

# The EU competition rules on vertical agreements

A guide to the assessment of vertical agreements (including the European Commission's block exemption regulations on vertical agreements and motor vehicle distribution)

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# 1. Introduction

- 1.1 This publication explains how the European competition rules are applied to “vertical agreements”, i.e. essentially agreements for the sale or purchase of goods or services between parties operating (for the purpose of the particular agreement) at different levels of the supply chain.
- 1.2 It considers the operation of the Commission’s vertical agreements block exemption regulation (“VABER”)<sup>1</sup> and the Commission’s accompanying Vertical Guidelines which set out principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union.<sup>2</sup> It also considers the stricter rules applicable to the motor vehicle sector in the Commission’s motor vehicle block exemption regulations (MVBERS).<sup>3</sup> Further detail on key stages of the analysis of vertical agreements is provided in the Appendices to this publication.
- 1.3 Businesses use various different types of vertical agreements for getting their goods and services to market. The concept of “vertical agreement” covers purchase or supply of intermediate goods (e.g. raw materials or goods subjected to further processing by the customer), finished goods (e.g. for resale by a dealer active at the wholesaling or retailing level) or services. It also covers agency agreements. Vertical agreements that look similar in form can have very different substantive effects on competition – just as different types of agreements can have similar competitive effects – depending on factors such as the conditions of competition in the markets concerned, and the parties’ strengths in those markets.
- 1.4 The Article 101(1) prohibition applies where an agreement or concerted practice – formal or informal, written or unwritten – between two or more “undertakings” (businesses), which may affect trade between Member States, has the object or effect of preventing, restricting or distorting competition to an appreciable extent.

<sup>1</sup> Regulation 330/2010 of 20 April 2010 (OJ 2010 L102/1, 23.04.2010). This block exemption came into force on 1 June 2010 and expires on 31 May 2022, and replaced Regulation 2790/1999. It was incorporated into the EEA competition rules by EEA Joint Committee Decision No. 077/2010 (amending Annex XIV to the EEA Agreement). There is a transitional period until 31 May 2011 during which agreements agreed before 31 May 2010 which satisfy the conditions for exemption under Regulation 2790/1999 but do not satisfy the conditions for exemption under the new VABER remain exempted from the application of Article 101(1). For the calculation of market shares under the VABER and Regulation 2790/1999, see [Appendix 1](#).

<sup>2</sup> Guidelines on vertical restraints, as formally adopted on 20 April 2010 (OJ 2010 C131/01, 19.05.2010). The EFTA Surveillance Authority is expected to adopt equivalent guidelines. The Commission has also published a more concise brochure on The competition rules for supply and distribution agreements.

<sup>3</sup> There are two motor vehicle block exemptions regulations: Regulation 1400/2002 of 31 July 2002 (OJ 2002 L203/30, 01.08.2002) (the “2002 MVBBER”) and Regulation 461/2010 of 27 May 2010 (OJ 2010 L129/52, 28.05.2010) (the “2010 MVBBER”). The 2002 MVBBER came into force on 1 October 2002 and was incorporated into the EEA competition rules by EEA Joint Committee Decision No. 136/2002 (amending Annex XIV to the EEA Agreement). As of 1 June 2010, it only applies to vertical agreements relating to the purchase, sale or resale of new motor vehicles and will expire on 31 May 2013. The 2010 MVBBER came into force on 1 June 2010 and expires on 31 May 2023. It was incorporated into the EEA competition rules by EEA Joint Committee Decision No. 091/2010 (amending Annex XIV to the EEA Agreement). The 2010 MVBBER applies to vertical agreements relating to the motor vehicle aftermarket, which includes the purchase, sale or resale of spare parts or provision of repair and maintenance services.

Even if an agreement falls within the scope of Article 101(1), it may be exempt from the prohibition if it has countervailing competitive benefits or efficiencies under Article 101(3). Some vertical agreements fall outside the scope of Article 101(1), such as agreements with final customers (not operating as undertakings), intra-group agreements and some agency agreements: see [Appendix 2](#).

- 1.5 “Vertical restraints” (restrictions in vertical agreements) tend to be considered less harmful than “horizontal restraints” (restrictions in agreements between companies operating at the same level(s) of production or distribution). This reflects the following:
- (a) *Vertical agreements*: In a vertical relationship the product of one party is the input of the other. This means that the exercise of market power by one party – whether the upstream supplier or the downstream buyer – may harm the commercial position of the other party. Parties to a vertical agreement therefore usually have an incentive to prevent each other from imposing unreasonable restrictions. For most vertical agreements, serious competition concerns only arise if there is insufficient inter-brand competition in the markets affected by the agreement, i.e. if the supplier (and/or buyer) has a high degree of market power.
  - (b) *Horizontal agreements*: In a horizontal relationship – in particular in an agreement between actual or realistic potential competitors – the exercise of market power by one party (to the potential detriment of third parties) may actually also benefit the other party. The Commission is therefore generally more wary of cooperation between parties active at the same level in the supply chain, particularly where the agreement has the object of fixing prices, limiting production or sharing markets or customers.<sup>4</sup>
- 1.6 Accordingly, many vertical agreements either fall outside the Article 101(1) prohibition altogether or satisfy the exemption criteria of Article 101(3). Where this is not the case, restrictive provisions in the agreement will be void by virtue of Article 101(2) (and possibly under Article 102 in the case of dominant companies). In serious cases, the European Commission’s Directorate-General for Competition and/or the Member States’ national competition authorities (“NCAs”) may investigate, and declare the restrictive provisions, and possibly the whole agreement, void (Article 101(2)) and may impose fines. The NCAs play a significant role in the enforcement of Articles 101 and 102 in accordance with Council Regulation 1/2003.<sup>5</sup> The Commission and NCAs cooperate with each other within the framework of the European Competition Network (“ECN”) to coordinate investigations or allocate cases. Third parties may also bring claims for damages in courts in Member States.

<sup>4</sup> In the field of “horizontal cooperation”, block exemptions are available for R&D agreements and specialisation agreements. The Commission has also adopted guidelines on the applicability of Article 101 to horizontal cooperation. These block exemptions and Horizontal Guidelines are considered in more detail in the Slaughter and May publication on *The EU competition rules on horizontal agreements*. The Horizontal Guidelines focus in particular on agreements on R&D, production agreements (e.g. joint production, specialisation and outsourcing agreements, subcontracting between competitors), purchasing agreements, commercialisation agreements, agreements on standards. They do not cover other forms of agreements between competitors such as minority shareholdings and strategic alliances; nor do they cover joint ventures notifiable under the EU Merger Regulation (see the Slaughter and May publication on *The EU Merger Regulation*).

<sup>5</sup> This Implementing Regulation fundamentally changed the way in which Articles 101 and 102 are enforced (Reg. 1/2003; OJ 2003 L1/1, 04.01.2003). Its objectives were: to facilitate more rigorous enforcement against blatant infringements such as cartels (*inter alia* by abolishing the system of notifying agreements to the Commission to obtain individual exemptions under Article 101(3)); to allow decentralisation of the application of the rules (in particular the Article 101(3) exemption criteria) to the NCAs and national courts; and to simplify enforcement procedures.

- 1.7 Commission block exemptions – such as the VABER and MVBERS – provide 'safe harbours' for agreements if certain formal conditions are satisfied, regardless of whether the agreement may have positive or negative effects on competition in the relevant market. The VABER applies to vertical agreements relating to most goods and services. However, the Commission has adopted stricter rules for vertical agreements relating to new motor vehicles, spare parts, repair and maintenance services. Until 31 May 2013, vertical agreements relating to the purchase, sale or resale of new motor vehicles continue to be governed by the 2002 motor vehicle block exemption regulation (the "2002 MVBBER"). After that date, these agreements will be assessed under the VABER like other economic sectors. Vertical agreements relating to the motor vehicle aftermarket (which includes the purchase, sale or resale of spare parts or provision of repair and maintenance services) are assessed in accordance with the provisions of the VABER and must not contain any of the supplementary hardcore restrictions contained in the 2010 motor vehicle block exemption regulation (the "2010 MVBBER"). The 2002 MVBBER and 2010 MVBBER are aimed at encouraging the development of multi-brand motor vehicle dealerships and repair outlets and facilitating cross-border sales of motor vehicles (direct or via intermediaries, including over the internet).<sup>6</sup>
- 1.8 It should be noted that agency agreements are not caught by Article 101(1) if the principal bears the commercial and financial risks related to the selling and purchasing of contract goods and services and obligations imposed on the agent in relation to the contracts concluded and or negotiated on behalf of the principal (see also [Appendix 2](#)). However, agency agreements containing single branding provisions and post-term non-compete provisions, may infringe Article 101(1) if they lead to or contribute to a (cumulative) foreclosure effect. Agency agreements may also fall within the scope of Article 101(1) where a number of principals coordinate their activities by using the same agent (see Vertical Guidelines at paras. 19-20).

<sup>6</sup> With this objective, as explained in more detail in this publication (including the Appendices) the 2002 MVBBER: (i) requires manufacturers/suppliers of motor vehicles to opt between either exclusive distribution or selective distribution; (ii) requires specific contractual provisions to be included in vertical agreements in the motor vehicle sector, aimed at improving the buyer's independence from the supplier; (iii) applies different market share criteria from those applicable under the VABER; and (iv) contains different rules for the VABER regarding restrictions which are treated as "hardcore" or "non-exempted". The 2010 MVBBER contains additional hardcore restrictions to those in the VABER.

## 2. Focus on effects on competition

- 2.1 Vertical agreements which merely establish basic terms for a specific sale and purchase transaction (price, quantity, quality, etc.) will not normally restrict competition within the meaning of Article 101; however, restrictive effects on competition may arise where an agreement involves restraints on the supplier or buyer (e.g. on the customers to whom the buyer may resell the products). The Vertical Guidelines (at paras. 100-105) describe the potential negative effects of vertical restraints which EU competition law aims to prevent. These potential effects on competition all relate essentially to the possibility of market foreclosure of competitors and/or the prospect of consumers having to pay higher prices (or receiving lower quality goods or services):
- (a) *Entry barriers*: The raising of barriers to market entry or expansion may foreclose other suppliers or buyers from the market. If competitors are partially or completely foreclosed from a significant part of the market, this may result in prices being higher and consumers having less choice than would otherwise have been the case;
  - (b) *Inter-brand competition*: The reduction of inter-brand competition may facilitate collusion between competing suppliers (or buyers) on matters such as pricing. This extends not only to explicit collusion (unlawful price-fixing or market sharing) but also to tacit collusion (conscious parallel behaviour in oligopolistic markets);
  - (c) *Intra-brand competition*: Same vertical restraints may reduce intra-brand competition (i.e. between distributors of the same brand). These potential negative effects are generally less harmful than a reduction of inter-brand competition, since the latter may have the more negative effect of foreclosing the market to competing brands;
  - (d) *Barriers to cross-border trade*: Some vertical restraints may result in market partitioning and the creation of obstacles to EU market integration, in particular limitations on the freedom of consumers to purchase goods/services in any Member State they choose.
- 2.2 If a vertical agreement (or a network of agreements) has any of these negative effects to an appreciable extent on a relevant market within the EU, the Article 101(1) prohibition is likely to be applicable. Appraising whether particular arrangements have any of these effects involves looking at conditions of competition in the markets concerned and the parties' strengths in those markets. The Commission's 1997 Market Definition Notice describes factors to take into account when defining relevant markets for these and other purposes:

## The EU competition rules on vertical agreements

see [Appendix 1.7](#) For most vertical restraints, competition concerns only arise if at least one of the parties has a significant level of market power. Market power (which can exist below levels of Article 102 dominance) describes the situation where the constraints which would usually ensure that an undertaking behaves in a competitive manner are not working effectively. It implies the ability to raise prices consistently and profitably above competitive levels (resulting in supra-competitive prices and supra-normal profits).<sup>8</sup>

2.3 Some vertical agreements may be able to benefit from the Commission's 2001 Notice on agreements of minor importance.<sup>9</sup> This *De Minimis* Notice confirms that the Commission will not initiate proceedings under Article 101 against agreements that do not contain any "hardcore" restrictions, e.g. price-fixing or market sharing (see further para. 3.3 below), and are between SMEs (small and medium-sized enterprises with fewer than 250 employees, and annual turnover not exceeding €50 million or assets not exceeding €43 million),<sup>10</sup> or involve larger companies where the parties' combined market shares in the relevant markets do not exceed the following thresholds:

- > 15% for agreements between non-competitors, i.e. between parties who are not actual or realistic potential competitors in the same product market (irrespective of whether they are active in the same geographic market);
- > 10% for agreements between competitors (including situations of "dual distribution", e.g. where the supplier is also active at the buyer's level of distribution). This 10% threshold also applies where it is difficult to classify the agreement as being between competitors or non-competitors); and
- > 5% where access to the market is foreclosed by the cumulative effect of parallel networks of similar vertical agreements by several companies.

2.4 A vertical agreement between parties whose market shares exceed the relevant market share threshold may nevertheless fall outside Article 101(1) if the agreement does not have an appreciable effect on competition.

2.5 It should also be remembered that the prohibitions under Articles 101(1) and 102 only apply if the agreement or conduct may affect trade between Member States. For these purposes, the Court of Justice has confirmed that *"it must be possible to foresee with a sufficient degree of probability, on the basis of prohibitions a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market*

<sup>7</sup> OJ 1997 C372/5, 09.12.1997.

<sup>8</sup> If one of the parties enjoys a dominant position in any relevant product or service market (whether across Europe as a whole or within a relevant national or regional market which constitutes a substantial part of the EU), it may also be vulnerable under Article 102.

<sup>9</sup> OJ 2001 C368/13, 22.12.2001.

<sup>10</sup> This definition is based on the definition of SME in the Annex to Commission Recommendation of 6 May 2003 (OJ 2003 L124/36, 20.05.2003).

*between Member States. Moreover, that effect must not be insignificant*".<sup>11</sup> For further details, see the Commission's 2004 Notice setting out Guidelines on the effect on trade concept.<sup>12</sup> Insofar as vertical restraints are intended to apply outside the EEA, they will not be capable of affecting trade between Member States and so should not be caught by the EU competition rules. If the agreement does not affect trade between Member States (e.g. because it relates to trade purely within a Member State), national competition legislation may be applicable.

<sup>11</sup> Case C-306/96, *Javico v. Yves Saint Laurent* [1998] ECR I-1983, referred to in the Vertical Guidelines (para. 10). In that case YSL had appointed Javico as an authorised dealer for Russia and Ukraine on condition that the contract goods not be sold outside those non-EEA countries (not even to consumers or authorised dealers in the YSL selective distribution network in the EEA or elsewhere). On the facts, the ECJ held that those vertical restraints could not be regarded as having the *object* of appreciably restricting competition within the EEA or as being capable of affecting, as such, trade between Member States. The ECJ, however, left it to the national court to determine whether the vertical restraints might have the *effect* of infringing Article 101, bearing in mind the structure of the relevant market within the EEA.

<sup>12</sup> OJ 2004 C101/81, 27.04.2004. This Notice is of particular relevance for the regime under Regulation 1/2003. If a NCA is applying national competition law to an agreement or contract which has an effect on trade between Member States, it is required also to apply Articles 101 and/or 102; if an agreement meets the criteria of Article 101(3) or comes within a Commission block exemption, it may not be prohibited by national competition law, except that an NCA may apply stricter national laws prohibiting or sanctioning unilateral conduct.

### 3. The “safe harbours” of the VABER and MVBERS

- 3.1 The various steps involved in the application of the EU competition rules to vertical agreements are illustrated by the flowchart at [Appendix 3](#).
- 3.2 The VABER and Motor Vehicle Block Exemptions are not available for agreements relating to the licensing or assignment of intellectual property rights if those IPR provisions constitute the primary object of the agreement: see [Appendix 4](#) (and the separate Slaughter and May publication on *The EU competition rules on intellectual property licensing*). The availability of the block exemptions is also limited in the case of vertical agreements involving competing undertakings or retailer buying groups.
- 3.3 The VABER and Motor Vehicle Block Exemptions each set out various categories of “hardcore” (or “blacklisted”) restrictions including price-fixing or resale price maintenance, as well as certain territorial or sales restrictions: see [Appendix 5](#) and [Appendix 9](#). These are restrictions which are considered to have such an obvious restrictive effect on competition that they can be presumed to be caught by the Article 101(1) prohibition irrespective of the market shares of the undertakings concerned and are unlikely to meet the Article 101(3) exemption criteria: however this is a rebuttable presumption and is not a per se rule. This leaves open the possibility for undertakings to plead an efficiency defence under Article 101(3) in an individual case. Conversely, a vertical agreement which does not contain any of these hardcore restrictions is automatically eligible for the Article 101(3) exemption through the “safe harbour” of the applicable block exemption, provided it meets the block exemption’s other conditions (see [Appendix 3](#)).
- 3.4 Among the VABER’s other conditions is a requirement that the market share threshold held by each of the parties to the agreement (both buyer and supplier) does not exceed 30% on any of the relevant markets affected by the agreement. When considering the market share of the supplier, the relevant market is that where it sells the contract products to the buyer; when considering the market share of the buyer, the relevant market is that where it buys the contract products. Different market share criteria apply under the 2002 MVBBER which is also only available to agreements which expressly include certain provisions (see [Appendix 9](#)).
- 3.5 Finally, to be able to come within the VABER or 2002 MVBBER, the agreement must not contain certain types of expressly non-exempted restrictions: see [Appendix 6](#) and [Appendix 9](#). For example, non-compete provisions or obligations imposed on the buyer are generally only permitted under the VABER if their duration is limited to a period of five years or less.

3.6 The “safe harbours” provided by the VABER and MVBERS are subject to the following caveats:

- (a) *Commission withdrawals*: The Commission may by Decision withdraw the benefit of the relevant block exemption if it finds in a particular case that the vertical agreement, whether in isolation or in conjunction with other similar agreements, nevertheless has certain effects which are incompatible with the Article 101(3) exemption criteria.<sup>13</sup> In these circumstances the Commission has the burden of proof that the agreement infringes Article 101(1) and does not meet the Article 101(3) criteria. In particular, the VABER and MVBERS provide that the Commission may withdraw the benefit of the block exemption where access to the relevant market (or competition therein) is significantly restricted by the “cumulative effect” of parallel networks of vertical agreements with similar substantive effects operated by competing suppliers/ buyers;
- (b) *Member State withdrawals*: A NCA may likewise withdraw the benefit of the relevant block exemption in respect of its territory for any particular case where vertical agreements have effects incompatible with the Article 101(3) exemption criteria in that Member State (or a part thereof) – but only if the territory has all the characteristics of a distinct geographic market;<sup>14</sup>
- (c) *Network effects*: The Commission may by Regulation declare that the relevant block exemption does not apply to specified types of agreements on a particular market where:
  - > there are parallel networks of vertical agreements with similar substantive effects, and
  - > these networks together cover more than 50% of the relevant market.<sup>15</sup>

<sup>13</sup> Recital 13 VABER; Vertical Guidelines, paras. 74-78; Article 6(1) 2002 MVBES; Recital 21 2010 MVBES; Article 29(1) of Council Regulation 1/2003.

<sup>14</sup> Recital 14 VABER; Vertical Guidelines, para. 78; Article 6(2) 2002 MVBES; Recital 22 2010 MVBES; Article 29(2) of Council Regulation 1/2003.

<sup>15</sup> Article 6 VABER; Vertical Guidelines, paras. 79-85; Article 7 2002 MVBES; Article 6 2010 MVBES.

## 4. Outside the “safe harbours” – case-by-case analysis

4.1 Where a vertical agreement does not qualify for exemption under the VABER, it may still be appraised favourably in accordance with the principles of Articles 101 and, if applicable, 102.<sup>16</sup> This appraisal involves a full analysis of the agreement’s effects on competition. The Vertical Guidelines – together with the Commission’s 2004 Guidelines on the application of Article 101(3)<sup>17</sup> – aim to assist business in undertaking this assessment.<sup>18</sup> For a summary of the issues which the Guidelines suggest should be taken into account, see [Appendix 7](#). As already indicated, the key issues for this assessment tend to be:

- (a) the structure of competition on the relevant markets and degree of market power exercised by the parties; and
- (b) whether the operation of the vertical agreement (or network of agreements) will have appreciable market foreclosure effects on competitors and/or result in higher prices to consumers.

4.2 This full Article 101 analysis first involves identifying whether Article 101(1) is applicable at all, i.e. whether the vertical agreement (or network of agreements) appreciably restricts or limits competition. This is a question of fact and degree requiring an examination of all relevant surrounding market circumstances (taking account of the factors listed at Part A of [Appendix 7](#)).

4.3 Where a vertical agreement fails to meet the criteria of the block exemption, there is no presumption of illegality under Article 101. If the Commission or a NCA investigates a vertical agreement, they have the burden of proof that the agreement is caught by Article 101(1). If they find that Article 101(1) is applicable, the parties may still be able to substantiate efficiency claims and benefits (i.e. to fall within Article 101(3)) in which case the Commission or NCA must examine whether the Article 101(3) criteria are met. This is a four-limb test (considered further at Part B of [Appendix 7](#)), requiring the parties to demonstrate that the vertical agreement:

<sup>16</sup> While the same is technically true for vertical agreements in the motor vehicle sector if they do not automatically qualify for exemption under the MVBBER, the sector-specific nature of that block exemption (specifically devised to take account of the dynamics of competition in that sector, including the cumulative effect of distribution networks operated by the motor vehicle industry) is such that there will be greater pressures to come within its strict terms.

<sup>17</sup> In 2004 the Commission adopted a new Notice setting out Guidelines on the application of Article 101(3), OJ 2004 C101/97, 27.04.2004.

<sup>18</sup> Companies are encouraged to do their own assessment without involving the Commission or NCAs (Vertical Guidelines, paras. 3 and 96). Where a case nevertheless gives rise to genuine uncertainty because it presents novel or unresolved questions regarding the application of Articles 101 or 102, the parties may wish to seek informal guidance from the Commission. In 2004 the Commission issued a Notice setting out the framework within which it will assess whether to issue such a guidance letter. The Commission publishes non-confidential versions of such guidance letters on its website.

- (a) offers efficiency gains by contributing to improving production and/or distribution or to promoting technical or economic progress. The Vertical Guidelines identify nine potential positive efficiency effects (as listed at Part B.1 of [Appendix 7](#));
- (b) offers consumer gains, it being necessary that consumers obtain a fair share of these efficiency gains;
- (c) does not impose on the undertakings concerned any vertical restraints which are not indispensable to the attainment of these efficiency benefits; and
- (d) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.4 Where there is litigation over a vertical agreement, the national court must first assess whether it is caught by Article 101(1) and, if so, whether it comes within the relevant block exemption. If it does not qualify for block exemption treatment, the court must assess whether it meets the Article 101(3) criteria. Under the regime established by Council Regulation 1/2003, national courts are able to rule directly on whether the criteria are satisfied.

4.5 In seeking to identify which types of vertical agreements are likely to have the negative effects and potential benefits outlined above, the Commission's Vertical Guidelines provide guidance on how the most common types of vertical restraints are analysed (paras. 128-229). These restrictions include:

- (1) *Single branding*: where the buyer is restricted to placing all or most of its orders with one particular supplier.
- (2) *Exclusive distribution*: where the supplier sells the contract goods to only one distributor for resale in a particular territory. The distributor is usually limited in its active selling into other (exclusively allocated) territories.
- (3) *Exclusive customer allocation*: where the supplier sells its products to only one distributor for resale to a particular group of customers. The distributor is usually limited in its active selling to other (exclusively allocated) groups of customers.
- (4) *Selective distribution*: where the supplier restricts the number of authorised distributors and their possibilities of resale to non-authorised distributors.
- (5) *Franchising*: where the supplier licenses intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. Such agreements often contain a combination of clauses concerning selective and exclusive distribution as well as non-compete clauses.
- (6) *Exclusive supply*: where the supplier is obliged or induced to sell the contract products only or mainly to one buyer.

- (7) *Upfront access payments*: where the supplier pays a fixed fee to a distributor in order to get access to its distribution network and remunerate services provided to the suppliers by the retailers.
- (8) *Category management agreements*: where the distributor entrusts the supplier with the marketing of a category of products, including those of competitors.
- (9) *Tying*: where a customer of one product is obliged to purchase another distinct product. This will fall under Article 101(1) if its result in a single-branding obligation.
- (10) *Resale price restrictions*: where the buyer's freedom to determine its resale prices is restricted.

4.6 The main elements and examples of each of these common vertical restraints are outlined at [Appendix 8](#), which also considers issues relevant to their competitive assessment. A particular vertical agreement may contain combinations of these different type of restraints.

## 5. Conclusions

- 5.1 The VABER and Vertical Guidelines allow a broad range of vertical agreements to qualify automatically for exemption under Article 101(3). They are available for any vertical agreements, including industrial supply contracts, selective distribution systems, agency arrangements, non-exclusive purchasing and distribution arrangements. Companies are not expected to squeeze their vertical arrangements into the straitjackets of agreements covered by previous block exemptions (on exclusive distribution, exclusive purchasing or franchising, for example). That said, the 2002 MVBBER and 2010 MVBBER impose stricter requirements on the motor vehicle sector.
- 5.2 Despite the general improvements brought about by this effects-focused approach, the Commission continues to proceed on the basis that some vertical agreements can raise serious competition concerns (depending on the relevant market structure and the market positions of the parties). The VABER has fixed an Article 101 “market power” threshold at 30% – well below the level of 40-50% at which issues of Article 102 “dominance” generally arise. It is rarely easy to determine with certainty the precise extent of the product and geographic markets affected by a vertical agreement. Often it will be necessary to consider the potential effects of an agreement by reference to various alternative relevant markets. The relevant party might satisfy the 30% threshold by reference to one market analysis, but a narrower market definition may mean that the threshold is exceeded. If so, a more detailed assessment of the applicability of Article 101(1) and (3) will generally need to be undertaken.
- 5.3 One of the aims of the more effects-focused approach was to reduce the Commission’s workload of relatively non-controversial vertical arrangements. For companies with market shares above the 30% threshold, however, there remains the risk of litigation and/or third party complaints seeking to take advantage of some of the uncertainties raised by the market share tests for block exemption treatment. That said, it should be remembered that the Commission’s Vertical Guidelines are merely a tool to be deployed by parties (and the Commission, NCAs and courts) in undertaking the case-by-case analysis of whether a particular agreement is compatible with the principles of Articles 101 and 102. Further guidance can also be drawn from European Court judgments and from Commission practice in other cases. Thus, for example, there are a number of useful Court precedents analysing vertical restraints in selective distribution networks, franchising agreements and agency schemes. Where appropriate, these should be considered in addition to the Commission’s own Guidelines.

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## Appendix 1: Relevant market definition issues

*NB For market definition issues relevant to the 2002 MVBBER, see also [Appendix 9](#) at Section 9.1, Part C.*

### A. Defining the relevant market for competition law purposes – generally

Market definition is a familiar concept under European competition law, serving to identify in a systematic way the competitive constraints that undertakings face. The Commission's 1997 Market Definition Notice – referred to in the Vertical Guidelines (para. 86) – describes factors to take into account when defining markets for competition law purposes.<sup>19</sup> These aim to identify:

- (a) **The relevant product market:** all goods/services which are regarded as interchangeable or substitutable by the consumer by reason of their characteristics, prices and intended use; and
- (b) **The relevant geographic market:** the area in which the undertakings concerned are involved in the supply of relevant goods/services, in which conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.

### B. Relevant factors for calculating whether 30% market share threshold met for VABER purposes<sup>20</sup>

- (a) **Supplier's market share:** Calculate supplier's share on the relevant product and geographic market on which it sells the contract products to the buyer;
- (b) **Buyer's market share:** Calculate buyer's share of the relevant product and geographic market on which it purchases the contract products;
- (c) In an agreement between **three parties at different levels of the supply chain** (e.g. manufacturer, wholesale and retailer), calculate the reseller's market share both as buyer and seller. The VABER applies only if it does not exceed 30% both as buyer and seller;

.../...

<sup>19</sup> Further guidance on the relevant market in the context of vertical agreements is provided at paras. 87-92 of the Vertical Guidelines.

<sup>20</sup> Article 8 VABER; Vertical Guidelines, in particular paras. 87-95.

.../...

- (d) **Value basis in preceding calendar year:** Market shares should be calculated on the basis of the market sales value data in the preceding calendar year. If these are not available, estimates based on other reliable market information (including market sales volumes) can be used;<sup>21</sup>
- (e) **In-house production:** In-house production (i.e. production of intermediate products for own use) should not be included in the calculation of the size of the relevant market – although it may be an important part of the analysis of the competitive structure of the marketplace. However, the relevant market should include supplies made to vertically integrated distributors (and agents) (i.e. where the undertaking is involved in production and distribution) for the purposes of sale;<sup>22</sup>
- (f) **Use of same agreement for different products/services:** If the 30% threshold is met for some products but not others, the VABER is applicable to those goods/services where the conditions are fulfilled. For the non-covered goods/services, it is necessary to appraise whether the Article 101(1) and (3) criteria are met;<sup>23</sup>
- (g) **Short-term increases above 30%:** If the relevant market share (while initially within the 30% threshold) subsequently exceeds 30% but does not exceed 35%, the VABER can continue to apply for two consecutive calendar years. If the relevant market share (while initially within the 30% threshold) subsequently exceeds 35%, the block exemption can continue to apply for one calendar year (provided that this exception cannot be combined with the 30-35% exception so as to exceed a period of two calendar years);<sup>24</sup>
- (h) **New products:** Where a distributor has to commit substantial investment to start up and/or develop a new market (e.g. a new brand or an existing brand in a new market) where there was previously no demand for that type of product in general, or for that type of product from that producer, restrictions of passive sales by other distributors into such a territory or to such a customer group generally fall outside Article 101(1), irrespective of market share, for the first two years after putting the product on the market.<sup>25</sup>

<sup>21</sup> Article 7(a)-(b) VABER; Vertical Guidelines, para. 93.

<sup>22</sup> Integrated distributors are connected undertakings within the meaning of Article 1(2) of the VABER. VABER, Article 7(c) and Vertical Guidelines, paras. 94-95.

<sup>23</sup> Vertical Guidelines, paras. 72-73.

<sup>24</sup> VABER, Article 7(d)-(f).

<sup>25</sup> Vertical Guidelines, para. 61.

## Appendix 2: What are vertical agreements and vertical restraints?

**Agreement:** Is there an agreement (or concerted practice) between two or more independent undertakings?

*NB Even if there is no explicit agreement (formal or informal, written or unwritten) expressing the concurrence of wills, it is sufficient that there is a unilateral policy of one party that receives the **acquiescence** of the other party.*

*NB **Intra-group agreements** are usually outside Article 101, so should only raise EU competition issues if the group as a whole may be engaging in abusive behaviour in a market where it enjoys a dominant position under Article 102 (e.g. by discriminating between customers and its own downstream operations).*

*NB Agreements with **final consumers** (not operating as undertakings) are likewise outside Article 101 (Vertical Guidelines, para. 25(b)).*

*NB **Agency agreements** are covered by the concept of a "vertical agreement". Under an agency agreement one party (the principal) appoints another (the agent) to negotiate and/or conclude contracts, on behalf of the principal, for the purchase or supply of goods/services. An agent will often act for more than one principal. It is important to distinguish the following:*

- *restrictions and obligations imposed under a "genuine agency" agreement will generally not be caught by Article 101(1), i.e. if the agent does not assume any (or only an insignificant part) of the financial or commercial risks in relation to (a) the contracts concluded and/or negotiated on behalf of the principal (e.g. costs and or risks of supply/purchase, storage or advertising of the contract goods or services), (b) the market-specific investments for the agency activity in question (e.g. costs of premises, such as petrol storage tanks for petrol retailing, or training of personnel) or (c) other activities required by the principal to be undertaken on the same product market (Vertical Guidelines, paras. 14-16). In such circumstances, the agent's selling/purchasing function is effectively "integrated" within the principal's business activities, so should not be treated as being between independent undertakings;*
- *if the agent does bear such financial or commercial risks, the agent will be treated as an independent dealer (Vertical Guidelines, paras. 12-21). Where an agent sells goods/services on behalf of the principal under an agreement falling within Article 101(1), the agent is treated as operating as a downstream "buyer" (Art. 1(h) VABER; Vertical Guidelines, paras. 12-21; Art. 1(k) 2002 MVBBER (see also Commission's 2002 MVBBER Brochure, section 4.2.2 Q.5)).*

Yes

No

The Article 101(1) prohibition is not applicable.

**Economic relationship:** Do the undertakings each operate, for the purposes of the agreement, at a different level of the production or distribution chain? Examples include:

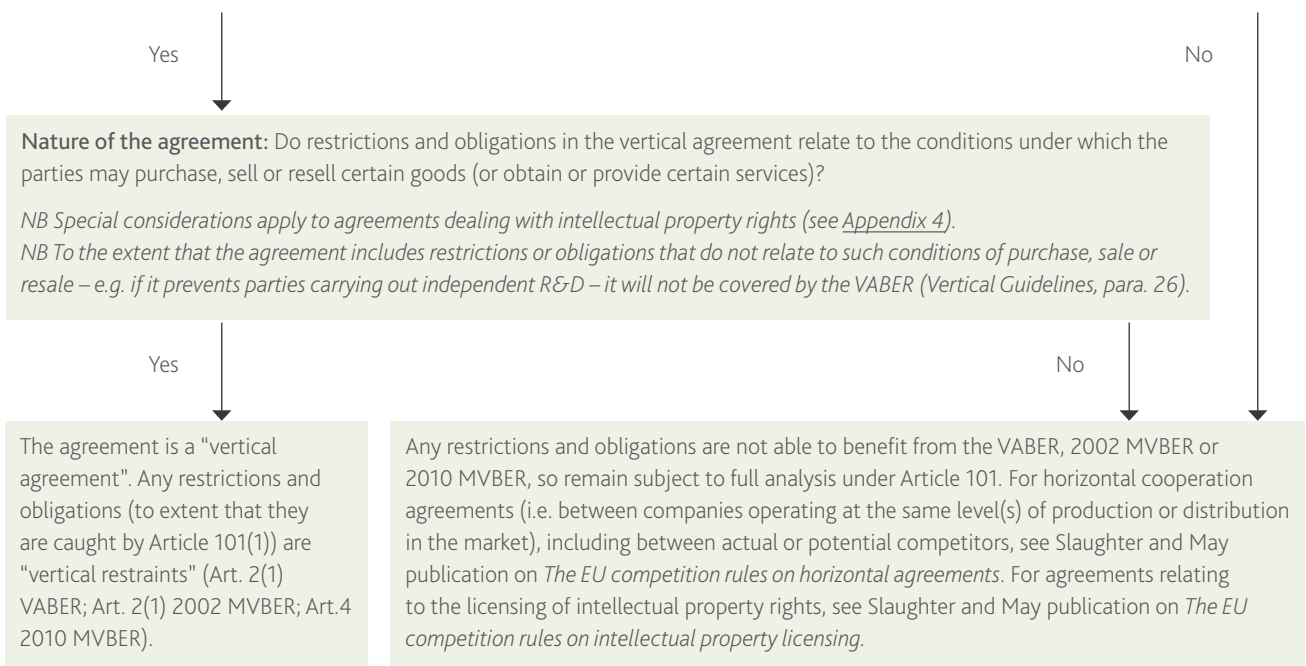
- sale or wholesale of finished goods (e.g. consumer goods) that buyer will resell (or rent) to third parties;
- sale of raw materials or semi-finished goods that buyer will further process before reselling.

*NB The concept of a "vertical agreement" does not preclude an undertaking from being active at more than one level of the production/distribution chain (Vertical Guidelines, para. 25(c)).*

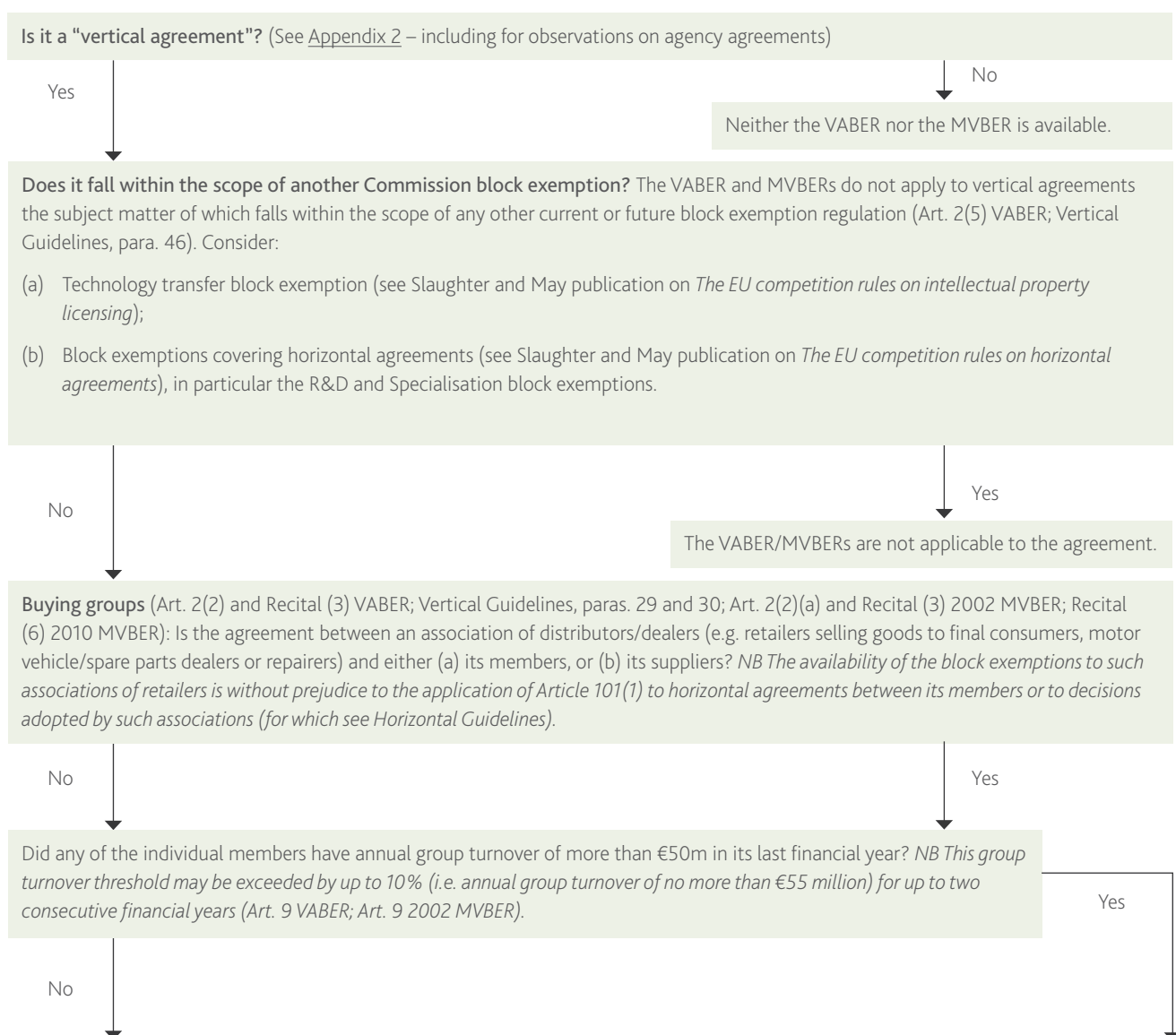
*NB An agreement for the **lease or rental of goods** is not assessed as a "vertical agreement" (Vertical Guidelines, para. 26), as no good or service is being sold by the supplier to the buyer.*

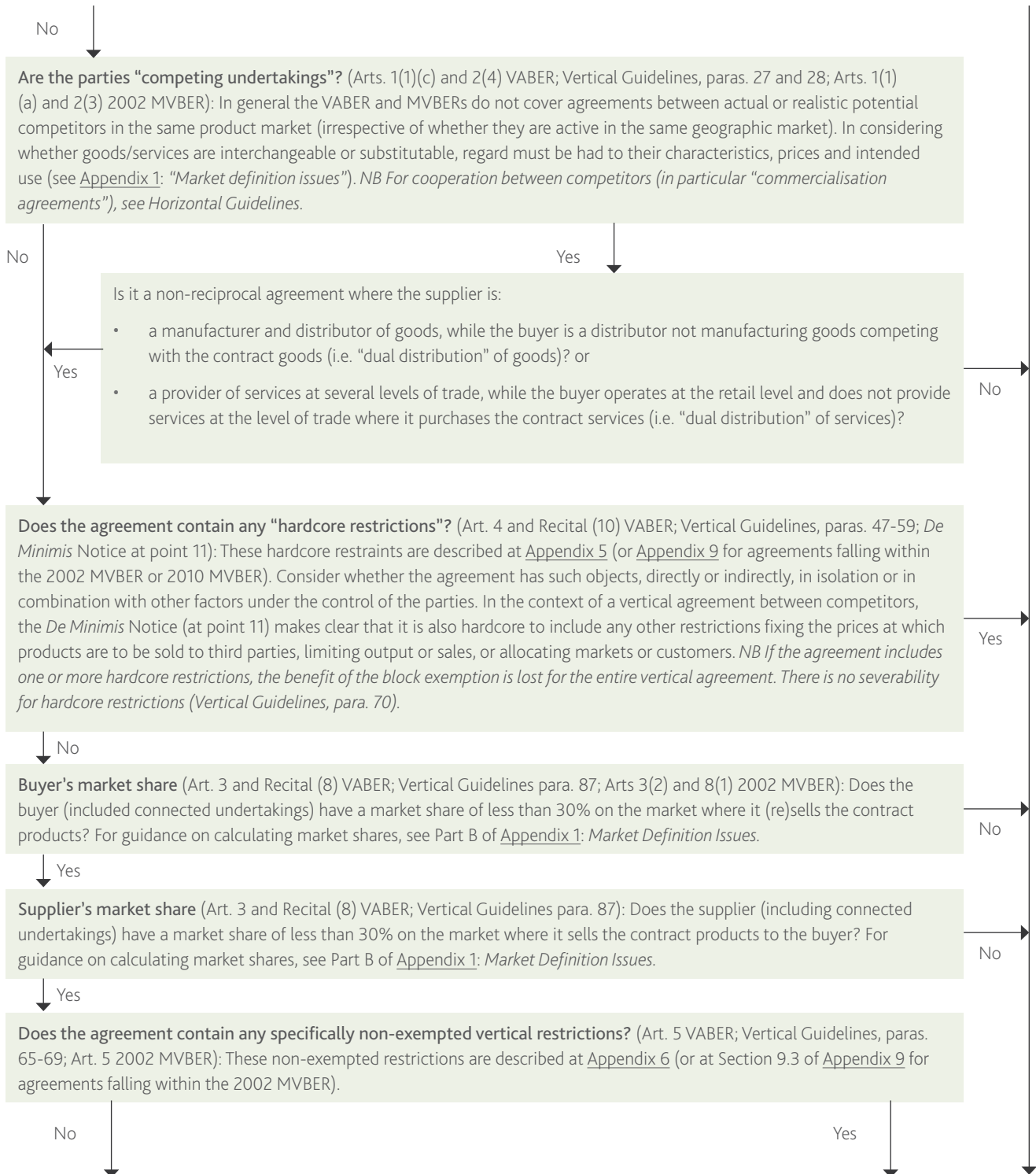
Yes

No

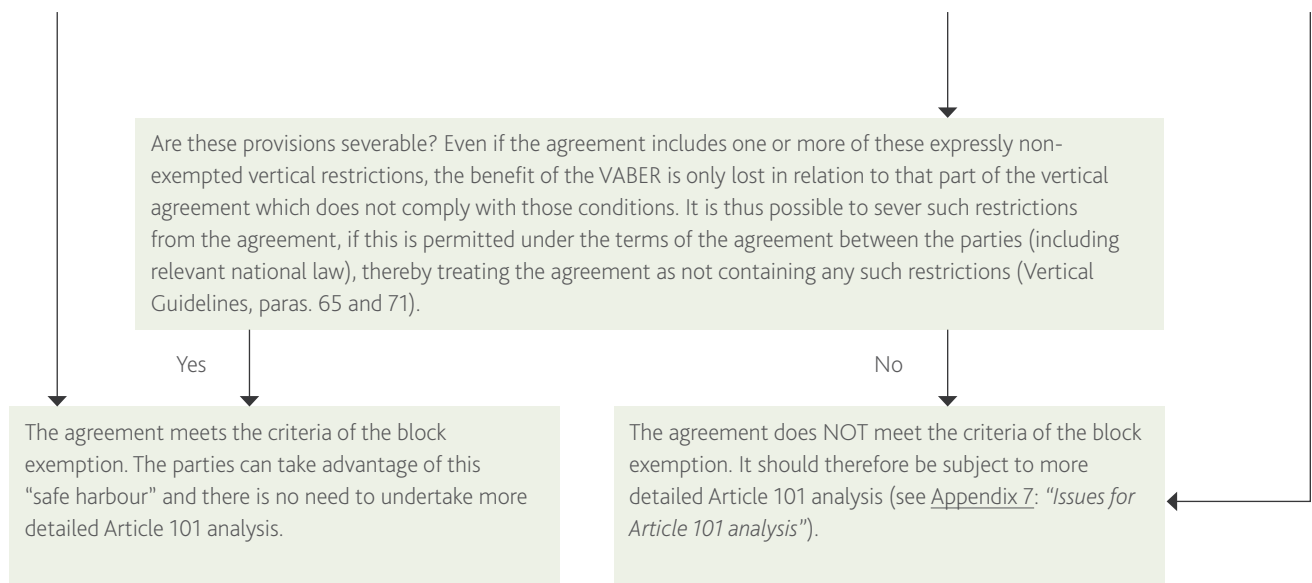


## Appendix 3: Analysing vertical agreements under the VABER and MVBERS

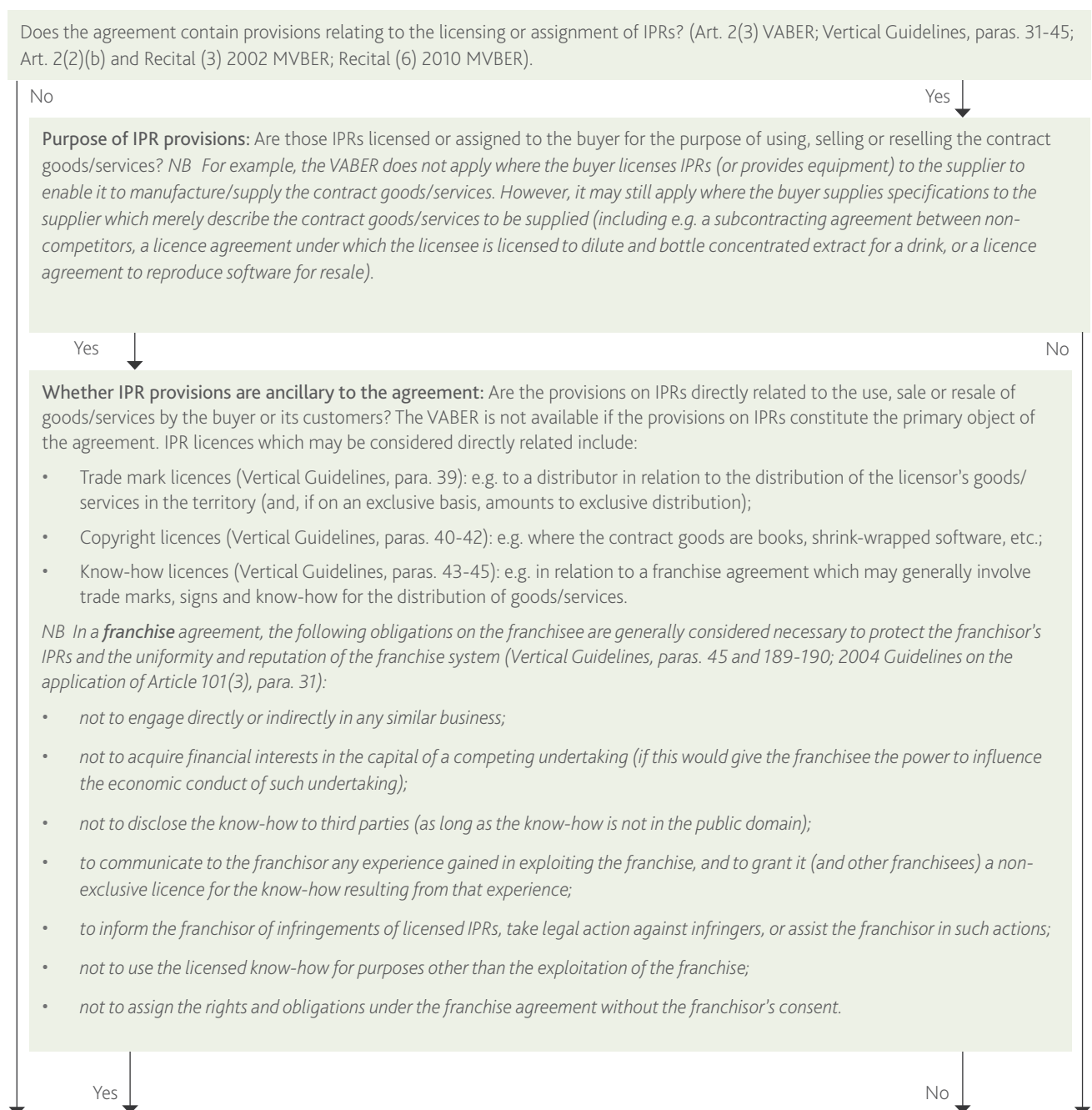




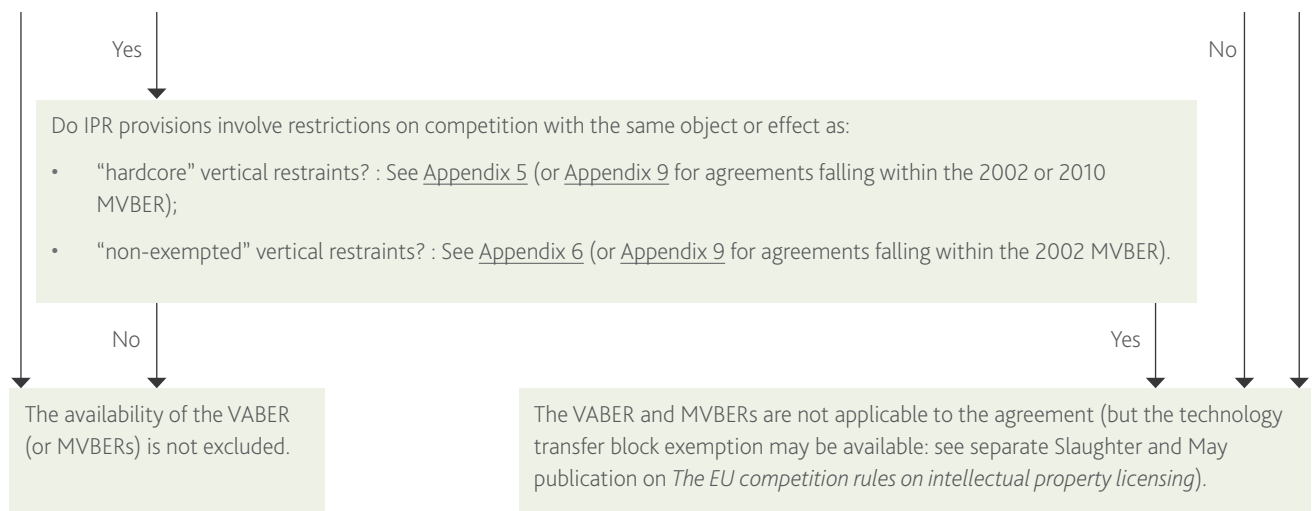
## The EU competition rules on vertical agreements



## Appendix 4: Treatment of intellectual property rights



## The EU competition rules on vertical agreements



## Appendix 5: Hardcore restrictions under the VABER

### A. Price-fixing or resale price maintenance (RPM)

Price-fixing restrictions on the buyer, including RPM, are not permitted under the VABER (Art. 4(a); Vertical Guidelines, paras. 48-49 and 222-229; also *De Minimis* Notice at point 11(2)(a)). Price-fixing extends to any attempt by a supplier, directly or indirectly, to restrict the buyer's ability to determine its resale prices, e.g.:

- fixing the distribution margin or maximum level of discount the buyer can grant from a prescribed price level;
- making the grant of rebates or reimbursement of promotional costs conditional upon respecting certain price levels;
- linking resale prices to competitors' resale prices;
- threatening to delay or withhold supplies (or impose other penalties) for failure to observe certain price levels; or
- taking measures to identify price-cutting dealers (e.g. price monitoring systems, obligation to report other buyers engaging in discounting).

*NB Providing a list of recommended selling prices, imposing maximum selling price, or using a particular supportive measure (such as price marked packs), does not constitute a hardcore restriction, provided these do not amount to fixed/minimum selling prices as a result of pressure from, or incentives offered by, the supplier.*

*NB For agency agreements caught by Art. 101(1), it would be a "hardcore" restriction for the principal to prevent the agent from sharing its commission with the customer (Vertical Guidelines, para. 49).*

## B. Certain territorial/customer sales restrictions (generally)

Certain territorial or customer restrictions on the buyer are generally not permitted under the VABER (Art. 4(b); Vertical Guidelines, paras. 50-55; also *De Minimis* Notice at point 11(2)(b)). Subject to the exceptions considered below, this applies to any direct or indirect restrictions on the territories in which, or customers to whom, the buyer may sell the contract goods or services (such as obligations to refer orders from such customers to the supplier or other dealers).

*NB This hardcore restriction does not apply if:*

- *the supplier restricts the buyer's distribution outlet(s) and warehouse(s) to a particular address, place or territory (Art. 4(b) VABER; para. 50 Vertical Guidelines);*
- *substantial investment by a distributor is necessary to start up and/or develop a new market, in which case restrictions on passive sales by other distributors into that market may fall outside Article 101(1) for a period of two years (Vertical Guidelines, para. 61; 2004 Guidelines on the application of Article 101(3), para. 18(2)); or*
- *the prohibition is objectively necessary, e.g. a ban on selling dangerous substances to certain customers on safety or health grounds (Vertical Guidelines, para. 60; 2004 Guidelines on the application of Article 101(3), para. 18(2)).*

*NB Indirect restrictions (having the same object or effect as a sales restriction) would include practices such as (Vertical Guidelines, para. 50):*

- *refusal or reduction of bonuses or discounts,*
- *termination of supply or reducing volumes supplied,*
- *threat of contract termination,*
- *profit pass-over obligations,*
- *failure to provide an EU-wide guarantee service (under which normally all dealers are obliged to provide the guarantee service and are reimbursed for this service by the supplier even in relation to products sold by other dealers into their territory), in particular if these practices are combined with the implementation by the supplier of a monitoring system aimed at verifying the actual destination of the supplied goods (e.g. differential labels or serial numbers).*

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This hardcore restriction is subject to the following permitted sales restrictions (a “white list”) (Vertical Guidelines, paras. 51-55):

- **Qualified protection of supplier or its other dealers:** Restrictions on “active” sales (such as the sending of unsolicited e-mails or targeted online advertising) into the exclusive territory and/or exclusive customer group reserved to the supplier or another of its dealers, provided such restrictions do not limit sales by the buyer’s customers. Dealers must, however, be free to make “passive” sales in response to orders from such territories or customer groups (such as responding to unsolicited requests).

*NB Where a dealer uses the internet to advertise/sell the contract goods/services, this is generally considered as a form of “passive” sales (regardless, for example, of the language used) (Vertical Guidelines, para. 52). Accordingly, examples of prima facie hardcore restrictions on passive selling include requiring a dealer:*

- *to prevent customers located in another part of the EU from viewing its website or to automatically re-route customers to the supplier’s or other dealers’ websites (NB a supplier may require the dealer’s website to have links to websites of other dealers and/or the supplier);*
- *to terminate customers’ internet transactions once their credit card data reveal an address that is not within the distributor’s territory (NB a supplier may demand a minimum amount of offline sales);*
- *to limit the proportion of overall sales made over the internet;*
- *to pay a higher price for products intended to be resold online (NB a supplier can offer a fixed fee to support offline or online sales efforts).*

*NB A supplier may require quality standards for the use of the internet to resell goods (in particular for selective distribution, a supplier may require its dealers to have a physical outlet before engaging in internet selling provided that the object is not to limit online sales).*

- **Wholesalers:** For sales to buyers operating at the wholesale level of trade, it is permitted to restrict sales (active or passive) to end users (allowing a supplier to keep the wholesale and retail level of trade separate).
- **Selective distribution systems:** It is permitted to restrict authorised dealers from active or passive sales to unauthorised dealers. Also selective and exclusive distribution can be combined (i.e. where the supplier commits to supply only one or a limited number of dealers in a given territory), provided that active and passive selling is not restricted anywhere (Vertical Guidelines, paras. 56 and 185). See Part C below for sales restrictions in selective distribution systems which are not permitted under the VABER.
- **Supply of components:** Where a supply contract covers components to be incorporated into finished goods, it is permitted to restrict the buyer from active or passive sales of the contract goods to competitors of the supplier (i.e. to customers who would use them to manufacture the same type of goods as those produced by the supplier).

### C. Further territorial/customer sales restrictions in selective distribution systems

In a selective distribution system (as defined in Art. 1(c) VABER), two further categories of restrictions are not permitted:

- **Sales to end users:** Any restriction on authorised dealers operating at the retail level of trade making sales (active or passive) to end users, whether business users or final consumers (Art. 4(c) VABER; Vertical Guidelines, para. 56; also *De Minimis* Notice at point 11(2)(c)).
- **Cross-supplies between authorised dealers:** Any restriction on authorised dealers making cross-supplies to other authorised dealers (Art. 4(d) VABER; Vertical Guidelines, para. 58; also *De Minimis* Notice at point 11(2)(d)). Dealers must remain free to purchase the contract goods/services from other authorised dealers within the network (at the same or different levels of trade). Thus “exclusive purchasing” commitments cannot be imposed on authorised dealers (nor may territorial/customer restrictions be imposed on authorised wholesalers’ sales to authorised dealers).

*NB The authorised dealer should be free to sell, both actively and passively to all end users, including with the help of the internet. The supplier may require quality standards for the use of the internet site to resell its goods, but they cannot impose criteria for internet selling that are not “equivalent” to those imposed for sales from physical outlets. This does not mean that the criteria must be the same, but that any differences must be justified by the different nature of the two channels. As noted above, an outright ban on internet selling is only possible if there is an objective justification.*

*NB It is however permitted to restrict the authorised retailer’s ability to determine the location of its business premises or to open a new outlet in a different location (although the use of the internet cannot be assimilated to the opening of a new outlet in a different location). If the retailer’s outlet is mobile (“shop on wheels”), the supplier may define an area outside which the mobile outlet cannot be operated. Also, the supplier may commit to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied (Vertical Guidelines, para. 57).*

### D. Certain sales restrictions affecting spare parts

Where a supplier supplies components to a buyer who incorporates them in a product, any restrictions on the supplier selling those components as spare parts to end-users or to independent repairers or other service providers are not permitted under the block exemption (Art.4(e) VABER; Vertical Guidelines, para. 59; also *De Minimis* Notice at point 11(2)(e)). For example, if a component manufacturer sells parts to an OEM (original equipment manufacturer) who incorporates them into its own products, that OEM cannot directly or indirectly prevent or restrict the upstream component manufacturer from selling to end-users, independent repairers or service providers.

*NB This does not concern access to supply of spare parts through the OEM’s own network of retailers/repairers; it is therefore acceptable for the OEM to require its own repair and service network to buy spare parts from it.*

## Appendix 6: Other non-exempted vertical restraints under the VABER

The following vertical restraints cannot benefit from the VABER. However, if they are severable from the rest of the agreement (under relevant national law), the remaining part of the agreement may benefit from the VABER.

### A. Buyer non-compete obligations (including requirement obligations or quantity-forcing above 80%) if these extend beyond 5 years

Any direct or indirect obligation which extends beyond a maximum period of 5 years and causes the buyer (VABER Arts. 1(1)(d) and 5(1)(a); Vertical Guidelines, paras. 66-67):

- (a) not to manufacture, purchase or resell goods/services competing with the contract goods/services; or
- (b) to purchase from the supplier (or designated third parties) goods/services equivalent to the value of more than 80% of the buyer's total purchases in the preceding calendar year (of the contract goods/services and their substitutes on the relevant market).

*NB Such quantity-forcing obligations are treated as non-competes since they prevent the buyer from purchasing more than 20% of its total purchases from competing suppliers. This includes a prohibition to sell competing goods or services over the internet if it has this effect. If no relevant purchasing data is available for the year prior to the contract, the 80% maximum should be calculated by reference to the buyer's best estimates of its annual total requirements.*

*NB An indefinite non-compete/requirements obligation (or one tacitly renewable beyond 5 years) will be treated as extending beyond 5 years.*

*NB Even if the duration of the non-compete obligation is 5 years or less, if obstacles are raised that hinder the buyer from effectively terminating the non-compete obligation after 5 years, it will not be treated as so limited. For example, if the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the 5 year period. Similarly, where the supplier provides the buyer with equipment which is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete expires.*

Exception: If the contract goods/services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, the duration of the non-compete/requirements obligation may extend up to a maximum of the period of occupancy of the point of sale by the buyer. *NB This is relevant e.g. to the situation where the operator of a public house or petrol station obtains its supplies of beer or petrol from a supplier which owns/leases the premises.*

## B. Post-termination buyer non-compete obligations

Any direct or indirect obligation requiring the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods/services unless (VABER Art. 5(1)(b)); Vertical Guidelines, para. 68):

- the obligation is limited to a maximum period of one-year post-termination;
- the obligation is limited to goods/services which compete with the contract goods/services;
- the obligation is limited to the point of sale from which the buyer has operated during the contract period; and
- the obligation is indispensable to protect substantial know-how transferred by the supplier to the buyer (for the operation of the vertical agreement).

*NB This is without prejudice to the possibility to impose a post-termination restriction (which may be unlimited in time) on the use and discharge of know-how which has not fallen into the public domain. Know-how covers any package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified (VABER Art. 1(1)(g)).*

## C. Restrictions on sales of particular competing products (in a selective distribution system)

Any direct or indirect obligation restricting an authorised dealer in a selective distribution network from selling the brands of particular competing suppliers (VABER Art. 5(1)(c); Vertical Guidelines, para. 69).

*NB A combination of selective distribution with a general non-compete (ie. preventing the dealer from selling competing brands in general) can benefit from the VABER.*

## Appendix 7: Issues for Article 101 case-by-case analysis of vertical agreements

### A. Checklist for Article 101(1) analysis of whether a vertical agreement appreciably restricts or limits competition

1. **Is there an appreciable effect on trade between Member States?** If the agreement is unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affectation of trade rule or “NAAT rule”), the EU competition rules are not applicable – although national competition rules may be. The Commission has published detailed guidelines on the effect on trade concept and the NAAT rule in a 2004 Notice (OJ 2004 C101/81, 27.04.2004). The *De Minimis* Notice (at point 3) acknowledges that agreements between SMEs are rarely capable of appreciably affecting trade between Member States.
2. **Does the agreement include any “hardcore” restrictions?** (See [Appendix 5](#), or [Appendix 9](#) for the motor vehicle sector). If there are, and assuming there is an effect on trade between Member States, there is a presumption that Article 101(1) is applicable – i.e. that the agreement has as its “object” the restriction of competition – and the criteria of Article 101(3) are unlikely to be met (Vertical Guidelines, para. 47; 2002 MVBBER Brochure at section 3.1; *De Minimis* Notice at point 9; 2004 Guidelines on the application of Article 101(3), para. 23).
3. **What are the relevant markets?** (See [Appendix 1](#)). Defining the relevant markets is necessary for applying the block exemptions’ market share thresholds, as well as for the general application of the competition rules (and the *De Minimis* Notice) where the block exemptions are not available.
4. **Other factors:** In appraising whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1), the following factors are particularly relevant. The relative importance of the factors varies from case to case (Vertical Guidelines, paras. 111-121);
  - **nature of the agreement:** in terms of the restraints, their duration and the percentage of total sales on the affect market. Implicit restraints (outside the agreement) should also be taken into account. These may be derived from the way the agreement is implemented and the incentives of the parties;
  - **parties’ market position:** by reference to market share, first mover advantage, patents, portfolio, strength of brands etc.;

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- **competitors' market positions:** by reference to similar criteria, for actual/potential competitors. The stronger the competitors are and the greater their number, the less risk that the parties will be able to exercise market power and foreclose the market or soften competition. Effective and timely counterstrategies competitors are likely to deploy are also relevant;
- **entry barriers:** economies of scale and scope, government regulations, access to resources, essential facilities, brand loyalty, etc. Vertical Guidelines, para. 117 provide that entry barriers can in general be said to be low if effective entry is likely to occur within 1 or 2 years;
- **maturity of the market:** negative effects are generally viewed as more likely in a stable or declining market;
- **level of trade:** supply of intermediate goods, wholesale supply, retail supply, etc. Buyers of intermediate goods/services are normally well informed customers, able to access quality and therefore less reliant on brand and image (see Vertical Guidelines, para. 119). Final goods are sold directly or indirectly to final consumers who often rely more on brand or image, so distributors (retailers, wholesalers) having to respond to consumer demand may suffer more (than a buyer of intermediate products) if they are foreclosed from selling certain brands;
- **buyer power:** may prevent the parties exercising market power, in particular when buyers can 'sponsor entry' by a new/smaller supplier. However where they extract more favourable terms for themselves, or pass on any price increase, they are not preventing the exercise of market power by the customers;
- **nature of the goods/services:** whether commodities, high value, regular or one-off purchases. Vertical Guidelines, para. 120 recognise that vertical restraints for non-branded goods and services (or intermediate goods or services) are generally less harmful than restraints affecting the distribution of branded goods and services (or final goods or services);
- **other considerations:** e.g. whether there is a combination of different vertical restraints which may aggravate their negative effects or whether there is a cumulative effect of coverage of the market by similar agreements between different parties, whether the agreement is imposed or agreed, the regulatory environment, behaviour that may facilitate collusion (Vertical Guidelines, para. 121), etc.

**B. Issues for Article 101(3) analysis of whether a vertical agreement has sufficient benefits to meet the exemption criteria (all four of which must be satisfied)** (Vertical Guidelines, paras. 122-127; Commission 2004 Guidelines on the application of Article 101(3)). The assessment is made on the basis of the facts at any given point in time, and is sensitive to material changes in the facts. When applying Article 101(3) it is necessary to take into account the investments made by any of the parties and the time needed and restraints required to recoup an efficiency enhancing investment.

1. **Efficiency gains:** The agreement must contribute to improving production or distribution or to promoting technical or economic progress. The Vertical Guidelines include a non-exhaustive list of nine possible positive effects/efficiencies (paras. 106-109):
  - (a) **To solve a "free-rider" problem:** This problem arises where one wholesaler or retailer (reseller B) "free-rides" on the promotional efforts of another reseller (reseller A), e.g. for relatively high value products where advice is required by the consumer (for new or technical products or where the reputation of the product is a major determinant of its demand). The supplier may agree to avoid this by appointing A on an exclusive or similar basis. Similar free-riding issues arise at the supplier level if supplier X invests in promotion at retailer A's premises, but this attracts customers for X's competitors. Again, this can be avoided by non-compete type restraints.
  - (b) **To open up/enter new markets:** For example, when exporting for the first time to a new territory a manufacturer may need to persuade a local distributor to make "first time investments" to establish the brand. It may therefore be necessary to provide the local distributor with territorial protection from other dealers, so that it can recoup these investments (see also Vertical Guidelines at para. 61 as considered at Part B(h) of [Appendix 1](#)).
  - (c) **The "certification free-rider" issue:** Where a retailer performs a valuable service by identifying good products, it may be of particular interest to a supplier to secure a listing at the time of launch. A short-term period of exclusivity (where the supplier agrees not to supply to other retailers) may be justified in these circumstances.
  - (d) **The "hold-up" problem:** Distribution of a particular product may require the supplier or buyer to make "relationship-specific investments", e.g. in special equipment or training (see also Vertical Guidelines, para. 146). Where these investments may not be recovered in the short run, and one party may be required to invest more than the other, there may be good reason to have some form of vertical restraint. Where the supplier makes the investment, this will generally take the form of a non-compete/quantity-forcing obligation. Where the buyer makes the investment, some form of exclusive distribution/customer allocation or exclusive supply commitment may be appropriate.
  - (e) **The specific hold-up problem in case of transfer of substantial know-how:** Restrictions to prevent secret and substantial know-how being used may be justifiable.

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- (f) **The "vertical externality" issue:** A retailer may not gain all the benefits of its action taken to improve sales; some may go to the manufacturer. If the retailer is pricing too high, this may lead to 'double marginalisation', which can be avoided by the imposition of a maximum resale price. Selective distribution, exclusive distribution or similar restrictions may increase the retailer's sales efforts, benefitting the manufacturer if wholesale price exceeds its marginal production costs.
- (g) **Economies of scale in distribution:** By concentrating the resale of its products through a limited number of dealers, a supplier may be able to achieve economies of scale (particularly at the wholesale level). This may be achieved through exclusive distribution, quantity-forcing (e.g. minimum purchasing requirements), selective distribution or exclusive sourcing.
- (h) **Capital market imperfections:** Banks may be reluctant to lend to one or other party to the vertical agreement. Where, because of better information, the supplier provides a loan to the buyer (or vice versa), this may justify a tighter relationship between the parties, including vertical restraints.
- (i) **Uniformity and quality standardisation:** The creation of a brand image and attractiveness to final consumers may require a certain measure of uniformity/quality standardisation between dealers. This type of restriction can be found for example in selective distribution and franchising.

Efficiency claims (e.g. regarding cost efficiencies flowing from the agreements or qualitative efficiencies in terms of product improvements) must be substantiated and must produce a net positive effect. Speculative claims on avoidance of free-riding or general statements on cost savings are not sufficient. Nor are cost savings that arise from the mere exercise of market power or from anti-competitive conduct. There may be strong justification for vertical restraints of a limited duration to help the introduction of new complex products or protect relationship-specific investments.

According to the 2004 Guidelines on the application of Article 101(3) (at para. 51 *et seq.*), substantiating the efficiency claims must enable verification of:

- (a) the *nature* of the claimed efficiencies;
- (b) the causal *link* between the agreement and the efficiencies;
- (c) the *likelihood* and *magnitude* of each claimed efficiency; and
- (d) *how* and *when* each claimed efficiency would be achieved.

- 2. Fair share for consumers:** The arrangements must allow consumers a fair share of these benefits (they must be at least compensated for the negative effects of the agreement). This means that the efficiency gains must fully off-set the likely negative impact on prices, output etc. caused by the agreement. This can normally be assumed to be fulfilled if there is sufficient residual competition on the market.

The 2004 Guidelines on the application of Article 101(3) describe (at para. 93 *et seq.*) the analytical framework for assessing consumer pass-on of efficiency gains distinguishing between (a) the pass-on and balancing of cost efficiencies and (b) the pass-on and balancing of other types of efficiencies (e.g. new or improved products).

- 3. Indispensability:** The agreement as such must be reasonably necessary to achieve the efficiencies; furthermore, the individual restrictions must be reasonably necessary for the attainment of the efficiencies. This criterion plays a role in ensuring that the least anti-competitive restraints are chosen to obtain certain positive effects. For example, the Vertical Guidelines refer at para. 103 to how non-exclusive arrangements are generally less anti-competitive than exclusive dealing arrangements (e.g. compare “quantity-forcing” with “buyer non-compete obligations”: see Part 1 of [Appendix 8](#)).

- 4. No elimination of competition:** The arrangements must not afford the parties the possibility of eliminating competition in respect of a substantial part of the relevant market (e.g. by removing all or most existing sources of actual or potential competition). This criterion is related to the question of Article 102 market dominance. If an undertaking is dominant, or becomes so as a result of the agreement, a vertical restraint with appreciable anti-competitive effects can in principle not meet the exemption criteria. However, the vertical restraint may well fall outside Article 101(1), e.g. if necessary for the protection of client-specific investments or the transfer of substantial know-how without which the supply/purchase of certain goods/services may not take place.

## Appendix 8: Vertical Guidelines' analysis of specific vertical restraints

### 1. Single Branding

**1.1 Main element:** Buyer is obliged/induced to concentrate its orders for a particular type of product with one supplier – i.e. not to buy and resell (or not to incorporate) competing goods/services (Vertical Guidelines, para. 129). The following vertical restraints are classified as “single branding” (paras. 129-150):

**(a) Buyer non-compete obligations:** where the buyer is obliged/incentivised to purchase more than 80% of its requirements on a particular market from only one supplier. The buyer cannot buy and resell or incorporate competing goods or services.

*Example: Vertical Guidelines (at para. 149) give a hypothetical example of a four-year non-compete obligation imposed on some retailers (“tied retailers”) by a supplier of an impulse-purchase branded consumer product where: supplier has 40% of market (clear No. 1); and 90% of supplier’s sales are through tied retailers to whom supplier provides special stocking cabinets.*

**(b) Quantity-forcing:** where an obligation or incentive scheme makes the buyer purchase its requirements only or mainly (Art. 1(d) VABER suggests if equivalent to more than 80% of its total purchases in the preceding calendar year) from one supplier. For these purposes:

- Quantity-forcing is viewed as “a weaker form of non-compete” (Vertical Guidelines, para. 129). It may take the form of minimum purchasing requirements, stocking requirements or non-linear pricing, e.g. conditional rebate schemes or a two-part pricing structure (fixed fee plus price per unit);
- An “English clause”, requiring buyer to report any better offer and to give supplier opportunity to match it, may have similar effects to a single branding obligation (particularly if buyer has to reveal who makes the better offer);

*Example: Vertical Guidelines (at para. 150) give a hypothetical example of quantity-forcing operated by producer X where: X has 40% of market (clear No. 1); and 80% of X’s sales are under five-year contracts which oblige reseller to purchase at least 75% of requirements from X, in return for which X offers financing and equipment at favourable rates. Contracts are terminable by customer after two years by repaying the outstanding loan.*

**1.2 Competitive assessment of “single branding” restrictions:** The Vertical Guidelines (para. 130) suggest that such vertical restraints have the following potential negative effects on competition:

- (a) Other suppliers cannot sell to the particular buyer(s) – which may lead to **foreclosure** of actual/potential competing suppliers/buyers. This may result in reduction of **inter-brand competition**.
- (b) When applied by several suppliers, the market share is made more rigid – which may facilitate collusion. This may result in reduction of **inter-brand competition**.
- (c) In case of distribution of final goods, the particular retailers will only sell one brand. This may result in **reduction of inter-brand competition** in their stores (loss of in-store competition). *Any reduction of inter-brand competition may be mitigated by stronger ex ante competition between suppliers to obtain the single branding contract. However, the longer the **duration**, the more likely this effect will not be strong enough to fully compensate for the reduction of inter-brand competition.*

**1.3 Key issues for Article 101(1) analysis of “single branding” restrictions (also see factors at Part A of Appendix 7):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- (a) **Supplier’s market position** (Vertical Guidelines, paras. 132): Single branding restraints are generally imposed by the supplier who may have a network of similar agreements with other buyers.
- (b) **Market coverage and duration of restraint** (Vertical Guidelines, para. 133): The higher the share of the market covered by such agreements, and the longer the duration of the non-compete obligations, the more significant the likely foreclosure effect. Thus non-compete obligations:
  - *of less than one year by non-dominant companies are generally not caught by Article 101(1);*
  - *of 1-5 years entered into by non-dominant companies usually require an analysis of pro- and anti-competitive effects;*
  - *of more than 5 years are likely to be found unnecessarily long;*
  - *entered into by dominant companies are more likely to result in anti-competitive foreclosure.*
- (c) **Competitors’ market positions** (Vertical Guidelines, para. 134): If competitors are sufficiently numerous and strong (compared with the supplier), Article 101(1) should not be applicable (e.g. if competitors have similar market positions and can offer similarly attractive products). However, if a number of suppliers have similar agreements, there may be a “negative cumulative effect” (so, even if individually these suppliers are covered by the block exemption, there may be grounds for its withdrawal). Such a cumulative effect may also facilitate collusion.

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- (d) **Entry barriers** (Vertical Guidelines, para. 136): Establishing whether there is real foreclosure involves considering whether competing suppliers have sufficient opportunities to get their goods/services to market.
- (e) **Buyer power** (Vertical Guidelines, para. 137): Absent the prospect of benefiting from efficiencies, powerful customers may not accept agreements which will deprive them of alternative sources of supply. However, even if such buyers are compensated for the loss of competition, consumers as a whole are unlikely to benefit if there are many customers and the single branding obligations have the effect of preventing the entry or expansion of competitors.
- (f) **Level of trade** (Vertical Guidelines, paras. 138-141). Thus:
  - **Intermediate products:** Foreclosure effects are less likely for intermediate products. Where the supplier is not dominant, competing suppliers still have a substantial share of the remaining “free” market. A serious “cumulative effect” is unlikely to arise as long as less than 50% of the market is “tied”;
  - **Wholesale level:** Where the agreement concerns the supply of a final product at the wholesale level and the supplier is not dominant, the analysis will depend on the type of wholesaling concerned (e.g. whether product-specific or covering a range of products) and entry barriers at the wholesale level;
  - **Retail level:** Foreclosure is more likely for final products where non-compete restraints affect the retail level, given the significant entry barriers to manufacturers setting up their own retail operations just for their own products (as well as reduction in in-store inter-brand competition). Significant anti-competitive effects may arise, taking account of other factors, if a non-dominant supplier ties 30% or more of the relevant market at the retail level. Where the supplier is dominant, even a modest tied market share may have significant anti-competitive effects. A serious “cumulative effect” (justifying withdrawal of the block exemption) is unlikely to arise where the individual suppliers each account for less than 30% of the market and the total tied market share is less than 40%. Even where some suppliers exceed the 30% level, a cumulative foreclosure effect is unlikely if the total tied market share is less than 30%.

**1.4 Key issues for Article 101(3) analysis of “single branding” restrictions (also see factors at Part B of Appendix 7):** The Vertical Guidelines refer to the following issues for the Article 101(3) assessment:

- (a) **Efficiency benefits:** To justify single branding vertical restraints – by reference to the list of efficiencies (a)-(i) at Part B.1 of Appendix 7 – may involve (Vertical Guidelines, para. 145):
- (a): *solving free rider problems;*
  - (d), (e): *solving various hold-up problems;*
  - (h): *addressing capital market imperfections.*
- (b) **Indispensability:** Consider whether less restrictive alternatives are available to achieve the efficiency benefits. For example (again by reference to the list of efficiencies (a)-(i)):
- quantity-forcing is preferable to a non-compete for efficiencies (a), (d) and (h). However for efficiency (e) (hold-up problem related to the transfer of know-how), a non-compete may be the only viable option (Vertical Guidelines, para. 145);
  - “relationship-specific investments” made by the supplier (efficiency (d)) will generally justify a non-compete or quantity-forcing agreement for the period of depreciation of the investment. More than 5 years may be justified for high relationship-specific investments. Efficiency (e) usually justifies a non-compete obligation for the whole duration of the supply agreement (e.g. in context of franchising).

## 2. Exclusive Distribution

**2.1 Main element:** Manufacturer/supplier sells the contract goods only to one buyer for resale in a particular territory in the EU (Vertical Guidelines, para. 151). Usually the distributor is restricted from active selling into other exclusively allocated territories.

*Examples:* Vertical Guidelines (paras. 165-167) give three hypothetical examples:

- *Exclusive distribution at wholesale level:* Supplier A (market leader with 50% at EU level and 40-60% at national levels in supply of a consumer product) appoints different exclusive wholesalers for different Member States/regions but without any “non-compete obligation” on the wholesalers (who are free to distribute competitors’ products) nor any “requirements obligation” on the wholesalers (who are free to purchase A’s products from other sources);
- *Exclusive distribution in oligopolistic market:* Four suppliers of relatively straightforward branded consumer products (each with 20% market share) each appoint exclusive retailers within local territories, with high degree of overlap in their authorised dealers;
- *Exclusive distribution combined with exclusive purchasing:* Supplier A (market leader with 40-60% market share in most national markets) sells via its own subsidiaries in each Member State, giving an exclusive territory to each appointed retailer. In addition, an “exclusive purchasing” clause obliges each retailer to purchase all its requirements direct from the relevant A subsidiary.

**2.2 Competitive assessment of “exclusive distribution” arrangements:** The Vertical Guidelines suggest that such vertical restraints may have the following potential negative effects on competition:

- (a) Other buyers cannot buy from the particular supplier – which may lead to foreclosure of more efficient dealers (or dealers with a different distribution format) from the market.
- (b) As fewer dealers will offer the product, this will lead to reduction of intra-brand competition and market partitioning (or total elimination in the case of wide exclusive territories). This may result in reduction of inter-brand competition.
- (c) When applied by most or all competing suppliers, this may facilitate collusion (at distributor or supplier level), so resulting in reduction of inter-brand competition.

**2.3 Key issues for Article 101(1) analysis of "exclusive distribution" arrangements (also see factors at Part A of [Appendix 7](#)):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- **supplier's market position** (Vertical Guidelines, para. 153);
- **competitors' market positions** (Vertical Guidelines, para. 154);
- **entry barriers**, although "exclusive distribution" should not raise foreclosure issues unless it is combined with "single branding" (Vertical Guidelines, para. 155);
- distributor's position on **downstream** market (Vertical Guidelines, para. 156);
- **buyer power** (Vertical Guidelines, para. 157);
- **maturity of the market** (Vertical Guidelines, para. 158);
- **level of trade**, with wholesale arrangements less likely to have appreciable anti-competitive effects (Vertical Guidelines, para. 159-160);
- whether **combination** with "single branding" or "exclusive sourcing" (Vertical Guidelines, paras. 161-162).

**2.4 Key issues for Article 101(3) analysis of "exclusive distribution" arrangements (also see factors at Part B of [Appendix 7](#)):** The Vertical Guidelines (at para. 164) state that efficiencies under Article 101(3) are most likely for new products, complex products, "experience products" and "credence products", and where savings in logistic costs due to economies of scale in transport and distribution can be demonstrated.

### 3. Exclusive Customer Allocation

**3.1 Main element:** Where the supplier agrees to sell its products to only one buyer for resale to a certain class of customer (Vertical Guidelines, paras. 168-173). At the same time, the Buyer is usually limited in its active selling to other (exclusively allocated) groups of customers.

*Example:* Vertical Guidelines (para. 173) give a hypothetical example of a producer of sophisticated sprinkler installations (with 40% market share) which appoints different specialised dealers, each with five years' exclusivity, for different types of buildings (offices, chemical plants, hospitals, etc.).

**3.2 Competitive assessment of "exclusive customer allocation" arrangements:** The Vertical Guidelines suggest that such vertical restraints may have the following potential negative effects on competition:

- (a) Other buyers cannot buy from the particular supplier – which may lead to foreclosure of other buyers from the market.
- (b) As fewer distributors will offer the product, this will lead to reduction of intra-brand competition and market partitioning, which may facilitate price discrimination.
- (c) When applied by most or all competing suppliers, this may facilitate collusion (at distributor or supplier level), so resulting in reduction of inter-brand competition.

**3.3 Key issues for Article 101(1) analysis of "exclusive customer allocation" arrangements (also see factors at Part A of [Appendix 7](#)):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- the same factors relevant to the assessment of exclusive distribution (see 2.3 above);
- foreclosure of non-appointed distributors (Vertical Guidelines, para. 170).

**3.4 Key issues for Article 101(3) analysis of "exclusive customer allocation" arrangements (also see factors at Part B of [Appendix 7](#)):** Where the block exemption is not available, the Vertical Guidelines (at para. 172) indicate that "exclusive customer allocation" may lead to efficiencies in cases where the dealer invests in specific equipment, skills or know-how, in particular for new or complex products or those which require adaptation to the needs of the individual customer.

#### 4. Selective Distribution

**4.1 Main element:** Where the supplier agrees to sell the contract goods/services (usually consumer goods), whether directly or indirectly, only to distributors selected on the basis of certain specified criteria and where those distributors agree not to sell to unauthorised distributors (Art. 1(e) VABER; Vertical Guidelines, paras. 174-188). Also, a distinction should be made between:

- (i) Purely **"qualitative"** selective distribution: – where the supplier selects the dealer only on the basis of objective criteria required by the nature of the product, such as training of sales personnel, the service provided at the point sale, without directly limiting the number of distributors. In general considered to fall outside Article 101(1) for lack of appreciable anti-competitive effects, provided:
  - *Nature of contract goods/services: There must be a legitimate requirement for selective distribution, having regard to the nature of the goods, to preserve their quality and/or ensure their proper use;*
  - *Objective criteria: Resellers must be chosen on the basis of objective qualitative criteria laid down uniformly for all potential distributors/dealers/repairers and applied in a non-discriminatory manner (e.g. staff training, point-of-sale services, product range and display, dedicated space for brand in showroom); and*
  - *Necessity: Criteria must not go beyond what is necessary; and*
- (ii) **"Quantitative"** selective distribution – where additional criteria more directly limit the potential number of distributors by, for instance, limiting the number of distributors in a given territory or imposing requirements which are in excess of what is required by the nature of the contract (e.g. unreasonable requirements for minimum/maximum sales/turnover, minimum annual purchases, quantified stock requirements) (Vertical Guidelines, para. 175).

Examples: Vertical Guidelines (paras. 187-188) give two hypothetical examples:

- *Supplier of consumer durables (market leader with 35%), requires authorised dealers to satisfy certain qualitative criteria (e.g. on range-stocking, levels of customer service), but the system also involves quantitative limits on the number of dealers by area;*
- *Selective distribution by a number of branded suppliers of a certain sports article requiring satisfaction of certain criteria (e.g. location of shops, training of sales personnel etc).*

**4.2 Competitive assessment of “selective distribution” arrangements:** The Vertical Guidelines suggest that such vertical restraints may have the following potential negative effects on competition:

- (a) Other buyers cannot buy from the particular supplier – which may lead to foreclosure of other buyers from the market.
- (b) As fewer distributors will offer the product, this may lead to reduction of intra-brand competition, which may facilitate price discrimination.
- (c) Facilitates collusion between suppliers or buyers.

**4.3 Key issues for Article 101(1) analysis of “selective distribution” arrangements (also see factors at Part A of [Appendix 7](#)):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- supplier’s market position (Vertical Guidelines, para. 177);
- competitors’ market positions and potential foreclosure of more efficient distributors, including price discounters in downstream market (Vertical Guidelines, paras. 177-178);
- cumulative effect if selective distribution operated by several players on market (Vertical Guidelines, para. 177-179);
- entry barriers for non-authorized dealers (Vertical Guidelines, para. 180);
- buyer power (Vertical Guidelines, para. 181);
- if combined with “single branding” obligations potentially foreclosure of other suppliers (Vertical Guidelines, para. 182-183);
- maturity of the market (Vertical Guidelines, para. 184).

**4.4 Key issues for Article 101(3) analysis of “selective distribution” arrangements (also see factors at Part B of [Appendix 7](#)):** The Vertical Guidelines (at paras. 185-186) indicate that “selective distribution” may lead to efficiencies in situations concerning potential “free-rider” problems and “quality standardisation” required for brand image – particularly relevant for new products, complex products, “experience products” and “credence products”. Combining selective distribution and a clause protecting an appointed dealer against other appointed dealers opening a shop in its vicinity may fulfil conditions of Article 101(3) if combination indispensable to protect substantial and relationship-specific investment made by authorised dealer. The conditions of Article 101(3) are unlikely to be fulfilled if new distributors capable of adequately selling the products in question (especially online sellers and price discounters) are foreclosed (Vertical Guidelines, para. 179).

## 5. Franchising

**5.1 Main element:** The franchisor licenses a business concept (consisting of IPRs – trade marks, signs, know-how) for payment of a franchise fee/royalties by the franchisee. A franchise agreement usually contains a combination of “selective distribution” and/or “non-compete” and/or “exclusive distribution” or weaker forms thereof (Vertical Guidelines, para. 189-191).

*Example:* Vertical Guidelines (para. 191) give example of franchising whereby the manufacturer franchises a method of selling sweets to franchisees who are only allowed to sell from agreed premises, to sell to end users or other franchisees and are not allowed to sell other sweets.

**5.2 Competitive assessment of “franchising” arrangements:** The Vertical Guidelines mention that if the franchising agreement contains non-compete obligations or exclusive or selective distribution arrangements, the negative effects on competition and the Article 101(1) analysis will be the same as for these vertical restraints (see 1, 2 and 4 above). However, for the Article 101(3) analysis (also see factors at Part B of [Appendix 7](#)) where the block exemption is not available, there are specific remarks to be made for “franchising”:

- The more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or indispensable to protect the know-how;
- A non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. Article 101(1) will not apply so long as the duration of the non-compete obligation does not exceed the duration of the franchise agreement itself.

## 6. Exclusive Supply

**6.1 Main element:** Where the supplier is obliged or induced to sell only or mainly to one buyer (Vertical Guidelines, paras. 192-202). Quantity-forcing is a weak form of exclusive supply where an incentive scheme makes the supplier concentrate its sales mainly on the one buyer. Exclusive supply contracts can relate either to final goods/services or to intermediate goods/services (e.g. an industrial supply contract where there is only one buyer for a specific use for incorporation).

*Example:* Vertical Guidelines (para. 202) give a hypothetical example of an industrial supply contract under which A (with 35% of relevant components market) supplies certain components to B on an exclusive basis for 5 years (and B agrees to take all its requirements from A for the 5 years). Under the agreement, A invests in new machines and produces components to B's specifications. B enjoys 40% of the upstream market for the purchase of components and 40% of the relevant downstream market.

**6.2 Competitive assessment of "exclusive supply" arrangements:** The Vertical Guidelines (at para. 194) suggest that such vertical restraints may have the following potential negative effects on competition:

- (a) Other buyers cannot buy from the particular supplier – which may foreclose buyers from the market.
- (b) Similar to exclusive distribution arrangements, as fewer buyers will offer the product, this will lead to reduction of intra-brand competition and market partitioning (which may reduce inter-brand competition).

**6.3 Key issues for Article 101(1) analysis of "exclusive supply" arrangements (also see factors at Part A of Appendix 7):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- buyer's market position on both the "upstream" market (on which it purchases the contract goods/services) and the "downstream" market (on which the buyer is active) (Vertical Guidelines, para. 194);
- duration of the exclusive supply obligation (Vertical Guidelines, para. 195). The higher the share of the market covered by such agreements, and the longer the duration of the obligation, the more significant the likely foreclosure effect. Thus:
  - exclusivity of less than 5 years by non-dominant companies will usually require a full Article 101(3) analysis of pro- and anti-competitive effects;
  - exclusivity beyond 5 years is likely to be found unnecessarily long;
- competing buyers' market positions on the "upstream" market (Vertical Guidelines, para. 196);
- entry barriers (Vertical Guidelines, para. 197);
- countervailing supplier power (Vertical Guidelines, para. 198);
- whether combination with "non-compete" (Vertical Guidelines, para. 198);
- level of trade and whether an intermediate or final product (Vertical Guidelines, para. 199).

**6.4 Key issues for Article 101(3) analysis of “exclusive supply” arrangements (also see factors at Part B of Appendix 7):** The Vertical Guidelines (at paras. 200-201) state that efficiencies can be expected in the case of a hold-up problem – see (d) and (e) at Part B.1 of Appendix 7 – and such efficiencies are more likely for intermediate products than for final products. Quantity forcing on the supplier could be a less restrictive alternative, however.

## 7. Upfront Access Payments

**7.1 Main element:** Upfront access payments are fixed fees that suppliers pay to distributors at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. Includes slotting allowances, pay-to-stay fees, payments to have access to a distributor's promotion campaigns etc. (Vertical Guidelines, para. 203).

**7.2 Competitive assessment of "upfront access payments":** The Vertical Guidelines (paras. 204-206) suggest that upfront access payments may have the following negative effects on competition:

- (a) foreclosure of other distributors, in particular when such payments induce the supplier to channel its products through only one or a limited number of distributors (similar to exclusive supply obligation);
- (b) foreclosure of other suppliers, if widespread use increases barriers to entry for small entrants (similar to single branding obligations);
- (c) facilitate collusion between distributors in a concentrated market. The payments may increase the price charged by the supplier, which may reduce retailers' incentives to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments.

**7.3 Key issues for Article 101(1) analysis of "upfront access payments" (also see factors at Part A of Appendix 7):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment:

- For foreclosure of other distributors, the same factors apply as for the assessment of exclusive supply obligations (see 6.3 above).
- For foreclosure of other suppliers, the same factors apply as for the assessment of single branding obligations (see 1.3 above).

**7.4 Key issues for Article 101(3) analysis of "upfront access payments" (also see factors at Part B of Appendix 7):** The Vertical Guidelines indicate that the following factors are relevant to the Article 101(3) analysis (Vertical Guidelines, paras. 207-208):

- (a) upfront access payments may contribute to an efficient allocation of shelf space for new products due to information asymmetry between the distributor and supplier on the potential for success of new products. Access payments explicitly allow suppliers to compete for shelf space, giving the distributor a signal of which products are most likely to be successful;
- (b) the information asymmetry may give the supplier the incentive to free-ride on distributors' promotional efforts in order to introduce suboptimal products. Access payments shift the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product introductions.

## 8. Category Management

**8.1 Main element:** The distributor entrusts the supplier (the “category captain”) with the marketing of a category of products including competing products as well as those of the supplier (Vertical Guidelines para. 209). The category captain may, for example, be able to influence product placement and product promotion in the shop and product selection for the shop.

**8.2 Competitive assessment of “category management agreements”:** The Vertical Guidelines (paras. 210-212) state that “category management” agreements will not be problematic in most cases but sometimes may have the following negative effects on competition, relevant to the Article 101(1) assessment:

- (a) distortion of competition between suppliers, leading to foreclosure of other suppliers, in particular when the category captain is able to limit or disadvantage the distribution of products of competing suppliers. Moreover, this effect may be stronger where the distributor also sells own label products, and has incentives to exclude certain suppliers. The assessment of the upstream foreclosure effect is made by analogy to the assessment of single branding obligations (see 1 above);
- (b) collusion between distributors if supplier serves as category captain for all or most distributors;
- (c) collusion between suppliers if increased opportunities to exchange information via retailers.

**8.3 Key issues for Article 101(3) analysis of “category management agreements” (also see factors at Part B of Appendix 7):** The Vertical Guidelines indicate that the following factors are relevant to the Article 101(3) analysis (Vertical Guidelines, para. 213):

- (a) Distributors may achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves or by allowing them to better anticipate demand and to tailor their promotions accordingly;
- (b) Category management agreements may lead to higher customer satisfaction as they better meet demand expectations;
- (c) Benefits are more likely to arise where there is a high level of inter-brand competition and low consumers' switching costs.

## 9. Tying

**9.1 Main element:** Where buyer is required to purchase a “tied” good/service from the supplier (or a designated third party) as a condition of purchasing another distinct “tying” good/service. Two products are distinct if, in the absence of tying, a substantial number of customers would purchase the tying product without also buying the tied product from the same supplier. This analysis needs to take account of the nature of the products and commercial usage (e.g. it would not be “tying” to supply shoes with laces). Tying has similar effects to other single branding vertical restraints, amounting to a form of “quantity-forcing” on the buyer in respect of the tied product (and may sometimes be accompanied by a “non-compete obligation” in respect of the tied product) (Vertical Guidelines, paras. 214-215).

**9.2 Competitive assessment of tying:** The Vertical Guidelines (paras. 216-217) suggest that tying may have the following potential negative effects on competition:

- (a) Anticompetitive foreclosure on the tied market, the tying market or both. The same analysis will be conducted as for single branding applies because tying involves a form of quantity-forcing (and may involve a non-compete obligation) on the buyer in respect of the tied product.
- (b) Buyer may pay higher prices for the tied product than it would otherwise do. This occurs if the tying and tied product can be used in variable proportions as inputs to a production process, if the tying allows price discrimination according to the use the customer makes of the tying product and in the case of long-term contracts where it becomes difficult for the customers to calculate the consequences of the tying.

**9.3 Key issues for Article 101(1) analysis of tying (also see factors at part A of [Appendix 7](#)):** The Vertical Guidelines refer to the following issues for the Article 101(1) assessment (paras. 219-221):

- (a) Supplier's market position: the importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse the tying obligation.
- (b) Competitors' positions: as long as competitors are numerous and strong (compared to the supplier), buyers should have sufficient alternatives to purchase the tying product without the tied product.
- (c) Buyer power: absent the prospect of obtaining at least part of the possible efficiencies, powerful customers may not accept agreements.

**9.4 Key issues for Article 101(3) analysis of tying (also see factors at Part B of [Appendix 7](#)):** The Vertical Guidelines (para. 222) refer to the following issues for the Article 101(3) assessment:

- (a) Efficiency gains: Tying may produce cost reductions (but these must be passed onto consumers) and may ensure a certain uniformity and quality standardisation.
- (b) Indispensability: Where the supplier of the tying product designates which other suppliers the buyer must use for the tied product (e.g. because it is not possible to formulate minimum quality standards), this may fall outside Article 101(1) e.g. if the supplier does not derive any direct financial benefit from so doing.

## 10. Resale Price Maintenance

**10.1 Main element:** An agreement or concerted practice having as its direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. RPM is a hardcore restriction (Vertical Guidelines, para. 223) Whilst it is presumed that RPM falls within Article 101(1) and is unlikely to fulfil the conditions in Article 101(3), this is a rebuttable presumption (Vertical Guidelines, para. 223).

**10.2 Competitive assessment of "resale price maintenance":** The Vertical Guidelines (paras. 48-49 and 224) suggest that vertical restraints in the "resale price maintenance" group (including recommended resale prices) have the following potential negative effects on competition:

- (a) facilitate collusion between suppliers (in particular in a tight oligopoly) by (i) enhancing price transparency in the market; (ii) undermining the supplier's incentive to cut its price;
- (b) facilitate collusion between the buyers due to lack of intra-brand price competition. Strong or well organised distributors may be able to force/convince one or more suppliers to fix their resale price and thereby help them stabilise a collusive equilibrium;
- (c) soften competition between manufacturers and/or between retailers, e.g. if manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them;
- (d) price increase, as all or certain distributors are prevented from lowering their retail price;
- (e) lower the pressure on the margin of the manufacturer, in particular where it has a commitment problem (an interest in lowering the price charged to subsequent distributors);
- (f) lack of price competition may also reduce dynamism and innovation at the distribution level (e.g. new entry, or entry/ expansion of price discounters).

**10.3 Key issues for Article 101(1) analysis of "resale price maintenance" restrictions (also see factors at part A of Appendix 7):** Including RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus falls within Article 101(1) (Vertical Guidelines, para. 223).

Including a recommended resale price, or a maximum resale price may be covered by the VABER provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties. Where it is not, the Article 101(1) assessment will assess the risk that it will have the same effect as RPM if it works as a focal point for the resellers, and/or facilitates collusion between suppliers (Vertical Guidelines, at para. 227). In practice, this will depend on:

- (i) existence of a monitoring mechanism;
- (ii) possibility of retaliation in case a distributor deviates from the focal price;
- (iii) market position of the supplier.

**10.4 Key issues for Article 101(3) analysis of “resale price maintenance” restrictions (also see factors at Part B of Appendix 7):** Including RPM in an agreement gives rise to a rebuttable presumption that the agreement is unlikely to fulfil the conditions of Article 101(3). The Vertical Guidelines refer to the following efficiencies as being relevant to the Article 101(3) assessment (Vertical Guidelines, paras. 225 and 229):

- (i) Where a supplier introduces a new brand or enters a new market, RPM may be helpful to induce distributors to develop demand;
- (ii) In a franchise network or similar distribution system, RPM may be necessary to facilitate short term price promotions (e.g. 2 to 6 weeks);
- (iii) Extra margin provided by RPM may allow retailers to provide (additional) pre-sale services, in particular in case of experience or complex products. RPM may prevent free riding at the distribution level where retailer provides pre-sale services but customers could purchase the product at lower prices from retailers who do not offer these services;
- (iv) For maximum resale prices, avoiding double marginalisation may be a particularly relevant efficiency (see efficiency (f) at Part B.1 in Appendix 7).

## Appendix 9: The Motor Vehicle Block Exemption Regulations (MVBERS)

### 9.1 Special provisions applicable under the 2002 MVBBER

#### A. The scope of application of the 2002 MVBBER

1. **Is the agreement of a type falling within the scope of the 2002 MVBBER?** The 2002 MVBBER applies to vertical agreements relating to the purchase, sale or resale of new motor vehicles, i.e. passenger cars, light commercial vehicles, trucks, buses and any other self-propelled vehicles intended for use on public roads and having three or more road wheels (Art. 1(1)(n) 2002 MVBBER). The 2002 MVBBER will cease to apply on 1 June 2013, following which vertical agreements falling under the 2002 MVBBER will be assessed in accordance with the VABER.

*NB The 2002 MVBBER is also available for vertical agreements between a distributor/dealer and a sub-dealer. However, it is not relevant to vertical agreements for second-hand cars, or to loan agreements by a bank to finance a vehicle purchase.*

2. **Option of exclusive distribution or selective distribution:** The 2002 MVBBER allows manufacturers/suppliers to opt between either:
  - (a) exclusive distribution – where the manufacturer/supplier agrees to sell its vehicles only to one distributor/dealer for a particular territory (and where that buyer is normally restricted from “active” (but not “passive”) sales into other exclusively allocated territories); or
  - (b) selective distribution – where:
    - (i) the manufacturer/supplier agrees to sell its vehicles, either directly or indirectly, only to authorised distributors/dealers – selected on the basis of specified quantitative or qualitative criteria (for general observations on the distinction, see 4.1 of [Appendix 8](#)) – who are free to make “active” (or “passive”) sales to end users anywhere in the EU (including active advertising, mail shots, personalised e-mails, etc.); and
    - (ii) those distributors/dealers agree not to sell those vehicles to unauthorised distributors – subject to this not involving any hardcore restraints.

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The 2002 MVBER is not available if a manufacturer/supplier combines exclusive sales territories and selective distribution for a single dealer, as this would involve “hardcore” restrictions (see Part B of Section 9.2 below); however, a manufacturer/supplier can decide to implement exclusive distribution in one market and selective distribution in another. Where a manufacturer/supplier combines selective distribution in some markets with other forms of distributions in other markets, the 2002 MVBER operates to ensure that effective competition is not unduly restricted. Thus authorised dealers in a selective distribution system must be free to make passive sales to any end user or unauthorised dealer located in markets in the EU where exclusive territories (or customer groups) have been allocated. Conversely, where an exclusive dealer is appointed in a territory, it must be free to make active or passive sales to any end user or unauthorised dealer located in markets in the EU where selective distribution is used (Recital (13) 2002 MVBER).

- 3. Operation of the 2002 MVBER:** The 2002 MVBER operates in many respects in the same way as the VABER, but with special rules regarding:
- (a) *Specific provisions on contractual protection:* The 2002 MVBER requires specific contractual provisions to be included in vertical agreements in the motor vehicle sector, aimed at improving the buyer's independence from the supplier (see Part B of this Section 9.1);
  - (b) *Market share criteria:* The 2002 MVBER applies different market share criteria from those applicable under the VABER (see Part C of this Section 9.1);
  - (c) *Hardcore restrictions:* The 2002 MVBER contains specific rules regarding restrictions which are treated as “hardcore” (see Section 9.2 below). If the agreement includes one or more hardcore restrictions, the benefit of the 2002 MVBER is lost for the entire agreement. There is no severability for hardcore restrictions (Art. 4 and Recital (12) 2002 MVBER; 2002 MVBER Brochure at section 3.1); and
  - (d) *Non-exempted restrictions:* The 2002 MVBER contains specific rules regarding restrictions which are treated as “non-exempted” (see Section 9.3 below). If the agreement includes one or more of these expressly non-exempted restrictions, the benefit of the 2002 MVBER is only lost in relation to that part of the agreement. It is thus possible to sever such restraints from the agreement, if this is permitted under the terms of the agreement, thereby treating the agreement as not containing any such restraints.

## B. Specific provisions on contractual protection which must be included in the agreement

*NB The provisions at paras. 1-4 below are aimed at strengthening the dealer's independence from the supplier and safeguarding a relatively stable contractual framework within which sellers of new vehicles can compete.*

*NB If an agreement does not meet these criteria, it cannot benefit from the 2002 MVBBER and should instead be subject to more detailed Article 101 analysis (see [Appendix 7](#)). If Article 101(1) is applicable, the parties will need to explain why, in their specific case, the absence of the relevant provisions helps to attain (or does not obstruct the attainment of) the positive effects referred to in Article 101(3) (2002 MVBBER Brochure at section 4.3.2, Q.8).*

1. **Transferability of the agreement:** The agreement must provide that the distributor/dealer is entitled to transfer its rights and obligations under the vertical agreement to any other member of the distribution system of the same type (distributor/dealer, as the case may be) of its choice (Art. 3(3), Recital (10) 2002 MVBBER; 2002 MVBBER Brochure at section 5.3.7).
2. **Written and personal notice for contract termination:** The agreement must provide that, when the supplier gives notice of termination (whether for breach or regular termination), it must give notice in writing including detailed, objective and transparent reasons for the termination (Art. 3(4), Recital (9) 2002 MVBBER). This is in order to prevent a supplier from ending an agreement with a distributor/dealer because of pro-competitive behaviour or practices which may not be restricted under the 2002 MVBBER, e.g. active/passive sales to foreign consumers, multibranding, sub-contracting of repair and maintenance services; for further details of actions which may not be restricted by the supplier, see Section 9.2 below (hardcore restrictions under the 2002 MVBBER) and Section 9.3 below (other non-exempted restraints under the 2002 MVBBER).
3. **Duration:** The agreement must either (Art. 3(5) 2002 MVBBER):
  - (a) have a minimum duration of 5 years – in which case each party must give the other at least 6 months' prior notice of its intention not to renew; or
  - (b) be of indefinite duration – in which case either party must give at least 2 years' notice for regular termination (in the manner specified at para. 2 above). This may be reduced to 1 year's notice if (i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or (ii) the supplier terminates the agreement because it is necessary to renegotiate the whole or a substantial part of the network.

4. **Arbitration:** The agreement must give each party the right (without prejudice to any rights to bring proceedings in national courts) to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator (Art. 3(6), Recital 11 2002 MVBBER), e.g. in relation to:
- (a) supply obligations;
  - (b) the setting/attainment of sales targets;
  - (c) the implementation of stock requirements;
  - (d) the implementation of an obligation to provide or use demonstration vehicles;
  - (e) the conditions for the sale of different brands;
  - (f) whether the prohibition on operating out of an unauthorised place of establishment limits the ability of a distributor/dealer of motor vehicles other than passenger cars or light commercial vehicles (e.g. trucks, buses and coaches) to expand its business (see observations on location clauses at Part E of Section 9.3 below); or
  - (g) whether the supplier's termination of an agreement is justified by the reasons given in the written notice (see para. 2 above).

### C. Market share criteria under the 2002 MVBBER

Under the 2002 MVBBER different market share thresholds apply, depending on the type of distribution system used. These market shares are applied by reference to the relevant market on which the supplier sells the new motor vehicles (Art. 3(1) 2002 MVBBER). These different thresholds are as follows:

- **Qualitative selective distribution:** for agreements establishing purely qualitative selective distribution systems (without quantitative limits) there are no thresholds, i.e. the 2002 MVBBER is available regardless of the supplier's market share;
- **Quantitative selective distribution:** for agreements establishing quantitative selective distribution systems the 2002 MVBBER is available if the supplier (including connected undertakings) enjoys a market share of less than 40% on the relevant market on which it sells to its buyers;
- **Exclusive distribution, etc.:** for all other agreements, the 2002 MVBBER is available if the supplier (including connected undertakings) enjoys a market share of less than 30% on the relevant market on which it sells to its buyers (i.e. the same general 30% thresholds as applies under the VABER).

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*NB For the purposes of the 2002 MVBBER, market shares are to be calculated by reference to the volume of contract goods, corresponding goods and other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer by reason of their characteristics, prices and intended use (Art. 8(1) 2002 MVBBER; see also 2002 MVBBER Brochure at section 6 (and also sections 4.3.1 and 5.4.1 (Q.72)).*

*When volume data is not available, value data may be used (or vice versa). If information is not available, estimates based on reliable market information may be used.*

*NB For the purposes of applying the above 30% and 40% thresholds, the following rules apply (Art. 8(2) 2002 MVBBER):*

- (a) Preceding calendar year: Data should relate to the preceding calendar year;*
- (b) Integrated distribution: Market share should include goods/services supplied to integrated distributors for the purpose of sale;*
- (c) Short-term increases above 30%/40%: If the relevant market share (while initially within the 30%/40% threshold) subsequently exceeds 30%/40% but does not exceed 35%/45%, the 2002 MVBBER can continue to apply for two consecutive calendar years. If the relevant market share (while initially within the 30%/40% threshold) subsequently exceeds 35%/45%, the block exemption can continue to apply for one calendar year (provided that this exception cannot be combined with the 30-35%/40-45% exception so as to exceed a period of two calendar years).*

## 9.2 Hardcore restrictions under the 2002 MVBBER

### A. Price-fixing or resale price maintenance (RPM)

Price-fixing restrictions on the distributor/dealer are not permitted (Art. 4(1)(a) 2002 MVBBER): exactly the same considerations apply as under the VABER (see Part A of [Appendix 5](#)).

### B. Certain territorial/customer sales restrictions (generally)

Restrictions on the territories in which, or the customers to whom, the distributor/dealer may sell the contract goods or services are not permitted (subject to the exceptions considered below) (Art. 4(1)(b) 2002 MVBBER). Essentially the same considerations apply as under the VABER (see Part B of [Appendix 5](#)).

*NB Use of intermediaries/purchasing agents: The right of any distributor to sell new motor vehicles passively (or, where relevant, actively) to end users includes the right to sell such vehicles to end users who have given authorisation to an intermediary/purchasing agent to purchase or take delivery of, transport or store a new motor vehicle on their behalf (Recital (14) 2002 MVBBER).*

*NB Use of Internet: Where a distributor/dealer uses the Internet (or Internet referral sites) to advertise or sell new motor vehicles, this is generally considered as a form of "passive sale" (Recital (15) 2002 MVBBER).*

*NB Examples of indirect restrictions of sales include where the supplier (Recitals (16) and (17) 2002 MVBBER):*

- *places limits on its dealers' sales to end users in other Member States (e.g. where the dealer's remuneration or the purchase price is dependent on the destination of the vehicle or the end user's place of residence);*
- *operates supply quotas (if based on a sales territory other than the EU) whether or not combined with sales targets;*
- *operates bonus systems based on the destination of the vehicles; or*
- *operates any form of discriminatory product supply to dealers (whether in the case of product shortage or otherwise).*

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This hardcore restriction is subject to the following permitted sales restrictions (a “white list”):

- **Exclusive distribution systems** – qualified protection of supplier or its other dealers: Where a supplier has opted for “exclusive distribution” (rather than “selective distribution”), it may restrict “active” sales into the exclusive territory and/or exclusive customer group reserved to the supplier or allocated by the supplier to another of its distributors/dealers (provided such restrictions do not limit sales by customers of the distributor/dealer) – but dealers must be free to make active or passive sales to any end user or unauthorised dealer located in markets where selective distribution is operated (Art. 4(1)(b)(i)). *NB For further Commission guidance on the concept of active sales and passive sales, see MVBBER Brochure at section 4.4, Q.12.*
- **Selective distribution systems:** When a supplier has opted for “selective distribution” (rather than “exclusive distribution”), it may restrict authorised distributors/dealers from selling new motor vehicles to unauthorised distributors/dealers located in markets where selective distribution is operated (provided such restrictions do not limit sales by customers of the distributor/dealer) (Art. 4(1)(b)(iii)).
- **Wholesalers:** In the context of sales to a distributor operating at the wholesale level of trade, it is permitted to restrict sales to end users (Art. 4(1)(b)(ii)).

### C. Further territorial/customer sales restrictions in selective distribution systems

In the context of markets where the supplier uses a selective distribution system (as defined in Art. 1(f) 2002 MVBBER), two further categories of sales restrictions are not permitted:

- **Cross-supplies between authorised distributors/dealers:** Any restriction on authorised distributors/dealers making cross-supplies to other members of the selective distribution system (Art. 4(1)(c) 2002 MVBBER). Dealers must remain free to sell to and/or purchase from other authorised dealers (at the same or different levels of trade). *NB This is without prejudice to the supplier's ability to prohibit members of the selective distribution system from operating out of an unauthorised place of establishment. However, this is subject to the 2002 MVBBER's provisions regarding “location clauses” in the context of selective distribution systems for passenger cars or light commercial vehicles (see Part E of Section 9.3 below) (Art. 4(1)(d) 2002 MVBBER).*
- **Sales to end users:** Any restriction on authorised dealers operating at the retail level of trade making sales (active or passive) of new motor vehicles to end users (Art. 4(1)(d) and (e) 2002 MVBBER). *NB For these purposes “end users” include leasing companies (unless the leasing contracts used provide for a transfer of ownership or an option to purchase the vehicle prior to the expiry of the contract) (Art. 1(1)(w) 2002 MVBBER).*

**D. Restrictions on distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range**

It is not permitted to restrict a distributor/dealer from selling a motor vehicle, corresponding to a model within the contract range of motor vehicles made available to the distributor/dealer, which is the subject of a distribution agreement with another undertaking within the distribution system (as set up by the manufacture or with its consent) and which is (a) manufactured or assembled in volume by the manufacturer and (b) identical as to body style, drive-line, chassis and type of motor to a vehicle within the contract range (Art. 4(1) (f), Recital (20) 2002 MVBBER).

*NB This means that the 2002 MVBBER is only available to vertical agreements which enable the dealer to order, stock and sell such corresponding vehicles (e.g. for a Continental dealer to sell RHD models to UK/Irish customers) sometimes referred to as an "availability clause". Discriminatory or objectively unjustified supply conditions (e.g. regarding delivery times or prices) applied by the supplier to corresponding vehicles are to be considered a restriction on the dealer's ability to sell such vehicles.*

### 9.3 Other non-exempted restraints under the 2002 MVBER

#### A. Buyer/repairer non-compete obligations (including requirements obligations or quantity-forcing above 30%)

Any direct or indirect obligation causing the buyer (Arts. 5(1)(a), Recital (27) 2002 MVBER; 2002 MVBER Brochure at section 4.5.1):

- (a) not to manufacture, purchase, sell or resell goods competing with the contract goods; or
- (b) to purchase from the supplier (or designated third parties such as other members of its distribution system) goods equivalent to the value of more than 30% of the buyer's total purchases in the previous calendar year (of the contract goods and their substitutes on the relevant market). *NB Such quantity-forcing obligations are treated as non-competes since they prevent multi-brand dealers from developing.*

*NB The Commission issued some "Frequently Asked Questions" in November 2003 which indicates that dealers must be given a real and exercisable opportunity to engage in multibranding, while recognising that what might be an acceptable requirement for one dealership could be a non-exempt non-compete obligation if applied to another. These FAQs stipulate that dealership agreements should make clear provision for multibranding and should make plain that requirements must be adapted or dispensed with if they would constitute barriers to a dealer wishing to engage in multibranding. They provide that: certain facilities (such as parking spaces, customer toilets, coffee machines, etc.) may be required by a supplier, but should not be reserved to a particular brand; some requirements may need to be relaxed or dispensed with altogether, having regard to the size and other characteristics of the dealership in question, if they would make multibranding difficult in practical or cost-related terms. This may apply, for example, to requirements for a specific reception desk, the number of vehicles of the brand to be exhibited, "corporate identity" requirements, etc.*

*NB An obligation to sell different brands in different areas of the showroom (in order to avoid confusion between the brands) does not generally constitute a non-compete obligation; however, it would be a no-exempt non-compete clause to insist that competitor's brands be sold in separate showrooms.*

*NB An obligation to display the full range of the manufacturer/supplier's motor vehicles may constitute a non-compete obligation if it makes the sale or display of other manufacturers' vehicles impossible or unreasonably difficult.*

*NB An obligation on the dealer to have brand-specific sales personnel for different brands of motor vehicles does constitute a non-compete obligation – unless the distributor decides to have brand-specific sales personnel and the supplier pays all the additional costs involved.*

#### B. Post-termination buyer non-compete obligations

Any direct or indirect obligation requiring the distributor/dealer, after termination of the agreement, not to manufacture, purchase, sell or resell motor vehicles (Art. 5(1)(d) 2002 MVBBER).

#### C. Restrictions on sales of particular competing products (in a selective distribution system)

Any direct or indirect obligation restricting an authorised distributor/dealer from selling motor vehicles of particular competing suppliers (Art. 5(1)(c), Recital (29) 2002 MVBBER).

#### D. Restrictions on sale of leasing services

Any direct or indirect obligation causing the retailer not to sell leasing services relating to contract goods or corresponding goods (Art. 5(2)(a), Recital (30)).

#### E. Location clauses (in a selective distribution system for passenger cars or light commercial vehicles)

Any direct or indirect obligation limiting the ability of an authorised distributor/dealer of new passenger cars or light commercial vehicles within a selective distribution system to establish additional sales or delivery outlets at other locations within the EU where selective distribution is applied (Art. 5(2)(b), Recitals (18) and (29) 2002 MVBBER; 2002 MVBBER Brochure at section 5.3.3).

*NB Such location clauses are non-exempted under the 2002 MVBBER since October 2005 (Art. 12(2), Recital (37) 2002 MVBBER). "Passenger cars" mean motor vehicles intended for the carriage of passengers and comprising no more than 8 seats in addition to the driver's seat (Art. 1(1)(o)); "light commercial vehicles" mean motor vehicles intended for the transport of goods or passengers where sold in versions with a maximum weight of no more than 3.5 tonnes (Art. 1(1)(p)). Accordingly, a manufacturer is still able to prohibit dealers of trucks, buses or coaches from opening a secondary sales outlet or repair shop without the manufacturer's consent. However, such prohibition is not exempted by the MVBBER if it limits the expansion of the dealer's business at its authorised place of establishment e.g. by restricting the development or acquisition of the infrastructure necessary to allow increases in sales volumes (including increases brought about by Internet sales).*

## 9.4 Additional hardcore restrictions under the 2010 MVBER

### A. Restriction of sale by members of a selective distribution system

Members of a selective distribution system must not be restricted from selling spare parts for motor vehicles to independent repairers which use those parts for the repair and maintenance of motor vehicles (Art. 5(a), Recital (16) 2010 MVBER). *NB: This aims to give independent repairers access to so-called "captive parts" in a selective distribution system (for example, a motor vehicle manufacturer's network of authorised dealerships). Without this access, independent repairers would not be able to compete effectively with authorised repairers.*

### B. Restriction of sale by suppliers of spare parts

An agreement, between a supplier of spare parts, repair tools or diagnostic equipment and a motor vehicle manufacturer, must not restrict the supplier's ability to sell those goods to authorised or independent distributors or repairers, or to end users (Art. 5(b), Recital (17) 2010 MVBER).

*NB: This does not affect the ability of motor vehicle manufacturers to require authorised repairers within their distribution system to only use spare parts that match the quality of the components used for the assembly of a certain motor vehicle. In addition, in view of the vehicle manufacturers' direct contractual involvement in repairs under warranty, free servicing, and recall operations, it is permitted to require authorised repairers to use only spare parts supplied by the vehicle manufacturer for those repairs.*

*NB: Tooling Arrangements: Article 101(1) does not normally apply to a sub-contracting arrangement whereby a motor vehicle manufacturer provides a tool to a component manufacturer for the production of certain components, shares in the product development costs, or contributes necessary IPRs or know-how, and does not allow this contribution to be used for the production of parts to be sold directly in the aftermarket. However, if a motor vehicle manufacturer obliges a component supplier to transfer its ownership of such a tool, IPRs, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, IPRs, or know-how, the agreement may be caught by Article 101(1) (see Commission's Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ 2010 C138/05), para. 23).*

### C. Restriction on supplier's ability to place trade mark or logo on component parts

An agreement, between a supplier of components and a motor vehicle manufacturer which uses those components in the assembly process, must not restrict the supplier's ability to place its trade mark or logo in an easily visible manner on such components or spare parts (Art. 5(c), Recital (18) 2010 MVBER). *NB: Having visible trade marks or logos on vehicle components is seen as important since it allows repairers or end users to identify the manufacturer of the component and to choose between alternative parts.*

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