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Vertical Agreements 2021

Contributing editor**Patrick J Harrison**

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Vertical Agreements*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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



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Contents

Argentina	3	Japan	103
Julián Peña and Federico Martin Rossi Allende & Brea		Nobuaki Mukai Momo-o Matsuo & Namba	
Austria	11	Malaysia	114
Axel Reidlinger and Franz Stenitzer Reidlinger Schatzmann		Nadarashnaraj Sargunraj and Nurul Syahirah Azman Zaid Ibrahim & Co	
Brazil	19	Netherlands	124
Carolina Destailleur Bueno, Cristianne Saccab Zarzur and Marcos Pajolla Garrido Pinheiro Neto Advogados		Sarah Beeston, Pim Jansen and Nina Korstenbroek Van Doorne	
China	31	Philippines	135
Lei Li Sidley Austin LLP		Arlene M. Maneja and Franco Aristotle G. Larcina SyCip Salazar Hernandez & Gatmaitan	
European Union	40	Spain	143
Patrick J Harrison and Rosanna Connolly Sidley Austin LLP		Pedro Callol, Manuel Cañadas and Laura Moya Callol, Coca & Asociados	
France	54	Sweden	152
Marco Plankensteiner, Pauline Dessèvre and Mathilde Vergnaud Kramer Levin Naftalis & Frankel LLP		Fredrik Lindblom, Sanna Widén and Angelo Skog Advokatfirman Cederquist KB	
Germany	64	Switzerland	161
Markus M Wirtz and Silke Möller Glade Michel Wirtz		Marcel Dietrich, Franz Hoffet, Richard Stäuber and Yves Bianchi Homburger	
India	77	Turkey	173
Deeksha Manchanda and Avinash Amarnath Chandhiok & Mahajan, Advocates and Solicitors		Gönenç Gürkaynak and O Onur Özgümüş ELIG Gürkaynak Attorneys-at-Law	
Indonesia	85	Ukraine	181
HMBC Rikrik Rizkiyana, Farid Nasution, Vovo Iswanto and Anastasia Pritahayu R Daniyati Assegaf Hamzah & Partners		Igor Svechkar, Oleksandr Voznyuk and Tetiana Vovk Asters	
Italy	94	United Kingdom	191
Enrico Fabrizi and Valeria Veneziano Osborne Clarke		Patrick J Harrison and Rosanna Connolly Sidley Austin LLP	
		United States	205
		Karen Kazmerzak and David C Giardina Sidley Austin LLP	

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LEGAL FRAMEWORK

Antitrust law

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

The legal sources that set out the law applicable to vertical restraints in Spain are Law 15/2007 of 3 July 2007 for Defence of Competition Act (LDC), Royal Decree 261/2008 of 22 February 2008, approving the Defence of Competition Regulation (RDC), and Law 3/2013 of 4 June 2013, creating the National Markets and Competition Commission (Law 3/2013).

Types of vertical restraint

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

Spanish law does not define the concept of vertical restraints. Nonetheless, the following are the types of vertical restraints as accepted by the administrative practice of competition authorities and case law of the courts:

- resale price maintenance: agreements or concerted practices having as their direct or indirect object the establishment of a fixed minimum resale price or a fixed minimum price level to be observed by the buyer;
- exclusive supply: where the supplier is required to exclusively or mainly distribute the products to only one purchaser;
- networks of exclusive agreements causing foreclosure in the market downstream;
- exclusive customer allocation: the supplier agrees to sell its products to only one distributor for resale to a particular group of customers;
- selective distribution: distribution systems based on qualitative criteria;
- single branding: agreements that have as their main element that the buyer is obliged or induced to exclusively or mainly sell products from a single brand;
- tying arrangements: situations where customers that purchase one product are also required to purchase another distinct product from the same supplier or from someone designated by the latter;
- category management: agreements whereby a distributor entrusts the supplier with the marketing of a category of products, including in general not only the supplier's products, but also the products of its competitors; and
- franchising: agreements containing licences of intellectual property rights related in particular to trademarks or signs and know-how for the use and distribution of goods or services.

Legal objective

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

The objective of Spanish competition law is the effective protection and promotion of competition.

Responsible authorities

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

The functions of the National Markets and Competition Commission (CNMC) are to guarantee, preserve and promote the correct functioning, transparency and existence of effective competition. For the purposes of the foregoing, the CNMC shall exercise its functions throughout the Spanish territory and in relation to all markets and economic sectors, including enforcement of the law on vertical restraints.

According to Law 1/2002 of 21 February 2002 on coordination of the jurisdictions of the State and the Autonomous Communities in the field of defence of competition, regional competition authorities will be responsible for exercising their powers in their territory when a business conduct alters or may alter free competition within the scope of the respective region. The exercise of their functions is restricted to conducts having an impact in the region where the relevant regional authority acts. The CNMC maintains a close collaboration with the regional competition authorities, with the objective of improving the application of antitrust regulation through the reciprocal exchange of information.

Jurisdiction

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

Vertical restraints will be subject to antitrust law in Spain if they have effect in all or parts of the Spanish territory.

As a general rule, Spanish competition authorities do not apply the law extraterritorially. This could in theory happen, however, if a given conduct not performed in Spain has effects in Spain.

At a national level, there is some reported activity in the context of internet sales.

Agreements concluded by public entities

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

Competition law applies to conduct with an impact in the market, including the conduct of state-owned or public entities. In the decision of 6 October 2011 (case S/0167/09, *Productores de Uva y Vinos de Jerez*) the CNMC expressly declared, for the first time, that public entities can breach competition law when they facilitate an agreement or a conduct contrary to competition law.

Also, the regional authorities have occasionally prosecuted public entities. The Catalan Authority adopted the decision of 24 November 2014 (case 40/2011, *Servicios funerarios del Llobregat*) where it fined the City Council of L'Hospitalet de Llobregat for the conclusion of agreements consisting of reserving the transfer of corpses from hospitals to a specific funeral services company. Therefore, antitrust law also applies as a general principle to vertical restraints concluded by public entities.

Sector-specific rules

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

Generally, the LDC establishes that conduct that fulfils the requirements of the EU block exemption regulations is also exempted under the LDC.

Royal Decree-law 4/2013, of 22 February, of support measures to entrepreneurs and to promote growth and employment, includes a number of measures to promote competition. In particular, it establishes a maximum duration of one year (annually extendable for a maximum of three years) for contracts between petrol companies and service stations. Moreover, petrol companies can no longer recommend resale prices in the supply agreements with service stations; and petrol companies with a market share above 30 per cent cannot sign new exclusive supply agreements in those regions where the 30 per cent market share is exceeded.

General exceptions

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

There are two types of exceptions, which do not appreciably restrict competition:

- if the aggregate market share held by (competing) parties to an agreement does not exceed 10 per cent of any of the relevant markets affected by the agreement; or
- if the market share held by (non-competing) parties to an agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement.

The second threshold would be the *de minimis* threshold applicable to vertical restraints.

When competition is restricted by the cumulative effect of parallel agreements, these market share limits are lowered to 5 per cent. A cumulative effect will not be found to exist if less than 30 per cent of the relevant market is covered by parallel networks of agreements.

Vertical restraints are not exempted under the above rules if they have as their object certain 'hard-core' restrictions similar to those listed in the Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community (2001/C 368/07).

In any event, the following agreements (to the extent that they contain a vertical or other restraint) are not considered to be of minor importance, regardless of the market size covered by the agreement:

- agreements including holders or beneficiaries of exclusive rights; and
- agreements involving companies present in relevant markets in which more than 50 per cent of the market is covered by parallel networks of vertical agreements having similar effects.

Finally, the CNMC may declare that article 1.1 LDC is not applicable to agreements that, although not meeting the above criteria for being considered *de minimis*, are not of sufficient importance to significantly restrict competition in light of their economic and legal context.

TYPES OF AGREEMENT

Agreements

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

Not in the applicable statutes. However, case law has developed a wide concept of agreement to include the general concept of meeting of minds or concurrence of wills, much in line with EU competition law. Arguably, the concept may be even wider under Spanish law than under EU competition law, as conscious parallelism is also included as conduct enabling characterisation under article 1 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC).

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

The existence of a formal written agreement is not necessary for antitrust law to apply. Any kind of agreement or informal or unwritten understanding is subject to competition law.

Parent and related-company agreements

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

The LDC does not contemplate any rule related to the vertical restraints applying to agreements between a parent company and a related company. Vertical restraints between companies of the same company group are not caught by the LDC. Conversely, vertical restraints between related companies that do not have common control are caught by the law on vertical restraints.

Much as under EU law, there is a general presumption that when a parent company directly or indirectly owns 100 per cent of the shares of its subsidiary and the latter infringes any competition regulation, the parent company has been able to exercise 'decisive influence' over the conduct of its subsidiary. Below a 100 per cent direct or indirect shareholding, whether two companies are related will depend on the particular circumstances of each case.

Agent-principal agreements

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

Agent-principal agreements are not subject to the LDC when the agent does not bear any risks in relation to the agreements concluded or

negotiated on behalf of the principal and in relation to market-specific investments for that field of activity.

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

Guidance in this area can be taken from EU law on the point, following the general legal reference under the LDC to EU competition law exemption regulations. The National Markets and Competition Commission (CNMC) in its decision of 30 July 2009 (case 652/08 *Repsol/Cepsa/BP*) established that, from the point of view of competition law, there are two categories of agency contracts. On the one hand, 'non-genuine agency contracts' in the fuel sector are distribution contracts; on the other hand, the LDC does not apply to 'genuine agency contracts'.

Intellectual property rights

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

The safe harbour is only applicable to the licence directly related to the use, sale or resale of goods and services when those intellectual property rights provisions do not constitute the primary object of the agreement.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC) (article 1.1) prohibits vertical agreements between two or more parties which have the object or the effect of preventing, restricting or distorting competition within the national market. Moreover, some vertical restraints are considered unlawful per se when they contain hardcore restrictions such as price fixing (retail price maintenance), non-competition clauses for a duration of more than five years or the restriction of passive sales.

Pursuant to article 1.3 LDC, the prohibition contained in article 1.1 LDC shall not apply to agreements:

- generating efficiency gains by contributing to improving production or distribution, or to promoting technical or economic progress;
- from which consumers must obtain a fair share of these efficiency gains;
- that do not impose on the undertakings concerned any vertical restraints not essential for reaching the sought efficiency benefits; and
- that do not allow the participating companies to eliminate competition with regard to a substantial part of the considered products or services.

The criteria contained in article 1.3 LDC are almost identical to those contained in article 101.3 of the TFEU.

In addition, as pointed out above, article 1.4 LDC provides that the prohibition foreseen in article 1.1 shall not apply to the agreements or collective recommendations meeting the criteria of any EU block exemption regulation, which, in the case of vertical restraints, is Commission Regulation (EU) No 330/2010, on the application of article 101.3 of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices (the Vertical Block Exemption).

Market shares

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

Article 1.4 LDC refers directly to the Vertical Block Exemption, incorporating its text into national competition law. The Vertical Block Exemption establishes that the exemption foreseen applies when the market share held by the supplier does not exceed 30 per cent of the relevant market in which it sells the contract goods or services.

However, outside the scope of the Vertical Block Exemption, the vertical agreements should be analysed individually according to the rules contained in article 1.3 LDC.

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

Article 1.4 LDC refers directly to the Vertical Block Exemption, which establishes that the exemption foreseen applies when the market share held by the buyer does not exceed 30 per cent of the relevant market in which it purchases the contract goods or services.

However, outside the scope of the Vertical Block Exemption, vertical agreements should be analysed individually pursuant to the article 1.3 LDC framework.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

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

Pursuant to article 1.4 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC), the Vertical Block Exemption to vertical restraints is applicable in Spain.

Consequently, the safe harbour or the block exemption of restrictive agreements is subject to market share thresholds. In other words, the safe harbour applies when the market share held by the supplier does not exceed 30 per cent of the relevant market in which it sells the contract goods or services, and the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services. This safe harbour does not apply in the case of hard-core restraints, in which case the parties can seek to be covered under the exemption provided for in article 1.3 LDC. For these purposes, the case law and guidance of the Spanish courts and agencies, the European Commission guidelines and practice, and the case law of the European courts are of relevance.

TYPES OF RESTRAINT

Assessment of restrictions

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

Resale price maintenance is, according to the National Markets and Competition Commission (CNMC), one of the most damaging modalities for the maintenance of competition in the market and is considered as

a per se restriction of competition (decision of 29 February 2008 in case 647/08, *Distribuciones Damm*).

However, taking into account the very low market share of the supplier (decision of 3 December 2009 in case 0105/08, *El Corral de las Flamenecas*) and the existence of an atomised market with no parallel networks of similar restraints (decision of 17 December 2010 in case S/0257/10, *Natura Bissé Internacional*, and decision of 17 July 2013 in case S/0417/12, *Mantra*), the CNMC exceptionally considered the application of the de minimis rule.

Resale price maintenance can be executed by any means or devices which have as their object or effect the restriction of the distributor's freedom to set end prices. This may be done, for instance, by establishing the margin that dealers must offer to their respective agents (decision of 11 January 2012, case S/0154/09, *Montesa Honda*); fixing maximum discount levels (decision of 5 October 2006 in case 599/06, *Maquinaria agropecuaria*); prohibition of applying discounts (decision of 29 October 2019 in case S/0629/18, *Asistencia Técnica Vaillant*) or by means of a finalist strategy aimed at monitoring discounts applied by a distributor (decision of 19 October 2004 in case 619/04, *Técnicas Ganaderas*).

The CNMC also considers minimum resale prices as an infringement of article 1 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC) (decision of 2 November 2004 in case 578/04, *EKO-AMA Mondáriz*).

The CNMC does not consider recommended resale prices as contrary to article 1 LDC (decision of 3 November 2008 in case 2765/07, *Animales de compañía*). However, and depending on the specific context and means employed, price recommendations have been considered by the CNMC as fixed resale prices. For instance, in the *Repsol/Cepsa/BP* case (decision of 30 July 2009 in case 652/07, *Repsol/Cepsa/BP*), the CNMC fined three petrol companies for notifying recommended and maximum resale prices to petrol stations that were, in practice, applied as fixed retail prices. The CNMC relied on, inter alia, the following indicia:

- high compliance (in more than 80 per cent of the cases) with the suggested or maximum retail prices;
- reduction of incentives to apply discounts by reducing the retailers' margins; and
- the IT system communicating the suggested resale prices hampered in practice the ability of petrol stations to deviate from the suggested resale prices.

Regarding maximum resale prices, the CNMC considers this practice to be compliant with the LDC (decision of 30 November 1998 in case 389/96, *Cervezas Mahou*).

On 6 February 2020, the CNMC adopted a decision with commitments accepted by Adidas to address the inclusion, in Adidas' franchising and selective distribution contracts, of conditions containing restrictions on internet sales and advertising, post-contractual non-competition obligations and restrictions on cross-selling (case S/DC/0631/18, *Adidas*). This decision is an important landmark in the area of vertical restraints in online commerce in Spain. Regarding resale price maintenance on selective distributors and franchisees, the CNMC found that Adidas' recommended retail prices were not binding, so they were genuinely recommended prices.

Recently, the CNMC has open an investigation into possible anti-competitive practices by ISDIN, S.A. The potential illegal conduct relates to the fixing of online resale prices (case S/0049/19, *ISDIN*). According to the CNMC press release, in the current context, in which e-commerce plays a relevant role for retailers, this conduct could disincentivise retailers from marketing products online. The CNMC had access to certain information that allowed it to suspect that ISDIN, S.A. committed a violation of article 1 LDC and article 101 TFEU, involving

resale price maintenance of skincare products, specifically sunscreens. The procedure is currently under investigation.

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

Exceptions generally accepted under the Vertical Block Exemption and interpretative Commission guidelines will generally be followed in Spain.

The decision of the CNMC of 30 November 2008 (case 389/96, *Cervezas Mahou*) contained an obiter dictum stating that vertical pricing can be accepted in certain cases such as those related to national campaigns carried out by the manufacturer, discounts or promotional sales. The CNMC points out in its decision to the judgment of the EU Court of Justice of 3 July 1985 (C-243/83, *Binon/Agence et Messageries de la Presse*).

Relevant decisions

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

The CNMC considered that the restriction caused by an exchange of confidential information was reinforced by parallel networks of quantitative selective distribution agreements and additional restrictions identified in certain local markets in Spain, such as resale price maintenance agreements (between the manufacturers and their respective dealers) and agreements between each brand's dealers fixing the margin of their respective commercial agents (decision of 19 January 2012, case S/0280/10, *Suzuki-Honda*).

Most-favoured nation clauses in vertical agreements have recently been considered in Spain, albeit not in a vertical restraints context, but in the context of article 102 TFEU and equivalent article 2 LDC (decision of 13 July 2017, case S/DC/0567/15, *Market studies in the pharmaceutical industry*) in a case related to the purchasing of data from pharmacies by dominant company IMS Health.

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

The CNMC has assessed, under the requirements contained in article 1.3 LDC, the efficiencies claimed by the participants in the framework of a resale price maintenance case. The CNMC has stated that the parties had to prove the nature of the efficiencies, the link between the resale price maintenance and the efficiencies, the absence of alternative measures to achieve such efficiencies and the transfer of those efficiencies to consumers. The CNMC finally dismissed the parties' defence (decision of 27 March 2012 in case S/0237/10, *Motocicletas*).

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines. Generally, hub-and-spoke and equivalent agreements have been identified as a potential source of concern by the CNMC study on relations between suppliers and distributors in the food sector.

Suppliers

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

Assessment of questions related to MFNs are analysed under the Vertical Block Exemption and the Vertical Guidelines, as well as under article 102 TFEU and its national equivalent, article 2 LDC, when applicable.

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

Restrictions on territory

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines, as well as the recent European Commission positioning on geo-blocking in the framework of restrictions to commerce in the e-commerce sector, and the legislative initiative approved in such context.

Restrictions on customers

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines.

Restrictions on use

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

The CNMC analyses these questions in accordance with the Vertical Block Exemption and the Vertical Guidelines. In *Intersport* (decision of 20 July 2004, case A 258/99), the CNMC required the amendment of one clause that prohibited the members of a sui generis franchise network from marketing their products via the internet using the Intersport brand. The CNMC finally accepted a drafting allowing the members of the franchise to keep their own websites provided the design criteria fixed by the coordination body of the franchise were respected to ensure product quality standards. In another case the CNMC considered a commitments decision was appropriate (in its decision of 10 March 2016, case S/DC/0510/14, *Food Service Project*, related to franchising agreements). More specifically, the franchisor designated and imposed on its franchisees all the products and services providers to be used (beyond what is necessary to protect the general image of the company) and fixed the prices to consumers. To successfully terminate the antitrust proceeding, the franchisor committed to modify the content of the franchising agreements (by specifying the products that had to be bought from the designated providers in order to protect the image of the franchise) as well as the documents of the management system of the franchisees (by fixing recommended or maximum prices and allowing the franchisees to fix their own prices), which the CNMC considered adequate to restore effective competition in the affected market.

Restrictions on online sales

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

In the antitrust proceeding against Adidas España, the CNMC has assessed online sales. Although the CNMC closed the proceedings by means of an agreed termination, the online sales restrictions in the *Adidas* case are assimilated to a hardcore ban on sales under the provisions of article 4c of the Vertical Block Exemption. In the *Adidas* case, three types of restrictions were identified:

- the obligation to sell exclusively at the physical point of sale, preventing online sales;
- the absence of any contractual provision enabling online sales. The CNMC considered this as having an effect akin to discouraging distributors and franchisees from selling over the internet; and
- general and prior approval by Adidas of the domain name (URL) of the selective distributor's website. The problem with this pre-approval condition is that it was broad and not subject to the fulfilment and verification of pre-stipulated conditions, so there was a risk that such approval could be used by Adidas in an arbitrary manner to prevent distributors and franchisees from having their own websites.

To address the CNMC's concerns, Adidas committed to (1) actively inform distributors that they were able to sell and advertise their products online; (2) change the prior acceptance requirement in connection with the IP domain for a mere verification; (3) the waiving of the non-competition obligation; and (4) clarify that cross-selling is valid among distributors and franchisees.

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

At the legislative level, there are no specific or detailed provisions in Spain.

Selective distribution systems

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

The CNMC has consistently held that the requirements to join the system must be proportionate and non-discriminatory, following the Vertical Block Exemption and its Guidelines. However, there is no specific requirement for the selection criteria to be published.

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

Spanish case law has considered selective distribution systems more likely to be lawful in relation to goods that require specialised post-sale service.

The CNMC has issued decisions in relation to luxury products, in particular:

- watches (decision of 20 April 2004, case A 330/02 *Distribución Selectiva Relojes Blancpain*; decision of 19 December 2002, case A 327/02 *Distribución selectiva relojes Glashütte*; decision of 19 September 2002, case A 316/02 *Distribución Selectiva Breguet*; and decision of 14 June 2000, case A 272/99, *Distribución Selectiva Gucci*);
- cosmetics (decision of 25 July 2002, case A 273/99 *Modificación, Distribución Selectiva Carolina Herrera*; decision of 16 July 2001, case A 265/99 *Modificación, Distribución Selectiva Christian Dior*);
- perfumery (decision of 23 April 2001, case A 281/00 *Distribución Selectiva Azzaro*; decision of 18 July 2000, case A 282/00 *Distribución selectiva de Perfumes Loewe*); and
- luxury fashion (decision of 12 July 1999 in case A 260/99, *Contrato tipo Cosmeparf*).

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

Restrictions on internet sales in the framework of selective distribution is a new area where EU law criteria are likely to be followed. However, it may be expected that the CNMC and Spanish courts will apply the recent *Coty* case law of the European Court of Justice (judgment of 6 December 2017, Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*).

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

The CNMC handed down a decision on 21 February 2000 (case R 379/99 *Relojes Longines*) in which the distributor breached a series of conditions established in a selective distribution contract. Those conditions were related to staff training, post-sale services and image requirements.

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

Yes, the CNMC takes into account the cumulative restrictive effects according to the Vertical Block Exemptions and the Vertical Guidelines.

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

There is no specific guidance or CNMC activity specifically dealing with such combination of arrangements. The guidance applicable in Spanish territory is the Vertical Block Exemption and the Vertical Guidelines.

Other restrictions

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

The Vertical Block Exemption and the Vertical Guidelines regulate these matters also in connection with national competition law.

The reverse conduct (restriction of a supplier's ability to supply to alternative purchasers) has recently been dealt with in Spain under article 102 TFEU and the equivalent national law provision (decision of 13 July 2017, case S/DC/0567/15, *Market studies in the pharmaceutical industry*) in a monopsony context.

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

There are no specific rules in Spanish law dealing with this matter. Therefore, EU law provides the starting point for analysis.

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

This type of restraint can be acceptable under the principles set out in the Vertical Block Exemption.

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

This type of restraint can be acceptable under the principles set out in the Vertical Block Exemption. Rules on abuse of dominant position may also apply when a dominant position exists following EU law principles.

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

This matter has been dealt with in the context of monopsony situations. Most-favoured nation clauses in vertical agreements have recently been considered in Spain, albeit not in a vertical restraints context, but in the context of article 102 TFEU and equivalent article 2 of the LDC (decision of 13 July 2017, case S/DC/0567/15, *Market studies in the pharmaceutical industry*) in a case related to the purchasing of data from pharmacies by dominant company IMS Health.

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

This matter would be dealt with under the principles set out in the Vertical Block Exemption and derived case law and guidelines. Restrictions on passive sales are likely to be considered illegal. For example, on 29 October 2019, the CNMC fined the Vaillant Group

for imposing restrictions on its network of authorised repairers of boilers (decision of 29 October 2019 in case S/0629/18, *Asistencia Técnica Vaillant*). The CNMC analysed the contracts between companies belonging to the Vaillant Group and the independent operators of technical assistance, where the freedom of independent operators has been limited by preventing them from making passive sales in territories other than those contractually assigned, fixing prices of the technical assistance services and forcing the purchase of spare parts exclusively from the manufacturer, which restricted cross supplies among the rest of the members of the official technical assistance network of the Vaillant Group.

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

No guidelines or agency decisions in Spain have dealt with this issue.

NOTIFICATION

Notifying agreements

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

There is no such formal procedure. The parties to the agreement must themselves assess whether or not an agreement is prohibited pursuant to article 1.1 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC) and whether it may be exempted pursuant to articles 1.3 (exemption of competition improvement), 4 (agreements exempted by Law) or 5 LDC (de minimis exemption).

However, article 5.2 of Law 3/2013, establishes that the National Markets and Competition Commission (CNMC) may act as a consulting body for issues related to the maintenance of effective competition and of the proper functioning of the market. The CNMC may be consulted by parliamentary chambers, the government, ministerial departments, Spanish territorial regions, local administrations, professional associations, chambers of commerce and corporate or consumer organisations.

Finally, article 6 LDC enables the CNMC to declare the inapplicability of the LDC to a given agreement or practice. This is very rarely done in practice.

Authority guidance

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

It is theoretically possibility to seek non-applicability of competition law to agreements.

As regards the courts, they have the power to apply articles 1.1 and 1.3 of the LDC. However, under Spanish procedural rules, a court may refuse to rule on a claim filed by a claimant exclusively seeking to obtain a declaration by the court that an agreement is not prohibited by article 1.1 LDC or that it benefits from the exemptions of article 1.3, article 4 or article 5.

ENFORCEMENT

Complaints procedure for private parties

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

Any private third party (natural or legal person) may file a complaint against an allegedly unlawful vertical agreement before the Competition Directorate of the National Markets and Competition Commission (CNMC) or before a regional competition authority (article 49 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC)). The complaint should include the contact details of the complainant, the facts triggering the unlawful conduct (and, as the case may be, evidence of the alleged unlawful conduct), together with the definition and structure of the relevant market. The complainant may only participate as an interested party in the formal investigation that may potentially follow if it is able to show a legitimate interest in the case. According to the CNMC's Annual Report of 2017, of 11 antitrust proceedings initiated in 2017, five were initiated by a complaint.

Upon receipt of the complaint, the Competition Directorate may start a preliminary inquiry to assess if there are sufficient *indicia* or reasons to open antitrust proceedings. Once an investigation is formally initiated, the CNMC has 18 months to decide on the case. The procedure is divided into two phases (investigation and resolution), which take place before two different bodies of the CNMC: the investigation phase is led by the Competition Directorate (no later than 12 months), while the resolution is issued by the Council of the CNMC (no later than six months). In its decision, the Council of the CNMC may declare the existence of an infringement and impose fines.

The investigation may be closed without fines if the CNMC considers that there is not sufficient evidence of infringement or when the parties submit appropriate commitments.

The decision of the Council amounts to final agency action and may be appealed only before the administrative courts.

There is no settlement procedure foreseen in the LDC. However, the Administrative Procedure Act (article 86 of the Act 39/2015 on the Common Administrative Procedure for Public Administrations), which applies to antitrust matters in those areas of procedure not regulated by the LDC or its implementing regulations, foresees the possibility that public administrations can terminate punishing proceedings (such as antitrust proceedings) with a settlement decision.

This possibility has to our knowledge been used twice by a regional competition authority (Basque Country). In those rare cases, the regional authority terminated the antitrust investigations with a mixed decision agreeing on the amount of the fine with the parties (while the parties acknowledged the infringement), and including commitments consisting, basically, of a cease-and-desist obligation, along with an obligation to publish the decision (Decisions of 30 December 2008, case 03/2008, *Asfaltos*, and of 20 May 2009, case 01/2009, *HIRU*).

There has been some informal talk at the CNMC and expert level about introducing a settlement procedure in the Competition Act. It is possible, therefore, that a settlement procedure will be inserted in the Competition Act in the future, although this is not likely to happen in the short term.

Regulatory enforcement

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

According to the CNMC's Annual Report of 2019, 10 sanctioning proceedings were initiated in 2019 due to infringements of article 1 of Law 15/2007

of 3 July 2007 of the Defence of Competition (LDC), and none dealt with vertical restraints. The *Adidas* matter appears to be the only relevant verticals case in recent times other than the *Atresmedia/Mediaset* case. So far in 2021 no proceedings have been initiated regarding vertical restraints.

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

Article 1.2 LDC provides that all agreements and practices contrary to article 1.1 LDC and non-exempted by articles 1.3, 4 or 5 LDC are null and void.

However, Spanish civil law allows that only the infringing provision be declared void, provided that the rest of the agreement may survive without that provision. This will depend on the facts of the case. The Supreme Court has declared that it is not possible to sever an infringing provision where the agreement itself provides that such provision is an essential element of the agreement, and where it is impossible in practice to make adjustments or modifications that would require the mutual agreement of the parties (see judgment of the Supreme Court of 30 June 2009, case 315/2004 and of 26 February 2009, case 109/2009).

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

The CNMC may impose penalties for any infringement of the LDC without the permission of or confirmation by another entity or by a court.

Vertical restraints are categorised as a serious infringement of the LDC (article 62.3.a) LDC) that can result in a fine of up to 5 per cent of the turnover of the infringing party in the business year preceding the imposition of the fine (article 63.1.b) LDC). If the turnover cannot be determined, the infringing parties may be exposed to a fine ranging from €500,001 to €10 million (article 63.3.b) LDC). In addition, the CNMC may impose behavioural or structural remedies on the infringing party, although it has not thus far done so.

On the other hand, if the CNMC considers that the agreement would not produce negative effects on competition if it were modified, the CNMC could impose several commitments (ex officio or proposed by the parties) to the parties to the agreement and will monitor that parties comply with those commitments (monitory proceeding). The CNMC has used commitments decisions in the context of vertical relationships dealt with under article 102 TFEU and article 2 LDC.

With regard to possible trends, in the past the CNMC was inclined to fine the supplier only, leaving the buyer unharmed. This is because it was considered that, although both were parties to the vertical agreement, responsibility for the infringement fell on the party with the higher bargaining power, usually the supplier. Notwithstanding the above, in June 2007 the CNMC fined both the supplier and the buyer on the basis that both parties had obtained an unlawful benefit from the agreement and both parties has countervailing bargaining power (see decision of the CNMC of 21 June 2007, in case 612/06, *Aceites 2*). In 2010, the CNMC ruled that exclusive contracts for acquisition and resale of football broadcasting rights lasting for more than three seasons for Spanish league and cup matches are anticompetitive and fined four buyers (broadcasting operators) but none of the suppliers (football clubs). Two years later, the CNMC fined Suzuki and five of its authorised dealers in Spain for agreeing minimum resale prices for Suzuki motorbikes (ie, the CNMC fined again both the supplier and the

buyer) (see decision of the CNMC of 27 March 2012, in case S/0237/10, *Motocicletas*).

Most recently, open television operators Mediaset and Atresmedia have received fines of €38.9 million and €38.2 million respectively for vertical conduct in the television advertising markets, which are remarkably high fines in the verticals area Decision of 12 November 2018, *Atresmedia/Mediaset*, case S/DC/0617/17). This case was interesting as it concerned a network of vertical agreements covering more than 50 per cent of the relevant market, between each of the two largest open TV operators and the media buying agencies, which forecloses competition by alternative television operators willing to compete in the television advertising market.

The *Atresmedia/Mediaset* matter, coupled with the ongoing investigations in the electronic markets area, may signal some new trend of verticals enforcement in Spain.

Investigative powers of the authority

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

Broadly, the authorities responsible for enforcing the prohibition of vertical restraints are entitled to:

- conduct inspections at the undertaking's premises (article 27.2 Law of the CNMC), which may involve:
 - gaining access to any premise, facility or vehicle of the enterprises, and even the entrepreneur's house;
 - checking books, records and documents;
 - requiring the production, examination, copying or even seizure of documents relevant to the investigation;
 - retaining books, records or documents for a maximum of 10 days;
 - sealing filing cabinets or rooms; and
 - requiring explanations of relevant documents or practices;
- issue binding letters developing and executing laws, royal-decrees or ministerial orders; and
- address information requests.

Private enforcement

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

The courts have the authority to declare the existence of an infringement of article 1.1 LDC as well as to declare an agreement exempt from that prohibition pursuant to article 1.3, always within the boundaries of the petition addressed to the competent court.

In principle, only the parties to the vertical agreement are entitled to seek declaratory judgments or injunctions and bring damages claims (but, theoretically, third parties could seek damages if such parties can prove that they have suffered a loss as a result of the anticompetitive agreements, or even seek an erga omnes declaration of nullity of the agreement, even in the absence of damages). These forms of order must be sought from the commercial courts, except where the party is simply seeking damages from a previously declared infringement (follow-on actions), in which case it must do so before the ordinary civil courts. Consumer associations have standing to sue in respect of their members, of the association itself and of the general interests of consumers.

The remedies available are those typical of any other civil claim, ranging from cease-and-desist orders to the award of damages.

Assuming that a private enforcement action goes through all the possible appeals up to the Supreme Court, a final judgment may be rendered after several years. For example, in the Sugar case (a follow-on damages claim for damages arising from a sugar cartel), the claim was filed in 2007 and, after several appeals, the Supreme Court decided on the case in 2012 (judgment of the Supreme Court of 8 June 2012, case 2163/2009).

On 25 March 2013 the CNMC fined 15 paper companies for bid rigging, customer sharing and price fixing. Several undertakings that had been harmed by the antitrust infringement sued some of the cartel members before the Commercial Courts of Madrid and Barcelona, seeking compensation for damages. Between March and September 2018, the Commercial Courts awarded damages in several of those claims. We expect those judgments will be appealed.

As regards costs, the general rule is that the losing party pays the costs of litigation (which are not in practice the actual costs, but a reasoned measure of costs as moderated by the court with the possible input of the Bar Association).

OTHER ISSUES

Other issues

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

No.

UPDATE AND TRENDS

Recent developments

56 | What were the most significant two or three decisions or developments in this area in the last 12 months?

The most significant decisions on vertical restraints are the following: (1) the National Markets and Competition Commission (CNMC) Decision of 18 February 2020, *Adidas*, case S/DC/0631/18; (2) the CNMC Decision of 15 December 2020, *Repsol*, case SNC/DC/054/20; and (3) the opening of a formal investigation into ISDIN by the CNMC (case S/0049/19, *ISDIN*).

The *Adidas* decision is the most important development on vertical restraints in 2020 in Spain. The *Adidas* case has been closed with commitments.

The *Repsol* decision fined Repsol for not having complied with its obligations derived from two prior CNMC decisions in which Repsol was fined for having breached competition law by indirectly fixing the resale price of fuel. The obligations forced Repsol to modify the existing contracts with the fuelling stations to ease the anticompetitive effects, concretely by amending or removing the contractual clauses that discouraged fuelling stations from offering discounts, thus indirectly fixing the price. Nonetheless, the CNMC understands that even though Repsol has been implementing its obligations, a great number of fuelling stations remain under the old price-fixing mechanism, thus not complying entirely with the prior CNMC antitrust decisions. Consequently, the CNMC fined Repsol €5 million for failing to comply with its obligations under the prior antitrust decisions.

Finally, the CNMC decided on 26 October 2020 to initiate a formal investigation into ISDIN. The CNMC has stated that it has had access to information that indicates the possible existence of a breach of article 1 of Law 15/2007 of 3 July 2007 on the Defence of Competition (LDC) and article 101 TFEU, by fixing the resale prices of certain skincare products.

Anticipated developments

57 | Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

The only measure expected in this area is the implementation into Spanish law of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market, which should entail amendments to the existing LDC. Expected changes are the introduction of the settlement procedure as a way to end formal investigations and the extension of the time periods in different procedures. The projected legislation will afford the CNMC the possibility to order interim measures, not only in antitrust (fining) investigations (as is the case under current law), but generally in any type of competition matters. The draft legislation reinforces the fining powers of the CNMC. The CNMC calculates antitrust fines on the basis of national turnover. Subsequent to the reform, maximum fines can run up to 10 per cent of worldwide turnover. Also, maximum fines on management and directors are currently perceived as relatively low and subsequent to the reform, maximum fines on those individuals have been increased from €60,000 to €400,000.

CORONAVIRUS

58 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The main emergency initiative implemented in Spain as a consequence of the coronavirus outbreak is the adoption of the umbrella scheme, along with all the amendments and other schemes under the temporary framework approved by the European Commission.

The umbrella scheme (SA.56851), approved by the European Commission, allowed every public administration in Spain (including general state, autonomous communities and local entities administrations) to support Spanish undertakings, including self-employed, during this time. The measures included all kinds of instruments to ensure the aid: direct grants, repayable advances, tax and payment advantages, guarantees on loans and subsidised interest rates for loans.

It was amended by three later measures (SA.57019, SA.59196 and SA.59723) to ensure two things: the existence of liquidity to be able to support Spanish undertakings; and the extension of the temporary framework until 21 December 2021.

Furthermore, the Spanish government also approved a fund to support strategic undertakings, validated by the European Commission under its temporary framework (SA.57659); a guarantee scheme for undertakings with composition agreements, also validated by the European Commission (SA.59045); and a guarantee scheme, with its pertinent amendments, that enabled undertakings and self-employed to finance their productive investments (SA.58096).

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