribution systems exceeds 50 per cent and the combined market share of the five most important suppliers also exceeds 50 per cent.

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

In Decision No. 07-D-25, such arrangements were analysed under applicable EU law and considered non-restrictive.

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

The assessment is similar to the analysis to be made under EU law. In France, the Competition Authority decided that a clause prohibiting a buyer from selling products to other authorised buyers constitutes a breach of antitrust rules (Decision No. 95-D-14).

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

The assessment is similar to the analysis to be made under EU law. French courts have admitted the restriction in selective distribution systems on the sale of products the proximity of which might damage the suppliers' brand image (eg, Cass Com, No. 99-17.183).

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

The analysis is similar to that under EU law.

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

The assessment is the same as in EU law. For example, in Decision No. 07-D-08, a provision that required that the buyer should purchase an amount corresponding to its total needs was declared anticompetitive.

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

The assessment is the same as under EU law. In Decision No. 08-MC-01, the Competition Authority adopted interim measures to end Apple's exclusive supply agreement with Orange for the sale of iPhones, as it considered that it could affect competition.

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

The assessment is the same as under EU law. The ability of wholesalers to sell directly to end-consumers may be restricted as they would have an unfair competitive advantage compared to retailers.

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

Not at present.

Notifying agreements

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

There is no general formal procedure for notifying agreements containing vertical restraints. Law No. 2015-990 of 6 August 2015 introduced a notification obligation for joint purchase agreements in the retail sector (article L462-10 of the French Commercial Code), which must be notified to the Competition Authority if certain turnover thresholds are met (article R462-5 of the French Commercial Code).

Authority guidance

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

The Competition Authority does not give any guidance and there is no possibility for the parties to obtain any declaratory judgment from a court. The Authority may be referred to for an Opinion, namely under article L462-1 of the French Commercial Code; however, this procedure is only open to the government and certain organisations.

Complaints procedure for private parties

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

Private parties, such as companies or consumer associations, can lodge a complaint with the Competition Authority. A consumer alone cannot bring such a complaint.

The complaint must mention the French law and, if applicable, EU law provisions that are allegedly violated, the description of the infringement and the complete identification of the complainant. The complaint must also indicate, if possible, the identity and address of the entity responsible for the alleged infringement. It is not necessary for a complainant to bring all evidence, but concrete elements establishing the likelihood of such infringement must be brought.

The Competition Authority may adopt injunction measures and sanctions, accept commitments by the parties and agree to a settlement. It can also declare the complaint inadmissible for lack of standing or reject it for insufficient evidence.

It may take several years to obtain a decision of sanction from the Competition Authority.

If the complainant demonstrates a serious and immediate threat to competition, urgent interim measures may be ordered by the Competition Authority. The Competition Authority ordered as an interim measure the suspension of the agreement granting Canal Plus the exclusive broadcasting rights for the French rugby first division championship for five years (Decision No. 14-MC-01).

Enforcement

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

In the past two years, the Competition Authority has ruled on 70 decisions on anticompetitive practices, seven of which relate to vertical agreements.

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

Under article L420-3 of the French Commercial Code, any clause or agreement that relates to an anticompetitive practice is null and void. The judge may pronounce a partial invalidity of an agreement and only the restrictive contractual provisions are null and void and the rest of the contract or agreement remains valid, unless the clause containing illegal restriction is a determining and critical condition of the contract.

Update and trends

Recent developments

In the *Showroom Privé v Coty France* and *Caudalie* cases following the ECJ *Coty* case law, the Paris Court of Appeal approved restrictions both on the sale of luxury products by pure players in order to support investment in store design and quality of service for consumers, and on the sale on third parties' online platforms as being necessary to preserve the luxury image of the products.

In the *Andreas Stihl* decision, the French Competition Authority decided that the obligation for the distribution of the product to be carried out by hand delivery, resulting in a de facto ban on online sales, including on its own website, is anticompetitive. Nevertheless, restrictions on online sales on third-party platforms were considered justified in this case by the objective of preserving consumer safety and brand image.

Anticipated developments

An in-depth review of the French legislation relating to relationships between suppliers and distributors is currently being conducted by the government. The relevant new rules are expected to be adopted during the first term of 2019.

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

Under article L464-2 of the French Commercial Code, according to the Guidelines issued on 16 May 2011, the Competition Authority may impose fines either immediately or to sanction a violation of an injunction or a commitment. The fines cannot exceed 10 per cent of the company's or the group's worldwide turnover.

The authority may impose a daily fine of up to 5 per cent of the company's average daily turnover to compel it to implement an injunction or interim measures.

In its annual report for 2017, the Competition Authority announced a total annual amount of fines of €498 million (while the average yearly amount between 2009 and 2017 was €526 million, with a record amount of €1.25 billion in 2015). Significant fines were imposed in 2015 in the milk sector (€192.7 million, Decision No. 15-D-03) and in the parcel delivery services industry (€672.3 million, Decision No. 15-D-19), and in 2017, in the floor coverings sector (€302.3 million, Decision No. 17-D-20).

The Competition Authority has issued 49 decisions in the past 10 years concerning interim measures requests, including three cases in connection with vertical restraints.

Investigative powers of the authority

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

Article L450-3 of the French Commercial Code provides for ordinary investigations that do not require any judicial authorisation. This article enables administrative agents to enter business premises and professional means of transport, to request the notification or make a copy of professional documents, to interview company's employees and to collect oral or written statements.

The 'judicial investigation' set out in article L450-4 of the French Commercial Code is subject to a judge's authorisation. Administrative agents can carry out dawn raids in any premises, request information, seize or copy any kind of documents (eg, emails), place seals and take oral or written statements.

The DGCCRF may also investigate specific sectors on the basis of evidence or suspicion of restrictions to identify competition concerns after having alerted the Competition Authority, which can decide to take over investigations (article L450-5 of the French Commercial Code). At the end of the investigation, the Competition Authority decides whether to open a case.

Private enforcement

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

Private enforcement actions are possible under French law, on the basis of article 1240 (formerly 1382) of the French Civil Code, before one of the specialised jurisdictions (see question 4). The person seeking compensation must bring evidence of a fault and of the harm personally suffered. New rules on damages claims relating to infringements of competition law set forth in article L481-1 et seq of the Code of Commerce, implementing EU Directive 2014/104, entered into force on 11 March 2017 and are applicable to proceedings initiated after 26 December 2014. The new provisions provide, in particular, for an irrefragable presumption of an infringement based on decisions of the Competition Authority or the European Commission and establish a principle of joint and several liability of all the parties to the agreement.

A party to an agreement containing vertical restraints can bring an action for compensation, provided that the claimant proves it was not responsible for the infringement and was forced to take part in the agreement (Paris Court of Appeal, No. 07/05460).

Since the introduction of the Law of 17 March 2014, certified consumer protection associations are allowed to bring follow-on collective actions in front of a court of first instance in order to obtain compensation for harm caused by antitrust practices. Collective actions are only open to consumer associations as opposed to business and professional associations.

Private enforcement action can take several years and may be suspended until a final decision is reached in the competition infringement case.

Other issues

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

No.

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