



Vertical Agreements 2010

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Belgium

Carmen Verdonck and Jenna Auwerx

Altius

Antitrust law

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

The main sources of law applicable to vertical restraints in Belgium are two Acts of 10 June 2006 on the protection of economic competition and on the establishment of a Competition Council, as coordinated by the Royal Decree of 15 September 2006 ('the Competition Act'). The text of the Competition Act is published on the website of the competition authorities: http://statbel.fgov.be/fr/modules/regulation/loi/20060915_1_protection_concurrence_economique_coordonnee.jsp. The decisions of the Competition Council can be consulted at: http://statbel.fgov.be/fr/entreprises/concurrence/Pratiques_restrictives_concurrence/Jurisprudence/Decisions_jurisprudence/index.jsp.

Article 2(1) of the Competition Act (equivalent to article 101(1) of the Treaty on the Functioning of the European Union (TFEU)) prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within Belgium.

Article 2(2) of the Competition Act renders agreements falling within this prohibition void, unless they satisfy the conditions for exemption under article 2(3) in a similar way as articles 101(2) and (3) TFEU.

Article 5(1) of the Competition Act confirms that the prohibition on restrictive practices is not applicable to agreements that benefit from an EU block exemption. The effect of the EU block exemptions is extended by article 5(2) to situations where trade between member states is not affected.

Thus far no 'Belgian' block exemptions or guidelines in relation to vertical agreements have been issued.

A number of Royal Decrees have been adopted implementing the Competition Act regarding procedural issues, such as the filing of complaints.

Types of vertical restraint

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

The Competition Act does not define vertical restraints or list specific vertical restraints covered by the prohibition of article 2 of the Competition Act. The Belgian courts and competition authorities have stated that the Competition Act should be interpreted in light of the jurisprudence of the Court of Justice of the European Union (CJEU) and the decisions and guidelines of the European Commission. The concept and types of vertical restraints subject to Belgian antitrust law are therefore nearly identical to the equivalent EU competition law concepts and types of vertical restraints.

Vertical restraints subject to Belgian antitrust law include resale price fixing, export restrictions, non-compete clauses, and exclusive and selective distribution agreements.

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 aim of the Competition Act is mainly economic (ie, to protect competition). In the application of the exemption to the prohibition on restrictive agreements under article 2(3) of the Competition Act, the interests of consumers are also taken into account, as well as those of small and medium-sized companies. The protection of the interests of small and medium-sized undertakings is also explicitly included in article 2(3) of the Competition Act, which contains the same four conditions for exemption as article 101(3) TFEU, but also adds to the criterion 'which contribute to improving production or distribution or to promoting technical and economic progress' the wording 'or which enable small and medium-sized undertakings to assert their competitive position in the market concerned or internationally' as an alternative ground for exemption.

Responsible authorities

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

The prohibition of anti-competitive vertical restraints can be enforced by the ordinary courts and by the Competition Council, after investigation by the Directorate-General for Competition under the supervision of the Competition Law prosecutors.

The Competition Council is an independent administrative court, whereas the Directorate-General for Competition is a department of the Ministry of Economic Affairs. The prosecutors are independent persons who lead investigations for the Directorate-General for Competition.

If a request for preliminary measures is submitted which the prosecutor considers is not justified, he can reject it. The requesting party can appeal this decision to the president of the Competition Council.

When the prosecutor considers that the request for preliminary measures is justified, he submits a report with his findings based on the investigation to the president of the Competition Council who will then issue a judgment. This decision of the president of the Competition Council can be appealed before the Brussels Court of Appeal.

When a complaint is lodged with the prosecutor and he considers it unjustified, he can reject it. The complainant can appeal this decision to the Competition Council. If the prosecutor considers that the complaint is justified, he will submit a report to the Competition Council, which will then decide upon the case.

The minister of economic affairs can order a general investigation or an investigation of a particular sector of the economy. However, he has no influence on the outcome of the case. Furthermore, the minister can appeal cases to the Court of Appeals in Brussels or

the Supreme Court, and he can also make written submissions to the courts and the Competition Council.

The ordinary courts also play an important role in the application and enforcement of the competition rules on vertical restraints, and frequently pronounce on the legality of distribution, agency or franchising agreements. They cannot impose fines, but can order a certain practice to stop, subject to periodic penalty payments in case of non-compliance and publicity measures. They can also award damages, to the extent that the conditions for the breach of the competition laws, the causal link and the damages can be proved.

Jurisdiction

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

The Competition Act applies to all vertical restraints which affect competition on the Belgian market or part of it.

Foreign undertakings are therefore also subject to the Competition Act if they participate in restrictive agreements or concerted practices having an effect on the Belgian market.

To date there has been no specific case dealing with this issue in a pure internet context, but it is likely that the same principles would be taken into account in such a context.

Agreements concluded by public entities

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

The Competition Act applies to agreements between 'undertakings'. The concept of 'undertaking' in the Competition Act has the same meaning as in EU competition law. Vertical restraints in agreements with public or state-owned entities will therefore be subject to antitrust law, to the extent that the agreement was concluded by the entity in the performance of an economic activity and not when fulfilling its public task. This view has been confirmed by the Brussels Court of Appeal in a preliminary ruling (Brussels Court of Appeal, 31 January 2006, *Jaarboek Handelspraktijken en Mededinging* 2006, page 762) and recently also by the competition prosecutor (Decision of the Competition Law Prosecutors, 16 December 2009, Case 2008-P/K-72-AUD, *ClearChannel Belgium v JC Decaux Belgium and la Région de Bruxelles-Capitale* and Decision of the Competition Law Prosecutors, 18 December 2008, Case 2008-V/M-73-AUD, *Belgian Poster v JC Decaux Belgium and la Région de Bruxelles-Capitale*).

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.

On the basis of article 5 of the Competition Act, the EU Motor Vehicle Block Exemption and other EU block exemptions will apply to agreements only having effect on the Belgian market.

When applying article 3(5) of the Motor Vehicle Block Exemption at the termination of dealerships for motor vehicles, the mandatory Belgian Act of 27 July 1961 on the unilateral termination of dealerships should be taken into account.

General exceptions

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

In order for the prohibition of article 2(1) of the Competition Act to apply, the vertical restraint must have an 'appreciable effect' on

competition within Belgium or a relevant part of it. The Competition Council has been given the power to issue de minimis notices. However, no such notice has yet been issued. In practice, the Belgian competition authorities and courts seem to apply the European Commission's de minimis notice (see, for example, Brussels Court of Appeal, 7 March 2006, *Power Oil NV/DDD. Invest NV, Jaarboek Handelspraktijken en Mededinging* 2006, page 773 or decision of the Competition Council of 10 October 2003, Case 2003-P/K-79).

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction? When assessing vertical restraints under antitrust law does the authority take into account that some agreements may form part of a larger network of agreements or is each agreement assessed in isolation?

There is no definition of 'agreement' in the Belgian Competition Act. The Belgian competition authorities and courts apply the same definition of 'agreement' as developed by European case law. Like the European Commission, the Competition Council will examine the agreement or concerted practice in the broader legal and economic context and take into account the existence of network effects of similar agreements applied by other undertakings. If the vertical restraints concluded by the supplier and its competitors have the cumulative effect of foreclosing market access, then any vertical restraints that contribute significantly to that foreclosure may be found to breach the Competition Act. The Brussels Court of Appeal thus ruled that the cumulative effect of three Belgian fruit auction houses, applying the same terms and conditions on sales, significantly restricted competition in the market (Brussels Court of Appeal, 29 September 2004, *Belgische Fruitveiling BVBA/Nationale Unie van Belgische exporteurs van Land-en Tuinbouwproducten VZW ao, Jaarboek Handelspraktijken & Mededinging* 2004, page 946; Competition Council, Competition Council Annual Report 2004, page 51; see also Antwerp Court of Appeal, 14 March 2006, *Jaarboek Handelspraktijken & Mededinging* 2006, page 784).

Parent- and related-company agreements

- 10 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)?

Article 2 of the Competition Act only applies to agreements between independent undertakings, and therefore not to those between a parent and its subsidiary nor between two undertakings controlled by the same ultimate parent company.

Agent-principal agreements

- 11 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 commission payment?

There is no explicit provision for agents in the Competition Act. In the preparatory works to the Competition Act, the Belgian legislators clearly indicated their desire for equivalent provisions in the Belgian Competition Act to be interpreted in the same way as under EU competition law. It can therefore be expected that the courts and competition authorities will not apply antitrust law to agreements between a principal and a 'genuine agent', and will apply the same criteria as the European Commission and the European courts for qualification as a 'genuine agent'.

Intellectual property rights

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

The EC Block Exemption No. 2790/99 and the Commission's Vertical Guidelines apply to agreements granting IPRs where the granting of such IPRs is not the primary object of the agreements and the IPRs relate to the use, sale or resale of the contract products by the buyer or its customer. If the primary object of the agreement relates to the licensing of IPRs, the applicability of the EC Technology Transfer Block Exemption and the related guidelines should be checked.

Analytical framework for assessment

- 13** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The analytical framework used by the Belgian Competition authorities is very similar to the European framework.

Vertical restraints agreed by public entities while performing their public task, included in genuine agency agreements and agreements between companies belonging to a same corporate group, are excluded from the application of the antitrust law.

For other vertical agreements, it should first be checked whether or not the vertical agreement contains a hard-core restriction: such as the fixing of minimum resale prices, certain restrictions on the customers to whom, or the territories into which, a buyer can sell the contract goods, restrictions on members of a selective distribution supplying each other or end-users, and restrictions on component suppliers selling components as spare parts to the buyer's finished products.

If the agreement does not contain a hard-core restriction, it should then be checked whether or not it can be considered *de minimis*, because it does not appreciably restrict competition on the Belgian market or a relevant part of it. The Commission's *de minimis* notice will provide guidance.

Given that the EU block exemptions also apply in Belgium to agreements without an appreciable effect on trade between EU member states, the agreement should then be checked to see whether it falls within the scope of the EU Vertical Agreements Block Exemption (or another EU Block Exemption such as the Technology Transfer Block Exemption) or not.

Finally, if the vertical agreement restricts competition but cannot be considered *de minimis* and does not fall within the scope of a Block Exemption, an 'individual assessment' of the agreement will be made to determine whether it falls within the scope of the prohibition of article 2(1) of the Competition Act or not, and, if it does, whether the conditions for exemption under article 2(3) of the Competition Act are satisfied or not. In making this assessment, the competition authority and courts will closely follow European policy, in particular the Vertical Guidelines of the European Commission and the case law of the European courts.

- 14** To what extent does the authority consider market shares, market structures and other economic factors when assessing the legality of individual restraints? Does it consider the market positions and conduct of other suppliers and buyers in its analysis? Does it analyse whether certain types of agreement or restriction are widely used in the market?

The Belgian competition authorities and courts do consider the market shares, market structures and other economic factors when assessing individual restraints. The Belgian regime and practice are in line with the European regime and practice in this respect. The competition authorities and courts also refer to the criteria set out in the European Commission's Notice on Agreements of Minor Importance (OJ 2001, C368/13). In this respect see, for example, Brussels

Court of Appeal, 7 March 2006, *Power Oil NV v DDD. Invest NV, Jaarboek Handelspraktijken en Mededinging* 2006, page 773 or the decision of the Competition Council, 10 October 2003, Case 2003-P/K-79, *Brandini Blaise v BVBA Rombouts*, MB 6 May 2004, page 37.041.

In the above-cited decisions, the Brussels Court of Appeal referred to the same levels of market share as in the *de minimis* notice. An agreement between undertakings will therefore generally be deemed not to have an appreciable effect on competition if the market share of each of the parties, which are not direct or potential competitors, does not exceed 15 per cent. If the parties are direct or potential competitors, their market share should not exceed 10 per cent for the agreement to be considered *de minimis*.

The Brussels Court of Appeal in the *Power Oil NV/DDD* decision also considered the market structure, referring to the same *de minimis* notice. The threshold is lowered to 5 per cent if on a relevant market the competition is restricted because of the cumulative blocking effect of parallel networks of agreements which have similar effects on the market. In cases where the agreement contains a hard-core restriction, the competition authorities and courts do not further examine the appreciable effect of the restriction on competition (see for example: Competition Council, 7 July 2008, Case 2008-P/K-43, *Test-Achats c/ auto-écoles de Belgique*; Brussels Court of Appeal, 23 January 2007, *Limb Rechtsl*, 2007, page 307).

Block exemption and safe harbour

- 15** 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.

Article 5 of the Competition Act confirms that the prohibition on restrictive practices does not apply to agreements that benefit from an EU block exemption. The effect of the EU block exemptions is extended in Belgium to situations where trade between EU member states is not affected. The EC Block Exemptions Regulations Nos. 2790/99, 1400/2002 and 772/2004 therefore apply to purely national situations. Article 50 of the Competition Act provides that 'Belgian' block exemptions can be issued in the form of a Royal Decree. However, no such 'Belgian' block exemptions have yet been adopted.

Types of restraint

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

Vertical price fixing is considered to constitute a hard-core restriction of competition for which no exemption can be obtained (Competition Council, 8 December 1998, No. 98-RPR-6, *NV Gebroeders Mermans c/ NV Van Cauwenbergh*, MB 10 November 1999, page 41.940 and Brussels Court of Appeal, 13 October 1998, *NV Laroy-Duvo c/ Belgian Government*, MB 21 October 1998, page 34.884). The determination of minimum resale prices is also considered as a restriction of competition *per se*. Maximum or recommended prices are allowed in principle, provided that the supplier does not use any pressure or other incentives to enforce the recommended prices.

It should be noted, however, that in one of its recent decisions, the Antwerp Court of Appeal has assessed the determination of minimum resale prices from a different perspective (Antwerp Court of Appeal, 27 October 2008, *NV Frost c/ BVBA Evlier*, RCB 2009 (1), page 60). The Antwerp Court of Appeal ruled that the parties, by stipulating in their agreement 'it is requested to respect the recommended minimum resale price', could not have intended to stipulate a minimum resale price because that would imply that they would have intended to stipulate an invalid agreement. Therefore the court argued that the expressly stipulated 'recommended minimum price' should only be regarded as a recommended price. The refusal to sup-

ply was not considered as a means of enforcing the recommended price, but merely as a breach of contract.

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

To date, there have been no specific decisions known to us that specifically address resale price maintenance for limited periods of time. Most likely the Belgian regime will not deviate from the European regime, and therefore any evolution of such practices under the new guidelines soon to be adopted will have an effect for Belgian cases.

Under Belgian legislation selling at a loss is, however, prohibited by the Belgian Trade Practices Act of 14 July 1991 (see articles 40 and above). The prohibition is a matter of public order and sales at a loss will be declared null and void. Problems of 'loss leadership' can therefore also be reviewed within the framework of the Trade Practices Act.

- 18** Have there been any developments in your jurisdiction in relation to resale price maintenance restrictions in light of the landmark US Supreme Court judgment in *Leegin Creative Leather Products Inc v PSKS Inc* or the European Commission's review of its Vertical Block Exemption Regulation and associated guidelines?

In one case, the Brussels Court of Appeal also referred to the legal, factual and economic context of the agreement before concluding that the resale price maintenance clause breached antitrust law (Brussels Court of Appeal, 13 October 1998, *NV Laroy-Duwo v Belgian Government*, MB 21 October 1998, page 34.884). In general, however, Belgian case law to date has not assessed resale price fixing using a rule-of-reason-type analysis.

Given that Belgian competition law is interpreted and applied while taking into account European case law, it can be expected that a rule-of-reason-type analysis will only be introduced in respect of resale price maintenance clauses, to the extent that the EU Commission and the European courts would start assessing fixed minimum resale prices using such analysis.

- 19** Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In the 'Orthodontist case', the Competition Council had to come to a decision on resale price maintenance practices linked to market partitioning (Competition Council, 10 January 2001, Case 2001-V/M-02, *Belgische Beroepsvereniging van Universitaire Specialisten in de Orthodontie/Landsbond Der Christelijke Mutualiteiten en Regionale Christelijke Ziekenfondsen*, MB 5 May 2001, page 14.852). The Christelijke Mutualiteiten (CM) (a health insurance fund) determined the conditions according to which a practitioner was approved as an orthodontist and published a list with the names of approved orthodontists which patients used to make their choice. The CM also imposed a maximum amount up to which treatment costs would be reimbursed and any additional costs were to be borne by the patients. The Competition Council judged that the combination of these two restrictions constituted a prima facie breach of the Competition Law. In a more recent case, the Competition Council also suspected the Belgian Federation of Driving Schools, which clearly prohibited its members from 'destabilising prices', of market partitioning. The driving schools were also prohibited from attracting clients from their competitors in a given territory. These facts led the Competition Council to rule that article 2 of the Competition Act had been breached and to fine the Federation (Competition Council, case 2008-P/K-43, *Test-Achats c/ auto-écoles de Belgique*).

- 20** Have decisions relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

Before the coming into force of Regulation No. 2790/99, the competition authorities addressed the issue of efficiencies in several decisions relating to resale price maintenance (eg, Competition Council, 25 March 1997, R.W. 1997-1998 (2), page 52 and Brussels Court of Appeal, 13 October 1998, MB 21 October 1998, page 34.884). In both cases it was decided that the efficiencies that could arise out of a system of fixed prices could not outweigh the harmful effects of the resale price maintenance for the consumer.

Since the coming into force of Regulation No. 2790/99, it seems that the Belgian competition authorities have not really addressed the issue but would legally not be prevented from doing so. Given that the legislators wished the Competition Act to be interpreted in line with the equivalent EU provisions, it can be expected that any evolutions in the EU case law in this respect will be followed in Belgium.

- 21** 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?

Article 2 of the Competition Act was drafted and has been interpreted in the same way as article 101 TFEU. By virtue of article 5 of the Competition Act, Regulation No. 2790/99 also applies to agreements without any significant effect on trade between EU member states. Also the Vertical Guidelines of the European Commission and European case law can be expected to be closely followed. (For a recent example see Brussels Court of Appeal, 23 January 2007, *Limb Rechtsl 2007 (4)*, page 297 in which the prohibition of a buyer from reselling in a certain territory was considered a significant restriction.)

- 22** 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?

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect as can be seen in a decision of the Commercial Court of Dendermonde (9 February 2009, *BVBA E & G c/ NV Ecuphar*, not yet published). In this decision, the distribution agreement was found to be null because of a prohibition on active sales imposed on the distributor in a territory not reserved to the principal and not attributed to another distributor.

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

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

- 24** How is restricting the buyer's ability to generate sales via the internet assessed? Have the authorities issued decisions or guidance in relation to restrictions on using the internet for advertising or selling? Has there been antitrust-based litigation resulting in court judgments regarding restrictions on internet sales? If so, what are the key principles encapsulated in such guidelines and judgments?

There is no specific Belgian guidance on the subject, but Belgian case law has adopted the same position as the European competition authorities on the buyer's restriction of sales via the internet. The Belgian Supreme Court's judgment of 10 October 2002 in the case *Makro v Beauté Prestige International ao* (www.cass.be), when assessing a selective distribution system which restricted the buyer to generating sales via the internet, referred expressly to the Guidelines on Vertical Restrictions (2000/C 291/01) when explaining its decision. The Supreme Court stated that a vertical agreement cannot

contain a restriction to sell via the internet, unless such restriction is objectively justified. In the case referred to, the Liège Court of Appeal had given a rather broad interpretation to the term 'objective justification'. The restriction on the sale via the internet concerned luxury perfumes and cosmetics, and the Liège Court of Appeal held that the restriction on internet sales was objectively justified by the nature of these products, requiring personal professional advice and therefore methods of sale which cannot be assured over the internet. The Supreme Court deciding on this case explicitly rejected the allegation that for internet sales only restrictions based on qualitative criteria in the use of internet can be imposed.

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

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect (see for example: Competition Council, 25 March 2003, case 2003-E/A-24, *Diprolux SA*, MB 14 October 2003, page 49.831). It is not necessary to publish the criteria for selection.

26 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?

Entirely in line with the European regime, under Belgian competition law, the luxury image of products can justify selective distribution. In the rare Belgian case law on selective distribution systems, most of the cases concerned jewellery (eg, Antwerp Court of Appeal, 22 November 1995, *Van Sloun Juweliers BVBA / Les must de Cartier Belgique NV*, *Jaarboek Handelspraktijken en Mededinging* 1995, page 345), or perfume, personal hygiene products and cosmetics (eg, Competition Council, 26 June 1995, Case 95-PRA-1, *Van Nieuwenhuysen/NV Parfums Christian Dior SAB*, MB 26 July 1995, page 20.260; Competition Council, 25 March 2003, Case 2003-E/A-24, *Diprolux SA*, MB 14 October 2003, page 49.831; Belgian Supreme Court, 10 October 2002, *Makro v Beauté Prestige International ao*, www.cass.be). In the *Makro* case, the Liège Court of Appeal stated that cosmetics and luxury perfumes can be considered as sophisticated products and the results of special research processes, whose luxury image can be preserved through selective distribution, since the product will thus stand a better chance of achieving its rightful place at the points of sale.

27 Regarding 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?

In the aforementioned *Makro* case (see question 26), the Supreme Court dismissed the appeal lodged against the decision of the Liège Court of Appeal, which stated that the restrictions on internet sales were objectively justified since the nature of the product required distribution via 'first-rate' points of sale, where appropriate, personal, professional advice could be assured. Thus, the suppliers could not only require a distributor to maintain a 'bricks-and-mortar' store, but could even forbid them from selling online if such prohibition were objectively justified.

Belgian law has specific legislation which sets out certain additional rules for internet sales (ie, articles 77 to 83 of the Belgian Trade Practices Act of 14 July 1991 and articles 8 to 12 of the E-commerce Act of 11 March 2003) that do not apply to other sales.

28 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 Belgian authorities have issued several decisions in relation to actions by suppliers to enforce the selective distribution system (eg, Liège Court of Appeal, 19 February 2001, *Beauté Prestige International ao v Makro*, *Jaarboek Handelspraktijken & Mededinging* 2001, page 817; Antwerp Court of Appeal, 22 November 1995, *Van Sloun Juweliers v Les must de Cartier Belgique*, *Jaarboek Handelspraktijken & Mededinging* 1995, page 345). In both cases the suppliers opposed the supply of their products (ie, perfume) to buyers that did not satisfy the selective criteria of the distribution network. The authorities considered that the actions of the suppliers were justified because the selective distribution systems were based only on qualitative and non-arbitrary criteria that reflected the luxury and prestige of the products.

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

There is no case law known to us explicitly dealing with the cumulative restrictive effects of multiple selective distribution systems operating in the same market.

30 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

The Mons Court of Appeal, ruling on the legality of a selective distribution system, was of the opinion that a clause which required the prior approval by the seller of advertisements placed by the buyer, could be prohibited if it constituted a form of indirect control of the prices, the number and the frequency of the advertisements and the reductions offered (Mons Court of Appeal, 6 September 2004, DAOR 2005, page 48).

Another decision of the Brussels Court of Appeal established the illegality of a selective distribution system used by holiday centres. The distribution network did not respect the conditions of objectivity and equality of the qualitative selection criteria on the basis of which the distributors were selected. Moreover, the Court held that given that resale prices were imposed on the resellers, the selective distribution network was prohibited per se (Brussels Court of Appeal, 22 April 1999, *JLMB* 1999, page 1240 and *TBH* 1999, page 418).

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

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect. (See for example, Brussels Court of Appeal 29 October 2002, *Etienne Decock/Danny Claerhout en Louis De Ketelaere*, *Jaarboek Handelspraktijken en Mededinging* 2002, page 951).

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

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

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

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

- 34** 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?

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

- 35** Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

- 36** To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

- 37** Explain how a supplier's 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. Would the analysis differ where the buyer commits to 'most favoured' terms in favour of the supplier?

Please see our answer to question 21. The Belgian regime is entirely in line with the European regime in this respect.

Notifying agreements

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

Since the entry into force of the new Competition Act on 1 October 2006, there is no longer a formal procedure for notifying agreements containing vertical restraints to the Belgian competition authorities.

Authority guidance

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

The Competition Act does not provide for the right nor the possibility of obtaining guidance from the competition authorities on particular vertical restraints. In practice, the prosecutors or the Director-General (or both) may be willing to provide their view informally.

Such views, however, are not binding on the Competition Council.

Complaints procedure for private parties

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

Complaints of antitrust infringements, including vertical restraints, can be filed with the prosecutor. The form and content of a complaint are determined by the Royal Decree of 31 October 2006 which prescribes the use of a 'PK Form' (MB 22 November 2006, page 64.624 or www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&cl=F&cn=2006103134&table_name=loi).

The form enumerates a limited number of formal and material requirements to be fulfilled and the information to be provided

Update and trends

The prohibition on restrictive practices included in article 2 of the Competition Act is not applicable to agreements that benefit from an EU Block Exemption. Also, agreements that do not have an effect on inter-member state trade but otherwise fulfil the conditions of an EU Block Exemption are automatically exempted under the Belgian Competition Act (article 5(2) Competition Act). The entry into force of the new EU Vertical Agreements Block Exemption will therefore have a direct impact on the Belgian competition law on vertical agreements even if there is no effect on inter-member state trade.

A draft bill of law which proposes the introduction of criminal sanctions for competition law infringements is being discussed. It is still uncertain, however, whether it will become law and if so, whether it will also apply to infringements in vertical agreements.

(description of the practice, the nature of the products, market positions, the alleged infringements, etc).

If the prosecutor considers that the complaint is not justified, he can reject it. The complainant can appeal this decision to the Competition Council within 30 days. If the prosecutor considers that the complaint is justified, the Competition Council will decide the case on the basis of the prosecutor's report and a hearing. There is no legal time limit within which the prosecutor or the Competition Council has to make his or its decision, and the procedure may take years.

However, interim measures can be applied for. Depending on the circumstances, proceedings may be speeded up by the authority (for example the *Football TV Rights* case in 2005 where the investigation began on 21 June 2005 and the decision was made on 29 July 2005, before the start of the new football season).

Enforcement

- 41** 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?

The competition authority used to allocate most of its resources to merger review proceedings, to which strict deadlines apply. Since the increase of the thresholds for Belgian merger control and the entry into force of the new Competition Act on 1 October 2006, more resources have become available for the investigation of restrictive practices, including vertical agreements. However, it seems that the authorities are focusing more on hard-core cartels and abuses of dominant position. To date, very few rulings on vertical agreements have been made.

The ordinary courts, however, frequently apply antitrust law to vertical restraints, especially in cases regarding resale price maintenance, exclusivity and non-compete undertakings in distribution agreements.

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

Antitrust law is considered to be part of public order law; therefore, the agreements or decisions forbidden under article 2(1) of the Competition Act are automatically void under article 2(2) of the Competition Act. This nullity is an absolute nullity, which works *ex tunc*. Under Belgian law, the severability principle applies and therefore, in principle, only the prohibited clauses become automatically null and void, not necessarily the whole agreement (Brussels Court of Appeal, 23 January 2007, *Limb Rechtsl* 2007(4), page 297). The nullity of the contractual provision only leads to the nullity of the agreement, if the null and void provision is inextricably linked to the remainder of the agreement in view of the will expressed by the parties and the structure of the agreement (Brussels Court of Appeal, 28 June 1995, *Jaarboek Handelspraktijken & Mededinging* 1995, page 576).

Previous case law explicitly stated that the nullity of the clause breaching antitrust law was absolute, and the duration of a non-compete clause in breach of antitrust law cannot be reduced by a judge to a legal duration (*Jaarboek Handelspraktijken & Mededinging* 1995, page 576). However, a more recent opinion of the Competition Council and a judgment of the Brussels Court of Appeal allowed the excessive duration of a non-compete clause to be reduced by a judge to a duration that would be valid under antitrust law (*Power Oil NV/DDD. Invest NV, Jaarboek Handelspraktijken en Mededinging* 2006, page 773).

- 43** 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 Competition Council can impose administrative fines of up to 10 per cent of the annual turnover of the undertaking (Belgian turnover and turnover realised from exports) and penalty payments of a fixed amount per day that cannot exceed 5 per cent of the average daily turnover of the undertaking, subject to the decision. The Competition Council can decide on the merits, but also impose provisional measures and endorse engagements offered by the parties. The Competition Council cannot award damages.

Parties wishing to obtain damages have to introduce a claim before the ordinary courts, which will take a decision on the merits, and may grant provisional measures or a cease-and-desist order, with penalty payments and publication measures. The ordinary courts cannot, however, impose administrative fines or penalties.

To date, hardly any fines have been imposed by the Competition Authorities for vertical restraints. Ordinary courts have ordered cease-and-desist orders, mostly accompanied by periodic fines.

Since 2005, the Competition Council has also started to endorse engagements (eg, *Distri-One v Coca-Cola Enterprises Belgium*, 2005-I/O-52, 30 November 2005, and *Banksys/Unizo/Frucm*, 2006-I/O-12, 31 August 2006).

Given the increased number of dawn raids carried out by the competition authorities, and the general increase in the number of investigations carried out by the Directorate-General for Competition, an increase in the number of decisions on restrictive practices has already led to a significant increase in the amount of fines imposed by the competition authority.

Investigative powers of the authority

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

The authorities have investigative powers that closely mirror the powers of the Commission. They can request information from the

parties concerned as well as from third parties. They can carry out 'dawn raids' on business premises and vehicles and, with the authority of an examining magistrate ('juge d'instruction'), on private homes and vehicles. During these dawn raids they can take copies of documents, take oral or written statements, seize goods and seal private and business premises. The prosecutor can also launch sector enquiries.

Private enforcement

- 45** 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?

Proceedings based on competition law can be started to invalidate contractual commitments, to obtain indemnification of damages suffered as a result of an infringement of competition law or to obtain the discontinuation (or prevention) of allegedly anti-competitive practices.

The Competition Act does not contain any provisions on such private actions. Therefore, the general principles of contract law, judicial law and tort law will be applicable. In order to obtain damages, the fault, damages and causal link between the fault and the damages have to be proved. Proceedings on the merits to obtain damages may take several years. Therefore, until recently, private enforcement in Belgium very often took the form of actions for cease-and-desist orders on the basis of the Trade Practices Act. Given that the concept of 'unfair trading practices' in the Act also covers infringements of the antitrust rules of the Competition Act, the presidents of the Commercial Courts can issue cease-and-desist orders, possibly subject to periodic penalty payments in case of non-compliance and publication measures, on the basis of the Trade Practices Act for breaches of antitrust law. Such proceedings allow the victim of the restrictive practices to obtain the termination of the practices in a very short time period (between a few days and a couple of weeks). The Commercial Court granting a cease-and-desist order on this basis is, however, not entitled to award damages.

Other issues

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

No.

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