



Vertical Agreements

The regulation of distribution practices
in 34 jurisdictions worldwide

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

Vertical restraints are regulated under chapter IV of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (the Competition Act). Chapter IV on 'Prohibition of Agreements Restricting Economic Competition' regulates both horizontal and vertical agreements restricting competition. Articles 81 and 82 of the EC Treaty also have direct application in Hungary in accordance with Regulation 1/2003/EC. Government Decree 55/2002 (III.26) regulates the rules of certain group exemptions from the general prohibition of vertical restraints. Regulations listed under question 3 are also relevant in the field of vertical restraints. The Competition Act is available at: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99600057.TV&jab=1.

2 List and describe the types of vertical restraints that are subject to antitrust law. Are those terms defined and how? Is the concept of vertical restraint itself defined in the antitrust law?

Agreements and concerted practices between companies, as well as the decisions of the social organisations of companies, public bodies, unions and other similar organisations of companies and unions with the purpose of the preventing, restricting or distorting economic competition, or which may display or in fact display such an effect, are prohibited. The prohibition, in particular, applies to the following:

- fixing the retail prices or defining other business conditions directly or indirectly;
- restricting manufacture, distribution, technical development or investment or keeping them under control;
- dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific consumers from the purchase of certain goods;
- dividing the market, excluding any party from selling, and restricting the choice of means of sales;
- preventing any party from entering the market;
- discriminating against certain partners with respect to transactions of an identical value or of the same nature which causes disadvantage to certain business partners in the competition; and
- rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract.

The above practices are prohibited both in horizontal and vertical context. No specific definition of vertical restraint is given in the Competition Act. The above activities or types of agreements do

not provide an exhaustive list of the prohibited activities, only construe the most common restrictions of trade prohibited by law.

3 Are there particular rules or laws applicable to the assessment of vertical restraints in specific sectors of industry? If so, please identify the sectors and the relevant sources.

Specific regulations apply to horizontal and vertical restraints in different industries as follows:

- Government Decree No. 86/1999 (VI.11) on exempting certain groups of technical-transfer agreements from the general prohibition of restraints (www.globalcompetitionforum.org/regions/europe/hungary/hun%208.pdf);
- Government Decree No. 53/2002 (III.26) on exempting certain groups of specialisation agreements from the general prohibition of economic restraints (www.globalcompetitionforum.org/regions/europe/Hungary/szakos%EDt%E1si%20csopment%20rendelet%202002%20magyar%20angolul.pdf);
- Government Decree No. 19/2004 (II.13) on exempting certain groups of agreements in the motor vehicle sector from the general prohibition of restraints;
- Government Decree No. 18/2004 (II.13) on exempting certain groups of agreements in the insurance sector from the general prohibition of restraints; and
- Government Decree No. 54/2002 (III.26) on exempting certain groups of agreements in the field of research and development.

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

The primary purpose of the law is to protect competition; nevertheless, as a side effect it also protects the survival of smaller businesses and through this – indirectly – employment relations as well.

5 What entity or agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Do governments or ministers have a role?

Enforcement of prohibitions on anti-competitive vertical restraints is delegated to the Office of Economic Competition, which is an independent organ established by law. The government and ministers do not have authority over the enforcement of antitrust matters.

- 6** What is the relevant test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction?

Generally, Hungarian competition law applies to the market conduct of any natural and legal persons and unincorporated business associations, regardless to their domicile, displayed in the territory of Hungary, unless otherwise provided for by law. The market conduct displayed by companies abroad, also falls under the scope of the Competition Act and other antitrust regulations, if the effect of such conduct manifests itself within Hungary.

- 7** To what extent does antitrust law apply to vertical restraints in agreements concluded by public or state-owned entities?

Public or state-owned entities are not exempted from antitrust law in Hungary.

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

Agreements concluded between non-independent companies are exempted from the prohibitions. Companies belonging to the same company group and the companies which are controlled by the same companies are considered non-independent

Agreements of minor importance are not subject to the general prohibition. An agreement is of minor importance if the total joint share of the parties concluding the agreement and of the companies that are not independent from such parties does not exceed 10 per cent in the market in question, except if the agreement pertains to:

- the fixing of the purchase or selling prices between competitors; or
- the dividing of the market among competitors.

Certain groups of vertical restraints are exempted by the government by decree from the general prohibitions of the Competition Act (see as listed under questions 1 and 3). The general prohibition does not apply to an agreement if:

- it improves the efficiency of production or distribution, or promotes technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the consumer;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals;
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

- 9** When assessing vertical restraints under antitrust law (or when considering the application of exceptions from antitrust law) does the relevant agency take into account that some agreements may form part of a larger, interrelated, network of agreements or is each agreement assessed in isolation?

The rule of minor importance (see question 8) does not apply to an agreement that is able to create an environment, in conjunction with other agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted.

Group exemptions established by a government decree (see question 8) from the prohibition of restrictive market practices shall not apply to an agreement if the conditions laid down in question 8 are not satisfied as a result of the impact it creates in the particular market in conjunction with other agreements of the like.

- 10** In what circumstances does antitrust law apply to agency agreements in which an undertaking agrees to perform certain services on a supplier's behalf in consideration of a commission payment?

In accordance with section 1(8) of Act CXVII of 2000 on independent commercial agency agreements, the rules of the Competition Act will apply also to those agency agreements which restrict competition. Typically, if the agent acts on behalf of the seller, enters into agreements that benefit and oblige the seller directly, then the relationship between the seller and the agent is not considered as restricting competition. On the other hand, if the agent acts on its own behalf, makes its own investments and carries significant risk of the business itself, it may be considered as a distributor (retailer) in which case rules on prohibition of vertical restraints shall apply.

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

Antitrust law, including certain group exemption rules as well, apply also to the transfer or licensing of intellectual property rights, where the grant of such rights is ancillary to the sale or resale of a product.

- 12** In what circumstances does antitrust law apply to agreements between a parent and a related company?

Rules on the prohibition of vertical restraints do not apply to agreements between companies which are not independent. Companies which belong to the same company group and those which are controlled by the same companies are considered non-independent. A company is regarded to be part of the same group of any company:

- that it controls independently;
- that controls it independently;
- that is controlled by a company referred to in the second point above); or
- that is controlled jointly by any two or more of the companies referred to under the above points and the company.

A company has direct control over another if:

- it holds over 50 per cent of the shares, stocks or voting rights in the other company; or
- it has the power to designate, appoint or dismiss the majority of the executive officers of the other company; or
- it has the power, by contract, to assert major influence over the decisions of the other company; or
- it acquires the ability to assert major influence over the decisions of the other company.

A company has indirect control over another company when the latter is controlled, whether independently or jointly, by one or more companies under the control of the former.

13 Can the legality under antitrust law of a given vertical restraint change over time?

Under antitrust law certain conditions need to be met to be eligible for being exempted from the prohibition of vertical restraints. For example, the so-called *de minimis* rule (agreements of minor importance) applies as long as the total joint market share of the parties to the agreement does not exceed 10 per cent of the market in question.

The requirement of a market share of 10 per cent or less has to be satisfied during the entire operative term of the agreement or in each calendar year if said term covers more than one year.

A similar rule applies with respect of the general vertical group exemption rules: the group exemption applies only to those agreements where the seller's market share does not exceed 30 per cent of the relevant market. The seller has to meet this requirement in each business year to be eligible for the exemption. Should the seller's market share exceed the 30 per cent threshold in one business year, it loses its exemption under the group exemption rules as of 30 June of the following business year.

The above rules are examples to situations where the legality of certain agreements may perish as a result of changing market conditions.

Lapse of time may also result in changes in the legality of an agreement: certain exclusivity agreements are exempted under the group exemption regulations only for a maximum term of five years.

14 Briefly explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Agreements and concerted practices between companies that are aimed at the prevention, restriction or distortion of economic competition, or that may display or in fact display such effect, are prohibited. The most typical activities and types of agreements prohibited by law are named by the Competition Act as listed in question 2.

All the above listed and similar agreements and activities restricting economic competition are prohibited unless they fall under the scope of an exemption established by law. Exemptions from the prohibition of vertical restraints are of different legal character:

- agreements between companies that are related (not independent from each other) are always exempted from the prohibition (see details under question 12); and
- agreements that fall under the *de minimis* rule are also exempted. This exemption applies to agreements between companies whose total joint market share (together with the controlled companies market shares) does not exceed 10 per cent, provided that the agreement does not establish:
 - fixing of purchase or retail prices between competitors; or
 - dividing of the market among competitors.

Consequently, in vertical relationships, if the seller and the purchaser are not competitors, and their joint market share does not exceed 10 per cent, they may even fix the retail prices or apply territorial restrictions.

Several vertical agreements fall under the general vertical group exemption rules or one of the specific industrial group exemption regulations (motor vehicle sector, insurance sector, technical transfer agreements, etc – see question 3). These exemption rules apply only to the extent and on the condition that the agreement in question meets the specific standards and require-

ments established by the relevant group exemption regulation.

An agreement containing vertical restraints may still be exempted from the prohibition if the parties can prove that:

- it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the consumer;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals;
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

The burden of proof to show that an agreement is exempted from the prohibition lies with the party who relies on the exemption.

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

As discussed in questions 1, 3 and 8, the government, based on the authorisation of the Competition Act, established certain block exemption rules in the field of general commercial relationships, the motor vehicle sector, the insurance sector, the transfer of technology, the technical specification and the research and development agreements. Agreements that fall under the scope of one or the other block exemption rules are exempted from the general prohibition of horizontal or vertical restraints, provided that the agreement in question meets in all respects the rules and requirements of the given block exemption regulations. In the following we address only the most important rules of Government Decree 55/2002 (III.26) on exempting certain groups of vertical agreements from the prohibitions on vertical restraints (General Block Exemption Decree).

The General Block Exemption Decree applies only to those vertical agreements that meet all of the following requirements:

- the seller's market share on the relevant market does not exceed 30 per cent;
- in case of exclusive supply obligation (ie, seller undertakes to sell all products to one purchaser only), the market share of the purchaser does not exceed 30 per cent of the relevant market;
- the goal of the agreement, directly or indirectly, in itself or together with other elements under the control of the parties, is not the:
 - limitation of the purchaser in establishing its own resale prices independently, except that the parties may establish a recommended or a maximised retail price;
 - limitation of the purchaser in establishing its territory of sale or the scope of its customers, except the (i) limitation of active sales to territories and customers maintained and delegated to other exclusive distributors, or maintaining the right of seller to enter into sales transactions; (ii) limitation of a wholesaler to sell to end-customers; (iii) limitation of sales in a selective distribution system to non-authorised distributors; (iv) limitation of the purchaser to sell spare parts to customers who would use such spare parts for the manufacture of similar goods;
 - limitation of the members of a selective distribution system in their active and passive sales to end-customers;

- limitation of the members of a selective distribution system to sell to each other;
- limitation of the seller to sell spare parts to end-customers, repair shops or other service providers.

Should the agreement fail to meet any provisions listed above, then the agreement is not eligible for exemption at all under the General Block Exemption Decree.

In addition to the above, certain provisions cannot validly be agreed upon. In accordance with these:

- agreements including an obligation on the purchaser not to manufacture, purchase, sell or resell competing goods, or that it has to purchase more than 80 per cent of its merchandise exclusively from seller, may not validly be agreed upon for an indefinite term or for a term exceeding five years;
- the purchaser may not validly be limited in its purchasing, sales or retail activities following the termination of the distribution agreement (some exemptions apply);
- members of a selective distribution system may not be limited in selling competing products of certain competitors.

- 16** What are the consequences of an infringement of antitrust law for the validity, or enforceability by one of the parties, of a contract containing prohibited vertical restraints?

It is a general rule of the Hungarian legal system that contracts that violate the law are null and void. If certain provisions of a contract are illegal, it results in the null and void nature of such provisions only. It will result in the nullification of the entire contract only if the parties would not have entered into the contract without the inclusion of the illegal provisions in question. Therefore, there is a legal possibility for one party of the contract containing an illegal vertical restraint to challenge the validity and enforceability of a certain provision or the entire contract at court, but it will not necessarily nullify the entire contract.

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

Retail price-fixing is generally prohibited. The only way to influence the level of retail prices by the seller is to establish a recommended retail price, as long as there is no pressure whatsoever by the seller to force the application thereof as an actual retail price, or, alternatively, to set a maximum retail price by the seller or the parties together.

- 18** Have there been any developments in your jurisdiction in light of the landmark 2007 judgment by the US Supreme Court in *Leegin Creative Leather Products Inc v PSKS Inc*? If not, is any response or development anticipated?

So far we have not seen decisions in Hungary allowing minimum price-fixing.

- 19** How is the restriction of the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances (if any) may a supplier require a buyer of its products not to resell the products in certain territories?

Generally, it is not allowed to restrict the purchaser in selling at certain territories, except, the seller may appoint another exclusive distributor to a certain territory, or may maintain a certain

territory to itself, in which case limitation of active sales to those territories by the purchaser is allowed.

- 20** Explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. In what circumstances (if any) may a supplier require a buyer of its products not to resell the products to certain customers?

Generally, it is not allowed to restrict the purchaser in selling to certain customers, except that limitation of sales is allowed in the following cases:

- sales to certain group of customers is retained for seller or delegated to another exclusive distributor;
- in case of a selective distribution system sales to non-contractual retailers can be excluded;
- purchasers may be limited in selling spare parts to customers who would use such spare parts for the manufacturing of similar goods;
- a wholesaler may be restricted from selling to end-customers.

- 21** How is the restricting of the uses to which a buyer (or a subsequent buyer) puts the contract products assessed under antitrust law?

In general, it might be concluded that sellers or purchasers may not be restricted in selling spare parts for servicing, repair and maintenance purposes. On the other hand, sale and resale may be restricted when spare parts would be sold to purchasers who would manufacture goods out of the spare parts similar to that of the goods sold by the seller.

- 22** Briefly explain how agreements establishing 'selective' distribution systems are assessed under antitrust law.

The General Block Exemption Decree allows the establishment of a selective distribution system under which only approved companies can be members of the distributions system and such members may legally undertake an obligation that they do not sell to retailers who are not approved members of the network; and that they do not carry out active sales activities on the territory of another member of the network. However, passive sales to end-customers may not be restricted. The selective system may be established based on a quantitative or on a qualitative basis. In a quantitative system the seller may set the maximum number of retailers, while in a qualitative system the seller has to enter into an agreement with all retailers who meet the qualitative requirements and apply for a membership in the network.

- 23** How is the restriction of the buyer's ability to obtain the supplier's products from alternative sources assessed under antitrust law?

Under the General Block Exemption Decree the retailer may be required to purchase its stock exclusively from the seller, provided that the seller's market share does not exceed 30 per cent on the relevant market. Further, an agreement containing exclusivity may not be concluded for an indefinite term or for a term longer than five years. This latter rule applies also for agreements under which the purchaser has to purchase more than 80 per cent of its entire sales (calculated on the previous business year's figures) from the same seller. Selective distribution agreements may not contain an obligation on the purchaser under which products of certain competitors may not be purchased and sold by the purchaser.

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

See question 23.

25 How is the requiring of the buyer to purchase from the supplier a certain amount, or minimum percentage, of its requirements, of the contract products assessed under antitrust law?

See question 23.

26 Explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

Under the General Block Exemption Decree the seller may agree to sell all of its products exclusively to the purchaser, provided that the purchaser's market share on the relevant market does not exceed 30 per cent.

27 To what extent are franchise agreements incorporating licences of intellectual property rights, relating to trademarks or signs and know-how for the use and distribution of products, assessed differently from 'simple' distribution agreements under antitrust law?

Hungarian antitrust law does not address franchise agreements per se. Therefore, their terms and validity need to be reviewed in accordance with the general rules of the Competition Act, the General Block Exemption Decree and the potential other exemptions discussed above.

28 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 warranting to the buyer that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law.

In a selective or other distribution system the supplier may legally agree to provide the same (equal) conditions to each member of the distribution system.

29 Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify it of any particular categories of agreement?

There is no formal procedure under which agreements containing vertical restraints can be notified with the Office of Economic Competition, nor can a negative clearance procedure be initiated.

30 If there is a formal notification procedure, how does it work? What type of ruling (if any) does the agency deliver at the end of the procedure? And how long does this take? Is a reasoned decision published at the end of the procedure?

Not applicable.

31 If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

The Office of Economic Competition does not issue negative clearance opinions or provide any other preliminary opinion in connection with individual agreements containing restraints. All

decisions of the Office issued in actual cases are published and they may include useful findings and guiding interpretation on different questions. Occasionally the Office issues non-binding guidelines on certain interpretation issues which are also very informative.

32 Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

Private parties may initiate the proceeding of the Office of Economic Competition either by completing a form questionnaire available for this purposes (report) or by simply informing the Office about their complaint. The reporter has to complete the questionnaire and provide the fact pattern that is the basis of its complaint. The reporter may request to maintain its anonymity. The investigator acting on behalf of the Office has to decide within 60 days (which can be extended by another 60 days) whether to initiate an official investigation proceeding or to decline the case and reject it as one without basis. The reporter may challenge the rejecting resolution at the competent court within eight days. Complaints that do not qualify as a report are treated as a complaint, in which case the investigator has to come up with its decision within 30 days (this deadline may be extended). Decisions rejecting a complaint may not be challenged in court.

33 How frequently is antitrust law applied to vertical restraints by the agency?

The Office of Economic Competition is rarely involved in cases of vertical restraints. During 2003 there were four vertical cases out of a total of 20 cartel cases. This ratio was 8 out of 28 in 2004; 11 out of 25 in 2005; 6 out of 10 in 2006; and 1 out of 10 in 2007.

34 May the agency impose penalties or must it petition the courts or another administrative or government agency? What sanctions and remedies can the agency or the courts impose when enforcing the prohibition of vertical restraints?

The Office of Economic Competition may impose a fine on the wrongdoer in its own authority, without consulting courts or other organs. In addition to imposing a fine, the Office may:

- declare the activity illegal;
- order the termination of the illegal act or the illegal circumstances; and
- order the carrying out of certain obligations.

35 What investigative powers does the agency have when enforcing the prohibition of vertical restraints?

The investigators of the Office of Economic Competition may:

- demand the handing over of any evidence and provide all information from the parties and any third party that is relevant in the case;
- prepare copies of written documents or any media or data storage device;
- seize any evidence;
- enter into and search sites or motor vehicles; and
- use police assistance to the above if necessary.

36 What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The sanctions that the Office of Economic Competition may apply in cases of vertical restraints are the following:

- declaration of the activity or agreement illegal;
- obligation to stop the illegal activity; and
- imposition of a fine, the amount of which is limited to 10 per cent of the net sales revenue of the company group in the previous business year.

There are few decisions made in connection with vertical restraints and only two of them contained fines, therefore no actual tendency in the determination of the fine can be drawn.

37 Can sanctions or remedies be imposed on companies having no branch or office in your jurisdiction?

Companies that have no branch or office in Hungary are also subject to Hungarian competition law and the jurisdiction of the Office of Economic Competition as long as the effect of their activity is realised or may be realised in Hungary. Therefore, they are subject to the sanctions and remedies of the Hungarian competition law.

38 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints 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? Can the successful party recover its legal costs?

According to the Competition Act (sections 11(3) and 88/A) any consequences which are attached by the Competition Act to any infringement of the prohibition of horizontal and ver-

tical restraints apply concurrently with the legal consequences prescribed by the Civil Code in connection with contracts that violate the provisions of the legal rules. Section 88/A emphasises that civil law claims – which would include damages claims as well – arising in connection with agreements illegally restraining competition may be brought in the form of private enforcement directly before the courts of general civil law competence. Private enforcement of civil law claims, including damages claims, would be available for parties to the contract as well as to third parties in the event they can prove damages and causal connection between the illegal contract and the damage suffered. Such damages claims may be successful if the party in violation of law cannot excuse itself from the wrongdoing by proving that it acted in accordance with the generally expected care under the given circumstances (general rule of negligence).

Between parties which are both parties to the illegal contract the rule of contributory negligence may be an important factor in case of a damages claim. No court cases exist yet at this point that would allow an analysis of the situation and concluding when a court may accept a damages claim under such circumstances.

Private enforcement actions may take several years, since the court in charge has a notification obligation to the Office of Economic Competition, which may interfere with the proceedings.

39 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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