

# Vertical Agreements

*Contributing editor*  
**Patrick Harrison**



2019

GETTING THE  
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# Vertical Agreements 2019

*Contributing editor*  
**Patrick Harrison**  
**Sidley Austin LLP**

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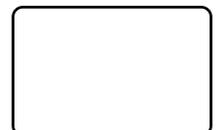


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# Preface

## Vertical Agreements 2019

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](http://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](http://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  
February 2019

# Ukraine

Igor Svechkar, Oleksandr Voznyuk and Tetiana Vovk

Asters

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## Antitrust law

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

The main legal source is the Law of Ukraine on Protection of Economic Competition of 2001 (the Competition Law). Other sources include:

- the Law of Ukraine on the Antimonopoly Committee of Ukraine of 1993;
- the Resolution of the Antimonopoly Committee of Ukraine (AMC) on the Procedure for Filing Applications with the AMC for Obtaining its Approval of the Concerted Practices of the Undertakings of 2002 (the Authorisation Regulation);
- the Resolution of the AMC on Establishing Standard Requirements to Vertical Concerted Practices of Undertakings and Amending the Standard Requirements to Concerted Practices of the Undertakings for their General Exemption from the Requirement to Obtain Prior AMC Clearance of 2017 (the Vertical Block Exemption Regulation); and
- the Law of Ukraine on the State Regulation on Technology Transfer Activities of 2006 (the Technology Transfer Law).

Furthermore, anticompetitive vertical restraints will be regarded as inconsistent with the EU-Ukraine Association Agreement insofar as they may affect trade between the parties to the said Agreement.

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## Types of vertical restraint

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

The Competition Law generally prohibits any agreements, decisions of associations or any other concerted behaviour (including acts and failure to act) of the undertakings that resulted or may result in the prevention, elimination or restriction of competition (anticompetitive concerted practices).

Further, the General Exemption Regulation defines the concept of 'vertical concerted practices on supply and use of products' and 'vertical restraints'. Vertical concerted practices on supply and use of products are concerted practices by two or more undertakings acting at different levels of the production or supply chain, whereby the parties purchase, sell or resell products. Vertical restraints are defined as restrictions of competition relating to vertical concerted practices on supply and use of products.

The Competition Law and the Technology Transfer Law contain non-exhaustive lists of prohibited concerted practices (which may contain vertical restraints), including:

- fixing of prices or other conditions of purchase or sale of goods (resale price maintenance);
- limiting production, markets, technological development or investment, as well as assuming control thereof;
- dividing markets or sources of supply according to territory, type of goods, sale or purchase volumes, or classes of sellers, purchasers or consumers or otherwise;
- ousting of other undertakings, buyers, sellers from the market or limitation of their access into (or exit from) the market;

- application of dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- substantial limitation of competitiveness of other undertakings on the market without objectively justifiable reasons; and
- export limitations (in the case of technology transfer).

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## Legal objective

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

The objective is predominantly economic. In particular, the following objectives may overwhelm the purpose of protection of competition (block exempted under the Vertical Block Exemption Regulation or, if not applicable, exempted individually under the Authorisation Regulation): promotion of technical and technological development, improvement of the production and distribution processes, development and application of uniform standards, and so on.

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## 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 AMC, as a state authority with special status, is responsible for the protection of economic competition. The AMC and its regional divisions (which are involved in supervision of compliance as well as investigation of violations of competition laws on the regional product markets) form the system of AMC bodies responsible for ensuring compliance with the competition laws and, in particular, enforcement of prohibitions on anticompetitive vertical restraints.

Also, prohibitions on anticompetitive vertical restraints may be enforced by commercial courts.

The Cabinet of Ministers of Ukraine (the Cabinet) is not directly involved in the enforcement of prohibitions on anticompetitive vertical restraints. However, it may authorise certain concerted practices that were prohibited by the AMC if the practices have an overwhelming positive effect on public interests. When deciding on a case, the Cabinet may involve any relevant governmental authorities (industry-specific ministries, national agencies, etc) as well as independent experts.

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

The Competition Law applies to relations that have or may have an impact on economic competition in Ukraine, irrespective of the parties' domicile, place of agreement, and so on. This provision can be reasonably interpreted as an effects doctrine applicable to concerted practices in general and vertical restraints in particular. In practice, however, considering that the AMC has exclusive competence to decide on whether certain concerted practices have or may have an impact on economic competition in Ukraine, there is very little room for self-assessment.

There is no public record of extraterritorial application of the Ukrainian competition law regarding vertical restraints; however, the AMC regularly acts extraterritorially on other issues (eg, foreign-to-foreign mergers), and theoretically may do so with respect to vertical restraints that are imposed by non-Ukrainian undertakings and that concern Ukrainian product markets. One should note, however, that extraterritorial enforcement of the AMC decision appears hardly practicable owing to a number of legal uncertainties and technical complications associated with cross-border reciprocal recognition of court judgments (through which the AMC decisions are forcibly enforced).

There is also no public record of the Ukrainian competition rules regarding vertical restraints being applied in a pure internet context.

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

The Competition Law and other applicable regulations apply with respect to vertical restraints to both private and public entities, irrespective of their legal form and type of ownership if they are 'undertakings' in the sense provided in the Competition Law, which stipulates that state bodies, local self-administration authorities and bodies of administrative and economic management and control are considered undertakings for these purposes, including in the context of vertical restraints, in that part of their activities that concerns manufacture, sale and purchase of goods or other commercial activity.

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**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.**

The Competition Law provides for a general exemption of concerted practices involving the transfer of intellectual property rights or the use of intellectual property (still, the Technology Transfer Law contains the list of prohibited restraints). As regards the motor sector, general rules apply (the Competition Law and the Vertical Block Exemption Regulation). Ukraine has implemented the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices, but does not intend to supplement the regulation with EU special rules for the motor sector.

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

The Competition Law sets general rules exempting vertical restraints concerning a product's supply and the use and transfer of intellectual property rights (IPRs) or the use of intellectual property (IP).

**Products supply and use**

The general prohibition does not apply to those restrictions imposed on the other party to the agreement, which limit:

- use of products supplied by the imposing undertaking or use of products of other suppliers;
- purchase of other products from other suppliers or sale of such other products to other undertakings or consumers;
- purchase of products that, owing to their nature or according to custom in trade and other fair business practices, are not related to the subject matter of the relevant agreement (tying); or
- price formation or establishment of other contractual terms and conditions for selling the products supplied by the imposing undertaking to other undertakings or consumers.

This exemption does not apply, however, where such restrictions:

- result in substantial restriction of competition on the market or a significant part thereof, including monopolisation of the relevant markets;
- limit other undertakings' access to the market; or
- result in economically unjustified price increases or product shortages.

The Vertical Block Exemption Regulation added more detail to these rules (see question 18).

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**Transfer of IPRs or use of IP**

The general prohibition does not apply to those restrictions imposed on the transferee (licensee) that do not exceed the limits of the legitimate rights of the owner of the IP (for the list of permitted restrictions, see question 14). Vertical agreements containing provisions that relate to the assignment to the buyer or use by the buyer of intellectual property rights are also covered by the Vertical Block Exemption Regulation (see question 18) to the extent that (i) those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of products by the buyer or its customers and that (ii) in relation to the contract products, those provisions do not contain restrictions of competition having the same object as vertical restraints that are not exempted under the Vertical Block Exemption Regulation.

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

The Competition Law and regulations applicable to vertical restraints do not define 'agreement' and thus, the more general civil law notion should be considered. In particular, the Civil Code of Ukraine of 2003 defines the term 'arrangement or transaction' as actions aimed at the establishment, alteration or termination of civil rights and obligations. The term 'agreement' is similarly defined in the Recommendations on the Application of the Concept on Control of 2018.

The AMC may assess agreements in aggregate. In particular, pursuant to the Vertical Block Exemption Regulation, in cases where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market, the AMC may issue a resolution that the vertical block exemption will not apply to such restraints.

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**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?**

No. The prohibition of anticompetitive practices generally applies to any concerted practices irrespective of their form (eg, formal written agreements, informal oral arrangements, gentlemen's agreements and mutual understandings).

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

The vertical restraints rules apply with respect to undertakings. Pursuant to the Competition Law, when defining the composition of an undertaking all controlling and controlled persons or entities of a separate undertaking in question should be included (ie, a group of undertakings is considered an undertaking itself). Thus, prohibition

of anticompetitive concerted practices, including anticompetitive vertical restraints, does not apply to agreements concluded between separate undertakings belonging to the same group of undertakings, since they occur within the same undertaking.

### 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?

According to the Vertical Block Exemption Regulation, agent–principal agreements shall not be regarded as vertical concerted practices (and shall not be subject to competition rules) if the agent does not bear any, or bears only insignificant, commercial or financial risks in relation to the activities performed for the principal in its capacity of the agent.

The Vertical Block Exemption Regulation further clarifies that the agent bears significant commercial or financial risks (alternative conditions) if the agent:

- bears the costs relating to the supply or purchase of the products (except for the transportation costs, provided that those are covered by the principal);
- is obliged to bear costs for advertising of the relevant products;
- maintains, at its own cost or risk, stocks of the contract products (except for cases where the agent is liable for the loss, shortage or damage of products);
- provides, at its own cost, after-sale repair or maintenance services;
- makes specific investments in equipment, premises or training of personnel (unless these costs are fully reimbursed by the principal);
- undertakes responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, it is liable for fault in this respect;
- takes responsibility for customers’ non-performance of the contract (unless the agent is liable for fault); or
- bears other costs or risks in connection with activities within the same product market required by the principal (unless these activities are fully reimbursed by the principal).

#### 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?

The law does not define ‘agency’ for antitrust purposes, and the notion applicable in a general civil law context is used. The Civil Code of Ukraine of 2003 defines the commission agreement as an undertaking to perform certain actions on behalf and at the expense of the principal, while the Commercial Code of Ukraine of 2003 provides for a more detailed definition: commercial intermediation (agency) is an entrepreneurial activity whereby the commercial agent provides intermediary services to the principal, acting on behalf, in the interest, under control and at the expense of the latter. Both notions are equally referred to in the Vertical Block Exemption Regulation.

### Intellectual property rights

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

The Competition Law does not apply to agreements concerning the transfer of IPRs or the rights to use the IP where such agreements contain certain allowed limitations on the economic activities of the transferee, in particular, on the volume of transferred rights, the period and the territory of permitted use of the IP, type of activity, application and the minimal production volume.

However, if the provisions on the transfer of IPRs form part of a broader agreement, general rules apply to the remaining part of the agreement. If an agreement involves technology transfer it should also be analysed against the list of prohibited restraints contained in the Technology Transfer Law.

Further regulation on this matter is expected in early 2019 (see ‘Update and trends’).

### Analytical framework for assessment

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

The analytical framework for assessment of vertical restraints may include the following steps:

- define the product markets concerned and the respective market shares of the parties;
- establish if any vertical restraints may be regarded as hardcore;
- if the aggregate market share of the parties (including their respective groups) in any of the product markets concerned is less than 30 per cent, a vertical restraint is covered by the Vertical Block Exemption Regulation (except for hardcore restrictions); and
- if the vertical restraint is not covered by the Vertical Block Exemption Regulation:
  - the potential impact of the restraint on competition should be comprehensively assessed; and
  - such vertical restraint may still be exempt from prohibition by obtaining the individual AMC clearance to that effect, if such restraint contributes to rationalisation of production, promotion of technical or economic development, optimisation of export or import processes, development and application of uniform product standards, etc, unless it results in substantial restriction of competition on the market or a significant part thereof.

In exceptional cases, and as a last resort, a vertical restraint prohibited by the AMC may be cleared by a decision of the Cabinet. This will involve illustrating that:

- the relevant efficiencies outweigh the negative impact on competition;
- the restraint is indispensable to the attainment of said efficiencies; and
- the resulting restriction of competition does not constitute a threat to the market economy system.

#### 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?

The supplier’s market share will be most relevant when considering whether a vertical restraint may benefit from the Vertical Block Exemption Regulation.

While the restrictions not covered by the said regulation may still be cleared individually under the Authorisation Regulation (unless they result in substantial restriction of competition), the authority will rather assess whether they carry strong efficiencies (ie, better quality of the products, cost efficiencies etc; see question 15) than consider their historical background or whether they may be considered usual practice. During the review of an application for individual clearance the authority would consider, among other things, the market position of other suppliers (as well as other market players), the general market structure and the resulting changes of the restraint in question.

#### 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?

The AMC’s approach is similar to that outlined in question 16.

### Block exemption and safe harbour

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

The Vertical Block Exemption Regulation generally exempts vertical restraints (save for hardcore restrictions) where the market shares of the supplier and the buyer on the market where they respectively sell and buy the contract goods or services, do not exceed 30 per cent.

The following practices are not covered by the exemption:

- vertical agreements between competing undertakings (unless the vertical agreement is non-reciprocal);
- hardcore vertical restraints, such as:
  - restriction of the buyer's ability to determine its sale price (except for imposing a maximum resale price or recommending a resale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure or incentives);
  - restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract products, except for:
    - restrictions of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
    - restriction of sales to end users by a buyer operating at the wholesale level of trade;
    - restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and
    - restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
  - restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
  - restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade; and
  - restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its products;
- non-compete obligations exceeding five years (or indefinite), except cases where the contract products are sold by the buyer from premises or land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;
- obligations causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, with certain exceptions; and
- obligations causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

### Types of restraint

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

Generally, anticompetitive concerted actions that set prices or other conditions with respect to the purchase or sale of products are prohibited. The Vertical Block Exemption regulation explicitly defines fixing a resale price and establishing a minimum resale price as hardcore restrictions. Theoretically, such restrictions may still benefit from an individual exemption by the AMC, but to obtain that, in addition to arguing economic efficiencies (see question 15), the parties will also need to show that such restriction does not result in substantial restriction of competition. The Competition Law lacks the proper definition of substantial restriction of competition and a great degree of discretion is vested in this respect with the AMC.

The establishment of maximum and recommended resale prices is generally not viewed as problematic (unless those amount to a fixed or minimum sale price as a result of pressure or certain incentives).

#### 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'?

There are no publicly available AMC decisions on the issue and such arrangements are likely to be analysed under the general rules and exemptions applicable to the establishment of resale prices (see question 19).

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

There are no publicly available AMC decisions on the issue, but it is likely that, in order to assess the degree of impact on the market and possible foreclosure effects, the AMC may consider other restrictive provisions in combination with resale price maintenance restrictions.

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

There are no publicly available AMC decisions or guidelines containing such analysis. The AMC makes an assessment of any efficiencies that may be brought about by a restrictive provision (including resale price maintenance restrictions) in the course of the review of the parties' application for individual exemption under the Authorisation Regulation (for the list of acceptable efficiencies, see question 15). In addition to arguing efficiencies, the parties will also need to show that resale price maintenance will not result in substantial restriction of competition. The burden of proof lies on the parties.

#### 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.

There are no publicly available AMC decisions in this respect, but, given that the AMC considers alignment with competitors' prices anti-competitive, it is likely that setting retail prices for supplier A's products by reference to supplier B's retail price may be also seen by the AMC as anticompetitive and aimed at or resulting in elimination of price competition between suppliers' products at the retail level.

#### 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.

It may be assumed that where sufficient competition at the retail level exists, most-favoured nations (MFNs) may benefit end-customers and may be regarded by the AMC as pro-competitive. If, however, MFN clauses are applied to buyers that have strong market positions at the retail level, the AMC may find wholesale MFNs as facilitating coordination of competitive behaviour and softening of competition between the retailers (eg, via unjustified price growth). Reportedly, there has been at least one decision of the AMC's regional division (although this decision is not publicly available), where very similar practices were found to be anticompetitive, but this does not appear indicative of the AMC's position, given that the AMC comes across similar provisions in contracts quite often, and has not expressed concerns (at least where no dominant players were involved).

#### 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.

The supplier is free to set prices for its products within an agent-principal arrangement, but competition concerns may arise if the supplier enjoys some degree of market power at the supply level and the agent acts as an independent undertaking at the resale level.

**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.**

There is no relevant guidance or precedent enforcement practice by the AMC on the minimum advertised price policy (MAPP) or internet minimum advertised price (IMAP) issue. There is an appreciable risk that such restrictions will be treated by the AMC as an indirect resale price maintenance obligation. Thus, it is advisable to obtain either a positive opinion letter from the authority or individual antitrust clearance before implementing such MAPP or IMAP.

**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.**

The AMC's assessment is usually similar to that outlined in question 24.

**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?**

Allocating territories under the exclusive distribution is exempted by the Vertical Block Exemption Regulation (except for restrictions of passive sales), provided that the market shares of the supplier and the buyer on the market where they respectively sell and buy the contract goods or services, do not exceed 30 per cent. As regards selective distribution, the said guidelines permit restrictions on members of a selective distribution system on operating out of their unauthorised place of establishment.

**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?**

The antitrust aspect of internet sales is not specifically regulated by the Competition Law. There are also no publicly available AMC or court decisions in relation to restrictions on internet sales. It is expected, though, that having implemented EU Regulation No. 330/2010, the AMC will also refer to the relevant EC Vertical Guidelines and established EU courts' practice for practical guidance.

**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 following may be permissible under the Vertical Block Exemption Regulation (if the relevant market share test is met):

- the restriction of active sales to a customer group within the exclusivity system, where such a restriction does not limit sales by the relevant customers;
- the restriction of sales to end-consumers by a buyer operating at the wholesale level of trade;
- the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and
- the restriction of the buyer's ability to sell components, supplied for the purposes of assembling of goods, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

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

Restrictions on the use to which a buyer may put the contract products may be caught by the prohibition on putting into agreements additional obligations that are not related to the subject matter of the agreement. However, such restrictions may be allowed under block exemptions:

- unconditionally in agreements concerning the transfer of IPRs or on granting the right to use the IP; and
- in agreements concerning product supply and use, provided such restriction will not:
  - result in substantial restriction of competition on the market or its significant part;

- result in monopolisation of the market;
- limit other undertakings' access to the market; or
- result in economically unjustified price increases or product shortages (see questions 8, 14 and 18).

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

The antitrust aspect of internet advertising and sales is not specifically regulated by the Competition Law. There is also no public record of AMC decisions in relation to restrictions on using the internet for advertising or selling, or antitrust-based litigation resulting in court judgments regarding restrictions on internet sales. It is anticipated, though, that the AMC will generally follow EC Commission and courts' practice on the issue.

**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'?**

Ukrainian competition laws and regulations do not specifically address this. Also, there is no publicly available AMC decision analysing such issues.

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

Selective distribution systems may be exempt under the Vertical Block Exemption Regulation, provided that the applicable market share thresholds are met. Irrespective of the parties' market shares, the following will be regarded as hardcore restrictions:

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

Also, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers will not be covered by the said block exemption regulation.

Currently, there is no available AMC practice prohibiting the selective distribution systems from limiting the total number distributors admitted to the system.

A specific exception is established in the Technology Transfer Law, which prohibits imposition of an obligation on the transferee to sell the products incorporating the transferred technology to the buyers preselected by the transferor.

**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?**

There is no clear legal guidance on the issue. However, it is likely that selective distribution systems relating to certain types of product requiring specific presentation and protection of brand reputation (eg, luxury products and cars) or treatment and personnel (eg, healthcare and cosmetics) will be justified.

**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?**

There is no legal guidance on the issue.

**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?**

There is no public record of such decisions.

### Update and trends

#### Anticipated developments

The AMC intends to implement Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of article 101(3) TFEU to categories of technology transfer agreements. The relevant regulation is expected to come into force in early 2019. Under the regulation, the technology transfer agreement will be generally exempted (save for hardcore restrictions) if:

- it is concluded between competitors whose combined market share does not exceed 20 per cent of the relevant market or markets; or
- it is concluded between non-competitors whose individual market share does not exceed 30 per cent of the relevant market or markets.

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

The AMC will likely consider the market structure as one of the relevant factors for the market analysis. The possible cumulative restrictive effects of multiple selective distribution systems may also be taken into account. It is the AMC's position that vertical restraints may have cumulative restrictive effects if selective distribution systems cover more than 50 per cent of the market.

### 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?

Restriction of active or passive sales to end users by the approved members of a selective distribution system operating at the retail level of trade (except for permissible restriction from selling to unauthorised distributors or unauthorised points of sale located in the territory of the selective distribution system) and restriction of cross-supplies between distributors within a selective distribution system are expressly considered as hardcore restrictions, irrespective of the market shares of the parties.

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

Restriction on the buyer's ability to obtain the supplier's products from alternative sources may come within several categories of prohibited practices (eg, as dividing markets or sources of supply, ousting of other suppliers from the market or limitation of their access to the market, or substantial limitation of competitiveness of the buyer without objectively justifiable reasons). In particular, such restrictions may amount to a non-compete obligation, which are exempt under the Vertical Block Exemption Regulation only if their duration does not exceed five years and the parties' market shares are below 30 per cent.

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

Such restriction may be exempt under the Vertical Block Exemption Regulation, provided that the parties meet the market share thresholds. Otherwise, such restrictions may be cleared individually, unless they result in substantial restriction of competition (see question 15).

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

Restriction on the buyer's ability to stock products competing with those supplied by the supplier may amount to a non-compete obligation, which is exempt under the Vertical Block Exemption Regulation, provided that the parties meet the applicable thresholds and duration of the restriction does not exceed five years. Otherwise, such restrictions may be cleared individually, unless they result in substantial restriction of competition (see question 15).

### 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?

A requirement that the buyer purchase a certain amount, a minimum percentage of the contract products or a full range of the supplier's products may pose competition concerns, especially if the supplier's market position is strong or it is an important source of supply for other reasons. These practices may amount to a non-compete obligation and will be assessed similarly to restrictions discussed in question 41.

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

Restricting the supplier's ability to supply to other buyers may be covered by the Vertical Block Exemption Regulation, if the parties meet the market share thresholds. Otherwise, the general rules (see question 15) will apply.

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

Restricting the supplier's ability to sell directly to end-consumers is not prohibited as such and, for example, may make up part of an exclusive distribution system that allows a supplier to keep the wholesale and retail level of trade separate. However, the restriction of the supplier's ability to sell components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods is regarded as a hardcore restriction.

### 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?

No.

### Notifying agreements

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

The Competition Law provides for the possibility of individual exemptions: agreements containing vertical restraints that are not covered by the Vertical Block Exemption Regulation may not be executed, unless individually exempt in accordance with the procedure prescribed by the Authorisation Regulation. A more reasonable interpretation of this prohibition allows execution of an agreement prior to clearance, provided the parties refrain from its implementation until it is authorised by the AMC.

The notified agreement may be exempt if the parties prove its economic efficiencies, such as:

- rationalisation of production, purchase or sales processes;
- promotion of technical, technological or economic development;
- development of small or medium-sized enterprises;
- optimisation of export or import processes;
- development and application of uniform technical terms and product standards; and
- rationalisation of production processes.

However, the AMC authorisation may not be granted if the agreement results in substantial restriction of competition in the market or a significant part thereof.

The parties seeking individual exemption must submit an application for clearance to the AMC. Upon review of the application, which may last three and a half months (and can be further extended), the AMC takes a reasoned decision to authorise the notified agreement or, if the notified agreement raises any competition concerns, the AMC initiates an in-depth investigation (Phase II review). The statutory Phase II review period is limited to three months from the date when all the information requested by the AMC was provided. However, in practice, the AMC investigation may take much longer since the AMC may request additional information, in which case a new three-month period would begin from the date on which the requested information was filed with the AMC. In practice, depending on the complexity of the case, the Phase II review period may last up to one year or even more. Within the second phase, the AMC may hold hearings of the applicants

and interested parties. Following an in-depth investigation, the AMC may authorise, conditionally authorise or prohibit implementation of the notified agreement. Since mid-2015, the AMC has published non-confidential versions of its decisions.

Exceptionally, a prohibited agreement may be exempted by a decision of the Cabinet based on the above efficiencies analysis, unless the restrictions contained therein are not indispensable to the attainment of the above efficiencies or the resulting restriction of competition constitutes a threat to the market economy system.

#### 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?

It is possible to obtain guidance from the AMC. The following procedures are available:

- recommendatory conclusions on whether the intended actions fall under the general prohibition and whether they may be eligible for an individual exemption; or
- preliminary conclusions of the AMC based on the detailed information regarding the intended action on whether such action may be authorised or prohibited or whether such action requires the authorisation of the AMC at all (or a combination).

#### 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 may file complaints to the AMC bodies about alleged violation of the relevant competition laws. The complainants may either be parties to the relevant restrictive agreement or third parties. The filing and investigation procedure is governed by the Rules for Investigation of Antitrust Violations of 1994.

If not rejected on formal grounds, the complaint shall be reviewed by the AMC within 30 calendar days (extendable further by 60 calendar days if additional information is required). Review of the complaint is finalised by issuance of the resolution to initiate or reject initiation of the investigation of the case. The time of investigation on the substance is not limited.

#### 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?

No separate statistics are publicly available with regard to vertical restraints. Based on available general AMC statistics, the vertical restraints proportion is likely to be significantly below 15 per cent.

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

The Competition Law does not declare agreements containing prohibited vertical restraints void per se. Respective provisions of an agreement and even the entire agreement may be rendered null and void by a court if requested by interested parties based on the AMC's decision establishing the violation of Ukrainian competition law. It is worth noting, however, that recent case law argues that agreements among shareholders aimed at the restriction or elimination of economic competition in the Ukrainian product markets are void. It is not clear whether the courts will extend this approach to cases regarding vertical restraints.

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

The AMC is entitled to impose fines for violation of Ukrainian competition law, including implementation of prohibited concerted practices, as well as to impose other obligations on the parties (eg, imposing conditions on the authorisation of the restrictive agreement or obliging the parties to terminate the violation). If the fine is not paid voluntarily, the AMC decision may be enforced in court.

No separate AMC statistics regarding fines for implementation of prohibited vertical restraints is available. According to the AMC Fining Guidelines of 2016 (recommendatory, but the AMC is committed to strictly follow these), the basic amount of fine for implementation of anticompetitive concerted practices (including vertical restraints) may be equal to either:

- 10 per cent of the turnover of the undertaking from the sales of products on the relevant and adjacent markets for the period between the commencement of the violation and its termination or the AMC's decision; or
- in the case of concerted practices that may be individually exempted by the AMC or by the government: 5 per cent of the turnover of the undertaking from the sales of products on the relevant markets for the period between the commencement of the violation and its termination or the respective decision.

According to the above-mentioned Fining Guidelines, the AMC may apply coefficients (depending on the effect of violation on competition, social importance of the products, profitability of economic activity connected with violation) that may increase or decrease the fine. Also, in each case, the above basic amounts are subject to possible further adjustment for aggravating or mitigating circumstances.

Still, theoretically, the maximum possible fine may amount to up to 10 per cent of the group worldwide turnover of the infringing undertaking in the financial year preceding the year in which the fine is imposed.



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

The AMC has broad investigative powers, including the power to:

- conduct on-site inspections of business premises and transport facilities;
- request expert opinions;
- request information or documents from the parties or other undertakings (or both), irrespective of their location;
- retain or seize documents, items or information media that may contain evidence; and
- engage police, customs and other enforcement authorities.

Failure to provide information at the AMC's request or provision of incorrect or incomplete information, as well as prevention of the AMC's inspections and other evidence-collection activities, is punishable by a fine of up to 1 per cent of the group worldwide turnover of the infringing undertaking in the financial year preceding the year in which the fine is imposed.

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**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?**

An infringing party may be exposed to damages claims by aggrieved third parties (eg, competitors) and theoretically a party to a prohibited agreement is not precluded from recovering damages from the other parties to the agreement.

Persons that sustained damage as a result of an unauthorised or prohibited transaction may seek damages in court. Damages are awarded at twice the amount of the loss. Claims for damages are subject to a general three-year limitation period.

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

No.

## *Getting the Deal Through*

Acquisition Finance	Environment & Climate Regulation	Private Antitrust Litigation
Advertising & Marketing	Equity Derivatives	Private Banking & Wealth Management
Agribusiness	Executive Compensation & Employee Benefits	Private Client
Air Transport	Financial Services Compliance	Private Equity
Anti-Corruption Regulation	Financial Services Litigation	Private M&A
Anti-Money Laundering	Fintech	Product Liability
Appeals	Foreign Investment Review	Product Recall
Arbitration	Franchise	Project Finance
Art Law	Fund Management	Public M&A
Asset Recovery	Gaming	Public-Private Partnerships
Automotive	Gas Regulation	Public Procurement
Aviation Finance & Leasing	Government Investigations	Rail Transport
Aviation Liability	Government Relations	Real Estate
Banking Regulation	Healthcare Enforcement & Litigation	Real Estate M&A
Cartel Regulation	High-Yield Debt	Renewable Energy
Class Actions	Initial Public Offerings	Restructuring & Insolvency
Cloud Computing	Insurance & Reinsurance	Right of Publicity
Commercial Contracts	Insurance Litigation	Risk & Compliance Management
Competition Compliance	Intellectual Property & Antitrust	Securities Finance
Complex Commercial Litigation	Investment Treaty Arbitration	Securities Litigation
Construction	Islamic Finance & Markets	Shareholder Activism & Engagement
Copyright	Joint Ventures	Ship Finance
Corporate Governance	Labour & Employment	Shipbuilding
Corporate Immigration	Legal Privilege & Professional Secrecy	Shipping
Corporate Reorganisations	Licensing	Sovereign Immunity
Cybersecurity	Life Sciences	Sports Law
Data Protection & Privacy	Litigation Funding	State Aid
Debt Capital Markets	Loans & Secured Financing	Structured Finance & Securitisation
Defence & Security Procurement	M&A Litigation	Tax Controversy
Dispute Resolution	Mediation	Tax on Inbound Investment
Distribution & Agency	Merger Control	Technology M&A
Domains & Domain Names	Mining	Telecoms & Media
Dominance	Oil Regulation	Trade & Customs
e-Commerce	Patents	Trademarks
Electricity Regulation	Pensions & Retirement Plans	Transfer Pricing
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