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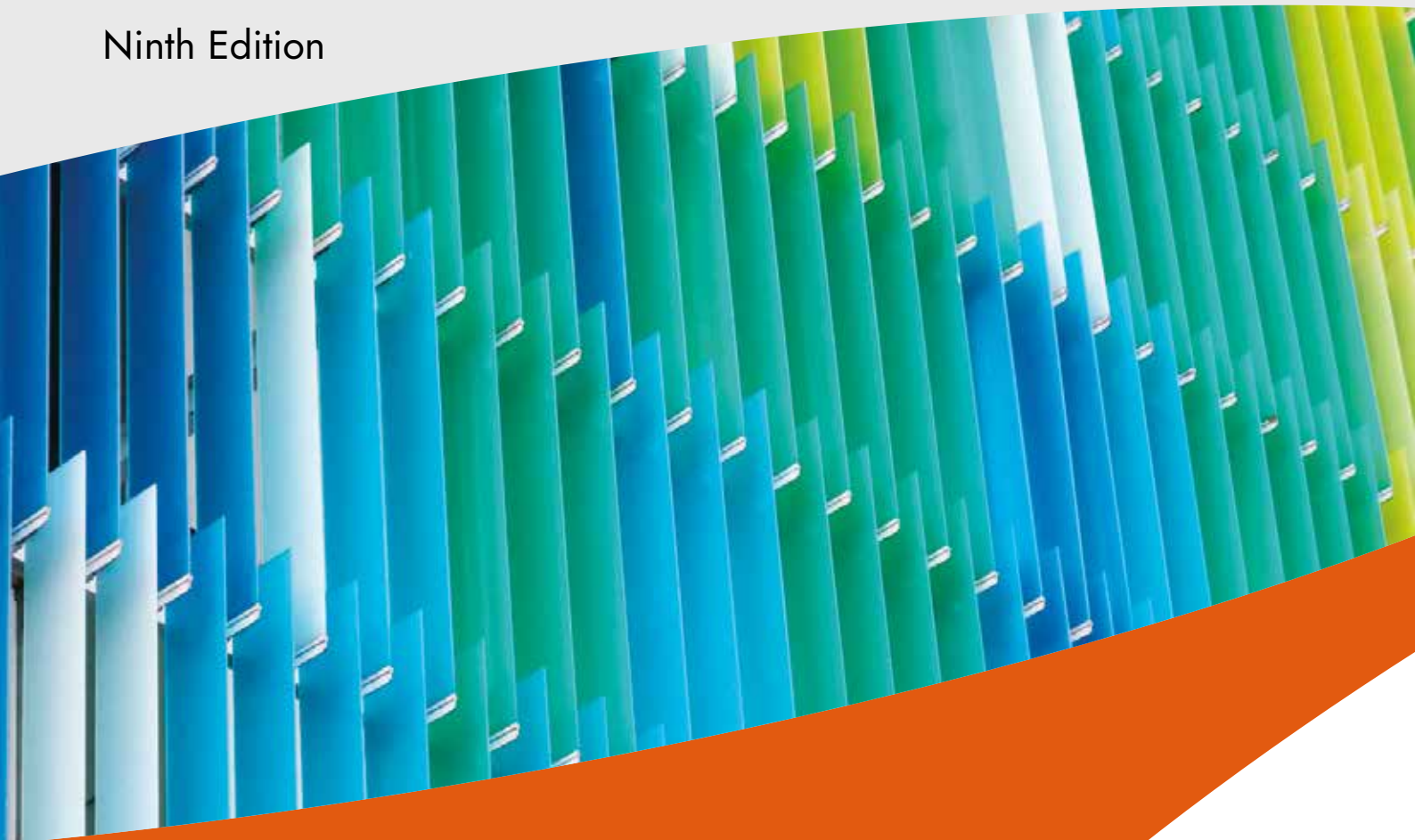
Vertical Agreements and Dominant Firms 2025

Ninth Edition



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1 General

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

The European Commission ('Commission') and the National Competition Authorities ('NCAs') form a network of public authorities which apply the relevant EU rules. They act in close cooperation through the European Competition Network. For NCAs or national courts to apply EU competition law, there needs to be an effect on trade between Member States. In the absence thereof, matters will exclusively be governed by the national competition law of the relevant Member State(s).

1.2 What investigative powers do the responsible competition authorities have?

The Commission can conduct unannounced inspections (dawn raids). It can search and seal company premises, copy or seize original documents, and collect digital/forensic evidence. It also has the power to ask questions. Moreover, it has the right to search the homes and cars of directors/managers and other staff members. The Commission can also issue written requests for information. Undertakings and persons involved have a duty to cooperate, failing which the Commission can impose fines and periodic penalty payments. NCAs have similar powers, depending on the national regime. The power of the Commission and the NCAs has limitations, depending on the jurisdiction, including Legal Professional Privilege ('LPP'), the right not to incriminate, the need to secure judicial search warrants and time limitations.

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

The Commission can open an investigation *ex officio* or following a complaint. The Commission conducts an initial investigation, following which the case is closed, sent to an NCA or the investigation is continued. After finalising the investigation, the Commission can either issue a statement of objections or close the case. If a statement of objections is issued, the undertaking(s) concerned are invited to respond in writing and orally. The undertaking(s) is (are) granted access to the (non-confidential version of the) Commission's investigation file. Following this stage, the Commission can take a prohibition decision, or close the investigation without imposing any remedies. Parties can contact the Commission at any time to discuss possible commitments (see below). The NCAs have similar processes, depending on the national regime.

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

The Commission and the NCAs can adopt the following decisions: (i) finding and requiring termination of an infringement; (ii) imposition of interim measures; (iii) accepting commitments; and (iv) imposing fines and periodic penalty payments. The NCAs can impose other penalties provided for in national law, including fines for individuals, criminal sanctions or the disqualification of directors. The available remedies are not harmonised across the various Member States.

1.5 How are those remedies determined and/or calculated?

The Commission can impose a maximum fine of 10% of the undertaking's worldwide turnover from the business year preceding the decision. The Commission first sets a basic amount. This is done by taking a proportion of the value of sales on the market concerned, depending on the degree of gravity of the infringement, which is then multiplied by the number of years of the infringement. The basic amount may then be adjusted upwards, based on aggravating circumstances or to ensure a sufficient deterrent effect, or downwards, based on mitigating circumstances.

The Commission also has the power to impose behavioural or structural remedies. These remedies must be proportionate and necessary to effectively bring the infringement to an end.

Many national competition laws include a calculation method resembling that of the Commission; however, the regime can differ across the Member States.

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

Companies under investigation may contact the Commission at any time to discuss commitments, preferably at the earliest possible stage. If the Commission is convinced of the genuine willingness to propose effective commitments, it drafts a Preliminary Assessment ('PA'), summarising the main facts and competition concerns. The PA serves as a basis to (better) define appropriate commitments. The Commission market tests the commitments. Depending on the results, the

commitments may be amended. The Commission makes the commitments binding through a commitment decision. The Commission or the undertaking(s) may decide at any moment to discontinue their discussions.

The Commission is also increasingly rewarding cooperation (in the form of providing new evidence or admitting the infringement) with fine reductions.

1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

Following the introduction of the commitment procedure in 2004, the Commission increasingly took commitment decisions. A considerable number of investigations are closed through a commitment decision. A similar trend can be observed at the level of certain NCAs.

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

The Commission can take an infringement decision without having to defend it in court proceedings. Its decisions can, however, be appealed before the General Court, which reviews the decisions from a factual and legal perspective. Decisions of the General Court can subsequently be appealed before the Court of Justice. This review is limited to points of law. In several Member States, courts act as public enforcers.

1.9 What is the appeals process?

The General Court and the Court of Justice have their own rules of procedure. An application sent to the registry opens the proceedings. The proceedings generally include a written and an oral phase. The oral phase is, in principle, held during a public hearing. The judgment is delivered at a public hearing.

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

Private enforcement is available via litigation before the national courts (and, if applicable, arbitration). The Commission adopted a directive on antitrust damages actions to render it easier to pursue damage claims.

Private actions provide several possibilities that are not available under public enforcement. National courts may award damages and rule on claims for payment pursuant to contractual obligations. It is, moreover, for courts to apply the civil sanction of nullity in contractual relationships. Courts generally have the power to award legal costs to the successful applicant.

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

The Commission has adopted a number of block exemption regulations that provide general exemptions with respect to the application of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'). If no block exemption is available, parties may prove that the relevant conduct is either not restrictive of competition within the meaning of Article 101(1) TFEU or, if it is restrictive, qualifies for an individual exemption based on Article 101(3) TFEU.

Article 102 TFEU does not foresee an exemption procedure. In the case law, justifications have been developed (see below).

1.12 Does enforcement vary between industries or businesses?

While there is no clear variation, the Commission and the NCAs do set priorities, which are often linked to certain industries or businesses. In the field of vertical agreements, e-commerce is given particular attention. NCAs often publish their priorities for the working year. With regard to vertical agreements, resale price maintenance ('RPM') triggers considerable enforcement activity.

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

In view of the principle of primacy of EU law, EU competition law takes precedence over national law. An industry's regulatory context is a factor that will be taken into account as part of the legal and economic context in the evaluation of a practice under competition law.

In 2010, Deutsche Telekom was condemned for price-squeezing, despite the fact that German regulator RegTP had approved its pricing. It was ruled that Deutsche Telekom had scope to adjust its retail prices, despite the intervention of RegTP. This reflects the general principle that government compulsion (e.g., by means of a regulatory framework) excludes the application of the competition rules to the extent that it leaves no freedom of action for the companies involved.

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

The political environment does not *per se* affect antitrust enforcement. The Commission and the NCAs, however, take policy decisions, including which cases to investigate, that could be influenced politically. It should, moreover, be noted that the EU commissioner is politically appointed.

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

The Commission has a clear focus on digital markets. Sustainability is also an important topic. In addition, the review of the legal framework regarding horizontal and vertical agreements, as well as exclusionary abuses, has been an important area of attention, triggering many debates. With the adoption of the new vertical (2022) and horizontal (2023) regimes, and the upcoming Guidelines on exclusionary abuses (expected by the end of 2025), these debates are likely to focus on the proper application of the new regimes.

1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

An important recent development in the sphere of vertical agreements is the adoption of Regulation 2022/720. This is the new Block Exemption Regulation that applies to vertical

agreements. It entered into force on 1 June 2022 and will expire on 31 May 2034. Together with the new Regulation the Commission also adopted new Vertical Guidelines. They replace the existing Guidelines that were adopted in 2010. The most important novelties concern agency, dual distribution, active sales restrictions, e-commerce, platforms and price parity.

With regard to the automotive sector, the Commission has extended the application of Regulation 461/2010 by another five years, until 2028. The Commission made very limited amendments to the Supplementary Guidelines related to Regulation 461/2010.

An important development in the context of dominance is the publication by the Commission of an amendment to its existing Guidance on enforcement priorities in relation to exclusionary abuses in 2023, in anticipation of the adoption of Guidelines on this topic by the end of 2025. A first draft of the new Guidelines was published in the summer of 2024. In addition, the Court of Justice rendered a number of important decisions, including in *Superleague*, *Super Bock* and *ISU*. The Commission, *inter alia*, fined Mondelez for hindering cross-border sales and re-adopted parts of its initial *Intel* decision following the General Court's *renvoi* decision.

Furthermore, as discussed below, a revised Market Definition Notice was published.

Finally, the European Commission recently announced it will launch an investigation on the topic of territorial supply restraints.

2 Vertical Agreements

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

Enforceability issues of vertical agreements are often raised before national courts.

Until recently, public enforcement essentially resided with the NCAs. The Commission issued a number of infringement decisions addressing RPM in the online world and with cross-border trade. Having regard to the newly adopted Regulation 2022/720 and Vertical Guidelines, it is reasonable to expect that RPM, online sales and platforms will be the focal points of future enforcement.

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

The concept of 'agreement' is broader than the classic civil law definition of the word. It suffices that the parties express a joint intention to conduct themselves on the market in a particular way. The form is irrelevant. (For further details, see the 2022 Vertical Guidelines § 53.)

The concept of 'vertical agreement' is not confined to agreements, but also encompasses concerted practices (Article 1(1)(a) of Regulation 2022/720).

An agreement will be deemed 'vertical' if the parties operate at different levels of the production or distribution chain for the purposes of that agreement.

2.3 What are the laws governing vertical agreements?

From an EU perspective, the relevant legislation consists essentially of Articles 101 and 102 TFEU, Regulation 2022/720 (general block exemption governing vertical agreements), Regulation 461/2010 (sector-specific block exemption for the automotive sector), the 2022 Vertical Guidelines and the Supplementary Guidelines (for the automotive sector).

On account of the principle of convergence (Article 3 of Regulation 1/2003), EU legislation is also relevant in the context of the application of national competition law if there is an effect on trade between Member States.

If the required effect on trade is not established, national competition law applies. Generally speaking, the relevant provisions of national competition law are phrased broadly, and the overriding practice applies such provisions in a manner consistent with the corresponding provisions of EU competition law. National deviations are obviously possible, thus a specific assessment of the applicable national regime is always required.

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

For agreements that come within the scope of application, three types of provisions can be distinguished:

- Hardcore restrictions: certain territorial and customer restrictions that are imposed directly or indirectly on distributors (both offline or online), and RPM.
- Excluded restrictions: non-compete clauses that do not benefit from the block exemption unless certain conditions are met, and certain retail price parity provisions.
- Other vertical restraints are automatically exempted.

Vertical agreements that cannot benefit from the block exemption must be subjected to a self-assessment based on Article 101(3) TFEU.

2.5 What is the analytical framework for assessing vertical agreements?

It must be determined whether the agreement restricts competition (see, e.g. *De Minimis Notice*, question 2.8). If so, the agreement is best assessed on the basis of the block exemption. In this respect, particular attention must be paid to the presence of any hardcore or excluded restrictions.

If the vertical agreement falls outside the block exemption, an analysis on the basis of Article 101 TFEU is called for. If the agreement falls within the scope of Article 101(1) TFEU, a self-assessment based on Article 101(3) TFEU is required. Guidance supporting such assessment can be found in the 2022 Vertical Guidelines.

If the agreement does not fall within the scope of EU competition law due to a lack of the required effect on trade between Member States, its assessment must be conducted exclusively on the basis of national competition law.

It should also be checked whether an analysis under Article 102 TFEU is required.

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

Guidance on the definition of relevant markets can be found in nos 170 and following of the 2022 Vertical Guidelines. Reference can further be made to the revised Market Definition Notice published by the Commission at the beginning of 2024, replacing the 1997 Notice.

For the assessment of whether the supplier complies with the market share limit of 30% under the block exemption (see

below), the market on which the supplier is selling the contract goods serves as the point of reference. Regarding the reseller/buyer, the purchasing market should be considered, i.e. the market on which it purchases the contract goods, and not the downstream market on which it engages in resale activities.

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

A vertical agreement entered into between competing undertakings is, in principle, excluded from the benefit of the block exemption. An exception to this is where the supplier is active upstream as a manufacturer, importer or wholesaler and at a downstream level, and the reseller/buyer is an importer, wholesaler or retailer at such downstream level, but does not compete at the upstream level where it buys the goods. The block exemption contains a similar exception regarding the provision of services. Dual distribution set-ups that meet this requirement may fall within the scope of the block exemption (see Article 2(4) of Regulation 2022/720).

In all other cases, a self-assessment pursuant to Article 101 TFEU will be required. In this respect, the horizontal dimension at the downstream level requires specific attention. Guidance in this respect can be found in the 2023 Horizontal Guidelines (part 5).

In the context of the new Regulation 2022/720, the issue of dual distribution has been given considerable attention, in particular the aspect of information exchange in relation to dual distribution (see Article 2(5) of Regulation 2022/720).

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

Vertical agreements benefit from the *De Minimis Notice* if the market share of the supplier and the buyer/reseller on any of the affected relevant markets does not exceed 15%. In the case of cumulative foreclosure effects of parallel networks of agreements, the limit is reduced to 5%. Vertical agreements benefitting from *de minimis* treatment escape the prohibition of Article 101(1) TFEU for all restrictions of competition. However, if the vertical agreement includes any of the hardcore restrictions listed in Article 4 of Regulation 2022/720, the *de minimis* regime does not apply.

Pursuant to Article 3 of Regulation 2022/720, a market share limit of 30% applies as a condition for the application of the block exemption. The supplier and the reseller/buyer must each comply with the limit. The market share of the reseller/buyer is measured by calculating his market share of the purchasing market. Article 8 of Regulation 2022/720 contains specific rules on the calculation of the market shares and offers room for limited exceptions.

Parties with market shares exceeding 40% should check whether their vertical agreements should also be assessed from the angle of Article 102 TFEU.

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

If the block exemption applies, economic analysis does not play a role and the check to be conducted is essentially legal in nature. If it does not apply and a self-assessment must be made, economic analysis will be crucial to determine whether there is an appreciable restriction of competition and, if so, whether the conditions of Article 101(3) TFEU are met.

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

The requirement to prove efficiencies does not arise in cases where the block exemption is applicable. If the block exemption is not applicable, a self-assessment must be undertaken, based on the four conditions of Article 101(3) TFEU. The first condition is that efficiencies are duly established. Such efficiencies are described as a contribution to improving the production or distribution of goods or to promoting technical or economic progress.

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

Vertical agreements containing provisions relating to the assignment or use of intellectual property rights ('IPR') by the reseller/buyer can benefit from the block exemption under strict conditions, namely that the IPR provisions (i) do not constitute the primary object of the vertical agreement, (ii) are directly related to the use, sale or resale of goods or services by the buyer or its customers, and (iii) do not contain restrictions of competition having the same object as the vertical restraints that are not block exempted.

Vertical agreements not meeting these conditions require a self-assessment. Guidance from the Commission with regard to such assessment is limited.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Enforcers will only need to demonstrate anticompetitive effects in cases where the restrictive practices do not qualify as 'by-object' restrictions. For vertical agreements, the Commission refers to the list of hardcore restrictions in Article 4 of Regulation 2022/720 to define the relevant by-object restrictions. Recent case law of the Court of Justice, notably in the *Super Bock* preliminary ruling, however, casts doubt as to whether such a direct link between a hardcore and a by-object qualification can always be made. For any restrictions in vertical agreements other than by-object restrictions, anticompetitive effects will need to be demonstrated and such proven effects must be appreciable. The need for the enforcers to demonstrate such effects applies only in cases where Regulation 2022/720 does not apply, or the enforcer intends to withdraw or disapply the benefit of the block exemption.

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

The weighing of the anticompetitive impact against potential benefits and efficiencies occurs within the context of the application of Article 101(3) TFEU, but does not apply in cases governed by the block exemption.

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

Apart from a *de minimis* defence (see above), there are essentially three defences: government compulsion; ancillary

restraints; and the availability of an objective justification. In cases where these defences cannot be applied successfully, the conditions for an individual exemption must be assessed. Any of the foregoing defences needs to be considered only in cases where the vertical agreement does not benefit from an automatic (block) exemption pursuant to Regulation 2022/720 or Regulation 461/2010. Furthermore, recent case law of the Court of Justice in *Super league*, *ISU* and *RAFC* underscores that, in the case of a (vertical) by-object restriction that does not benefit from the block exemption, defences based on the ancillary restraints doctrine and the objective justification theory are not available.

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

The Commission has issued Vertical Guidelines and Supplementary Guidelines (for the automotive sector).

2.16 How is resale price maintenance treated under the law?

Vertical price fixing (RPM) is considered a hardcore restriction in Regulation 2022/720 (Article 4(a)). The hardcore restriction covers the imposition of fixed or minimum prices, but does not object to price recommendations and the imposition of (genuine) maximum prices. The Vertical Guidelines (nos 197 and following) do not rule out that vertical price fixing may benefit from an individual exemption under Article 101(3) TFEU. The exceptions, however, are narrowly circumscribed.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing takes the form of non-compete obligations.

Within the context of the block exemption, the non-compete concept extends to both single branding obligations and certain cases of quantity forcing. A quantity requirement qualifies as a non-compete obligation if it entails a direct or indirect obligation for the buyer/reseller to purchase from the supplier or an undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods and their substitutes on the relevant market.

Non-compete obligations benefit from the safe harbour if they are entered into for a fixed term not exceeding five years. Tacit renewal is permissible provided that the buyer/reseller can step out every five years with a reasonable notice and at a reasonable cost. Exceptions apply to scenarios where the buyer operates from premises and land owned by the supplier or leased by the supplier from third parties.

Furthermore, Regulation 2022/720 exempts, under strict conditions, certain post-term non-compete obligations.

Guidance regarding non-compete obligations outside the block exemption is offered in nos 298 and following of the 2022 Vertical Guidelines.

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

Both practices are automatically exempted in the case of vertical agreements covered by the block exemption.

Outside the block exemption, an individual assessment under Articles 101 and, possibly, 102 is called for. Guidance in this respect is offered in nos 389 and following of the 2022 Vertical Guidelines.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination can benefit from an automatic exemption in the case of vertical agreements covered by the block exemption. However, certain measures taken to protect a price discrimination practice (such as the blocking of cross-border sales, customer restrictions or vertical price fixing) may constitute hardcore restrictions.

The public enforcement practice in relation to price discrimination falling outside of the block exemption is very limited and essentially confined to Article 102 TFEU.

2.20 How do enforcers and courts examine loyalty discount claims?

Under the block exemption regime, loyalty discounts are addressed in conjunction with the principles covering non-compete obligations. A loyalty discount scheme is likely to be considered an indirect means of achieving a non-compete commitment on the part of the reseller/buyer (please see question 2.17).

The position is more complex as regards dominant undertakings, where case law has been developed over the years specifically addressing the issue. In January 2022, the General Court annulled part of the Commission's decision in *Intel* on this topic. The Commission's appeal of this judgment has, in the meantime, been rejected by the Court of Justice in its judgment of 24 October 2024. As a consequence, the standard of proof for finding abuse within the meaning of Article 102 TFEU that relates to discount schemes has increased compared to past Commission practice.

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

The position under Article 101 TFEU is similar to that outlined in respect of tying (please see question 2.18).

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

The vertical restrictions that are characterised as hardcore are the following:

- RPM.
- Territorial restrictions imposed on the reseller/buyer (both online and offline), with limited exceptions.
- Customer restrictions imposed on the reseller/buyer (both online and offline), with limited exceptions.

Restrictions imposed on the supplier (with an exception related to the after-market) and territorial or customer restrictions imposed on the distributor pertaining to countries outside of the EEA are, in principle, not on the hardcore list.

With regard to territorial and customer restrictions, please consult the Expert Report published on the website of DG Competition (https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en and https://ec.europa.eu/competition-policy/document/download/8f01bfe6-b940-48a0-abd4-3c2f1a063947_en?filename=kd0821131enn_VBER_active_sales.pdf).

2.23 How are MFNs treated under the law?

There is no harmonised view across the EU as to the assessment from a competition law perspective.

Provided that the market share limit of 30% is not exceeded and the parties involved do not qualify as competing undertakings, MFN provisions should be able to benefit from the block exemption. General guidance on MFNs is provided in the Vertical Guidelines (§ 356 *et seq.*).

NCAs have arrived on various grounds at negative conclusions as to the compatibility of MFNs with Articles 101 and 102 TFEU.

3 Dominant Firms

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

The Commission is currently actively pursuing abuse of dominance cases, with an ongoing focus on the digital market.

In view of the recent amendment of its Guidance and the ongoing process to adopt Guidelines, the Commission has reconfirmed its focus on abusive exclusionary behaviour.

3.2 What are the laws governing dominant firms?

At the European level, the main provision regulating dominant firms is Article 102 TFEU. There are no regulations that specifically relate to abuse of dominance cases. The Commission has only published a communication with its enforcement priorities with respect to Article 102 TFEU that provides additional guidance with respect to exclusionary abuses ('Communication'), which it recently amended. It intends to adopt Guidelines on exclusionary abuses by the end of 2025.

At the national level, Article 102 TFEU is applicable if there is an effect on trade between Member States. Additional national legislation may also be in place, and such legislation concerns in many instances the abuse of a position of economic dependence in addition to the prohibition of abuse of absolute dominance.

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

The market is defined in the same way as with respect to vertical agreements (see question 2.6).

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

Market shares above 50% trigger a rebuttable presumption of dominance. The higher the market shares, the stronger the presumption. For market shares of 40–50%, an investigation into additional factors is required. If the market shares are below 40%, there is a presumption that the firm is not dominant.

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

Dominance itself is not illegal. A dominant firm can continue to compete on the market, provided it does so on the merits. However, a dominant firm does have a special obligation not to abuse its position.

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

Economic analysis plays an important role. In the classic case law, dominance is defined as a position of economic strength providing a degree of independence in a company's market conduct. In its Communication, the Commission clearly adopts an economic approach. The test is whether a firm is capable of profitably increasing prices above the competitive level for a significant period of time. In its assessment, the Commission considers the competitive structure of the market, and in particular (i) the market position of the undertaking and its competitors, (ii) expansion and entry by actual or potential competitors, and (iii) countervailing buyer power.

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

Market shares are the starting point of the assessment. They provide a first indication of the market structure and of the relative importance of the various undertakings on the market.

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

Article 102 TFEU does not contain a specific provision rendering the prohibition inapplicable. In the case law, two ways to justify conduct are accepted: (i) the conduct is objectively necessary; or (ii) the conduct produces substantial efficiencies that outweigh any anticompetitive effects on consumers.

Other possible defences are the rebuttal of a dominant position or of the abusive nature of the conduct.

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

A dominant firm can demonstrate that its conduct produces substantial efficiencies that outweigh the anticompetitive effects on consumers. The dominant firm will have to demonstrate that (i) efficiencies have been or are likely to be realised, as a result of the conduct, (ii) the conduct is indispensable to the realisation of the efficiencies, (iii) the likely efficiencies outweigh the likely negative effects on competition and consumer welfare in the affected markets, and (iv) the conduct does not eliminate competition.

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

Yes, Article 102 TFEU refers to 'abuse by one or more undertakings of a dominant position'.

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

Article 102 TFEU provides a general prohibition on the abuse of a dominant position. This provision is equally applicable to dominant purchasers.

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

Article 102 TFEU contains a general prohibition of abuse, without providing a specific definition. It contains a non-exhaustive list of examples.

Abuse has been further defined in the case law as behaviour of a dominant firm that, through recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market. A comparison of the conduct with competition on the merits has become an important benchmark.

Conduct defined as abuse includes predatory pricing, exclusive dealing, loyalty rebates, tying and bundling, refusal to supply, margin squeezing, (price) discrimination and excessive pricing.

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

IPRs owned by the dominant firm are an element that may be considered when establishing dominance or whether certain behaviour is abusive. It will have to be established whether relying on exclusionary rights related to an IPR constitutes competition on the merits.

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

Enforcers and legal tribunals typically follow the assessment explained in question 3.6. This does not exclude the fact that direct effects can be considered when assessing market power.

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

Platform dominance is assessed in the same way as any other form of dominance. There are, however, several challenges. In view of the nascent and dynamic nature of many digital markets on which platforms are active, the Commission indicated in the *Microsoft/Skype* case that market shares provide a limited indication of the competitive strength of the firms. The conduct that is deemed abusive is also still in development. While some of the classic abuses can be applied to platform dominance, there is an emergence of new abuses. By way of example, in the *Google Shopping* case, Google was fined for preferencing its own shopping platform, and in *Google Android Auto,* the Court of Justice found that a dominant platform's refusal to ensure interoperability with a third-party app may constitute abuse of dominance. In the meantime, the Commission has an additional ground to tackle platform dominance, as the Digital Markets Act ('DMA') entered into force on 1 November 2022. In September 2023, the Commission designated the first six so-called gatekeepers under the DMA. It has, in the meantime, also opened several investigations in this context. In 2025, the Commission has imposed fines for DMA violations on Meta and Apple. Meta and Apple have announced that they are appealing the decisions.

3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

The DMA is aimed at preventing large companies from abusing their role as gatekeeper to such platforms.

At the national level, Germany is taking the lead in updating its competition rules in view of the emergence of digital markets.

3.17 Under what circumstances are refusals to deal considered anticompetitive?

A refusal to supply can constitute abuse if a number of conditions are fulfilled: (i) the undertaking refusing to supply is vertically integrated, and dominant on the upstream market; (ii) the product to which access is refused is indispensable to compete on the downstream market; (iii) the refusal leads to the elimination of effective competition in the downstream market; and (iv) an objective justification is lacking. In *Google Android Auto*, the Court of Justice confirmed that, in specific circumstances, abuse may also be established, despite the indispensability condition (point (ii) above) not being fulfilled.

4 Miscellaneous

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

The recent *Mondelez* case is at the crossroads of dominance and vertical agreements. The Commission fined Mondelez on the basis of Article 101 TFEU and Article 102 TFEU for its deliberate strategy to restrict cross-border sales. This decision is in line with the Commission's 2019 *AB Inbev* decision on similar practices. More generally, while the block exemptions (Regulations 2022/720 and 461/2010) provide optimal guidance and the Vertical Guidelines and the Supplementary Guidelines offer considerable guidance regarding the application of Article 101 TFEU to vertical cases falling outside the block exemptions, guidance offered on distribution scenarios applied by dominant undertakings remains limited.

Emmelie Wijckmans is a Partner within Faros, handling EU and domestic competition law matters. Emmelie focuses on abuse of dominance, horizontal agreements and cartels practice within Faros. Her experience further extends to merger control and distribution agreements. In addition to her competition law practice, Emmelie advises clients on general business law matters, and practises general litigation, with a particular focus on arbitration. She has particular expertise in the retail sector, as well as in media, IT and pharma. Furthermore, she is a trainer within the compliance team of Faros. In this context, she develops tailor-made competition law compliance training for Belgian and international businesses. Furthermore, Emmelie teaches at the Informa Connect Summer School at the University of Cambridge.

Emmelie studied at the University of Antwerp from 2006–2011 and the University of Virginia from 2011–2012. She is a member of the Brussels Bar.

Emmelie regularly publishes in the field of competition law. She co-authored the first handbook on Belgian competition law, *Bos Door De Bomen Mededingingsrecht*. The second edition of this book was published earlier in 2025. In addition, she was the editor and co-author of the *Horizontal Agreements – Block Exemptions & Horizontal Guidelines – Toolbook for Practitioners* (LeA Publishers) on the revised Horizontal Block Exemption Regulations on Research and Development and Specialisation Agreements ('HBERs') and the revised 2023 Horizontal Guidelines.

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Frank Wijckmans is a Partner within Faros. He has extensive expertise in all types of EU and domestic competition law matters. Frank has particular expertise in vertical agreements, in which field he acted as an expert advisor to DG Competition of the EC regarding the new EU competition law regime on vertical agreements. His report was published on the DG Competition website.

Frank graduated from the University of Antwerp in 1985 and the University of Virginia in 1986.

He is ranked in *Chambers and Partners* and *The Legal 500* and is a Member of the Brussels Bar.

Frank is an assessor at the Belgian Competition Authority (appointed by the Belgian government in February 2022), a teacher at the Brussels School of Competition (course: 'Law and Economics of Vertical Restraints') and a trainer within the compliance team of Faros. He has an extensive publication track record: *Vertical Block Exemption Regulation – Toolbook for Practitioners* (LeA Publishers); *Horizontal Agreements – Block Exemptions & Horizontal Guidelines – Toolbook for Practitioners* (LeA Publishers); *Bos Door De Bomen Mededingingsrecht* (LeA Publishers), of which the second edition was released in 2025; *Vertical Agreements in EU Competition Law* (Oxford University Press), of which the fourth edition was released in 2025; and different articles in renowned journals.

Frank is a regular speaker at conferences across Europe; recently, he trained several national competition authorities (in Belgium, Luxembourg and Greece) on the new EU legislation on vertical and horizontal agreements.

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Faros is unique in its focus on competition law and data protection law, as a boutique firm building upon relevant expertise in high-profile cases. Faros is regularly involved in relevant cases pending before the European Commission and the Court of Justice. The team frequently handles cases before the Belgian Competition Authority and national courts.

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