

Lithuania

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

The legal sources that set out the antitrust law applicable to vertical restraints are:

- The Law on Competition of the Republic of Lithuania (as amended on 15 April 2004 No. IX-2126) (the Lithuanian Competition Law). <http://www.konkuren.lt/english/antitrust/legislation.htm>
- Competition Council Resolution No. 1S-132 of 2 September 2004 on Agreements Complying with paragraph 1 of article 6 of the Law on Competition and on Announcement of Certain Resolutions of the Competition Council as having Ceased Their Power (the Lithuanian Verticals Resolution). Available only in Lithuanian: <http://www.konkuren.lt/konkurencija/poist.htm>
- Competition Council Resolution No. 1 of 13 January 2000 on Requirements and Conditions to Agreements Which Due to Their Minor Effect May not Materially Restrict Competition (the Lithuanian De Minimis Resolution). Available only in Lithuanian: <http://www.konkuren.lt/konkurencija/poist.htm>

- 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?

The concept and types of vertical restraints are not specifically defined in Lithuania antitrust law, but are generally based on the EU competition law and practice. The most common vertical restraints subject to antitrust law are single branding, exclusive distribution, franchising, exclusive customer allocation, selective distribution, exclusive supply, tying, and recommended or maximum resale prices.

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

Prohibited agreements, which do not affect trade among member states of the EU but have effects only on trade within the territory of Lithuania, may be exempted under the block exemptions.

The Lithuanian Verticals Resolution establishes that all EU regulations on block exemptions apply also to prohibited agreements concerning trade within the Lithuanian territory only, provided that the annual turnover thresholds, expressed in euros, established therein are reduced 10 times. Thus, all EU legal acts on assessment of vertical restraints in specific sectors of industry apply in Lithuania.

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

The objective of the Lithuanian Competition Law is to protect competition in Lithuania. Thus, the Lithuanian Competition Law does not seek to protect other interests, eg to secure employment-related, regional policy-related or small business-related objectives, or to regulate relationships in the labour market.

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

The Competition Council is primarily responsible for enforcing prohibitions on anti-competitive vertical restraints. The courts are responsible to the extent that the decisions of the Competition Council are appealed, as well as in granting sanctions for certain investigations. The government and ministers do not have a role in enforcing prohibitions on anti-competitive vertical restraints.

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

A vertical restraint will be subject to Lithuanian antitrust law if it does not affect the trade among the member states of the EU, but restricts competition within the territory of Lithuania only.

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

Lithuanian antitrust law applies to agreements concluded by state-owned and public undertakings as well.

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

Pursuant to the Lithuanian De Minimis Resolution, vertical restraints established between undertakings, when the market shares of each such undertaking do not exceed 15 per cent, are not considered as restricting the competition (*de minimis*).

However, the *de minimis* rule is not applicable and exemption is not possible for vertical restraints which directly or indirectly limit the following:

- A buyer's ability to determine sale price. However, the supplier is able to impose a maximum sale price or to recommend a sale price.
- The territory or the customers into which or to whom the buyer may sell products, except:
 - restriction of active sales into the exclusive territory or to

an exclusive customer group, where such restriction does not limit sales by the customers of the buyer;

- restriction of sales to end-users by a buyer operating at the wholesale level of trade;
- restriction of sales to unauthorised distributors by the members of a selective distribution system, or
- restriction of buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.
- Active or passive sales to end-users by members of a selective distribution system operating at the retail trade level.
- Cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade.
- The ability of a supplier to sell components as spare parts to the end-users or to an undertaking, providing repairing or other services, when such undertaking is not assigned by the buyer to repair its products or provide other services, when such limitation is established by the supplier of components and a buyer who incorporates those components.

- 9** When assessing vertical restraints under 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 Competition Council takes into account the network of agreements when assessing a specific agreement.

- 10** Under 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 the case of a 'genuine' agency, when an agent does not bear any or bears only insignificant financial and commercial risk in relation to contracts concluded or negotiated on behalf of a principal, functions of an agent are considered as part of principal's activities and not an independent economic activity. Thus, in such case territorial and customer limitations and fixing of price are allowed. However, non-compete provisions and exclusive agency appointments may still in certain cases fall under antitrust rules, if such restrictions lead to foreclosure of the relevant market where the contract goods or services are sold or purchased.

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

When the agreement containing the vertical restraint also contains provisions granting IPRs, the block exemption applies on the condition that provisions granting IPRs:

- do not constitute the primary object of the implementation of such agreement;
- are directly related to the use, sale or resale of the goods by the purchaser or his clients.

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

Antitrust law applies to agreements between a parent and a related company if they are considered as separate economic

units, ie a related company has real freedom to determine its course of action on the market. Whether or not a related company can be said to be independent of its parent or to form a part of the same economic unit depends on a number of factors, eg whether the parent has control over the board of the related company, whether the related company complies with directions given by the parent, etc.

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

The legality under antitrust law of a given vertical restraint may change over time. For example, pursuant to the Lithuanian De Minimis Resolution, exempted vertical restraints under de minimis rules are not restricting competition if the market shares of undertakings do not exceed the established thresholds during two successive calendar year by more than 2 per cent.

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

The assessment of vertical restraints involves the following steps:

- Check whether an exemption under the Lithuanian De Minimis Resolution applies:
 - define the relevant markets of the parties of the agreement. If the market shares of each of them do not exceed 15 per cent, de minimis rule may apply.
 - check whether a vertical restraint contains hardcore restrictions, which may not be exempted (see question 8). If there are no vertical restraints containing hardcore restrictions, vertical restraint is exempted.
- If vertical restraint may not be exempted under de minimis exemption, the exemption under the Lithuanian Verticals Resolution (ie the commission regulation (EC) No. 2790/1999 of 22 December 1999 (the EU Verticals Regulation), see question 3), should be checked:
 - define whether the agreement is between the 'competing undertakings'. If the agreement is between the 'competing undertakings and is not non-reciprocal and does not comply to the conditions listed in the article 2, paragraph 4(a)–(c) of the EU Verticals Regulation, then the block exemption does not apply. Otherwise the block exemption may apply;
 - define the relevant market of the supplier (or the buyer in case of exclusive supply obligation), assessing whether the market share of the supplier/buyer exceeds 30 per cent. If the market share is below the 30 per cent threshold, the vertical agreement may be covered by the EU Verticals Regulation. Otherwise, the agreement is not exempted;
 - define whether there are hardcore restrictions in the agreement as established in article 4 of the EU Verticals Regulation:
 - any element of price-fixing or minimum resale price maintenance, except maximum or recommended price;
 - any restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services (subject to certain listed exceptions);
 - any restrictions of active or passive sales to end users by selective distribution system members operating at retail level of trade;

- any restrictions on cross-supplies between any distributors in a selective distribution system;
- any restrictions on sales of spare parts by the supplier to end users who are not buyer's own repairers.

If the agreement contains hardcore restriction, the block exemption is not applicable. Otherwise, the agreement is exempted.

- In case the market share of an undertaking is above the 30 per cent threshold, the vertical restraint may still be exempted under article 6 of the Lithuanian Competition Law. The vertical agreement would be exempted if:
 - the vertical agreement promotes technical or economic progress or improves the production or distribution of goods, thus allowing all consumers to get additional benefit; and
 - the agreement does not impose restrictions on the activity of the parties thereto which are not indispensable to the attainment of the above mentioned objectives; and
 - the agreement does not afford contracting parties the possibility to restrict competition in a large relevant market share.

- 15** Is there a block exemption or safe harbour which provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please briefly explain the manner in which this block exemption/safe harbour functions.

The Lithuanian Verticals Resolution establishes that all EU regulations on block exemptions apply also for the prohibited agreements concerning the trade within Lithuanian territory only, provided that the annual turnover thresholds, expressed in euros, established therein are reduced 10 times. Thus, the EU Verticals Regulation applies in Lithuania. The block exemption under the EU Verticals Regulation creates a presumption of legality for vertical agreements, provided the market share of the supplier (or the buyer in case of exclusive supply obligation) does not exceed 30 per cent of the relevant market.

- 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?

An agreement or a part of it which has as its object the restriction of competition or which may restrict competition is prohibited and shall be void from the moment of its conclusion.

- 17** Briefly explain how restricting the buyer's ability to determine its resale price is assessed under antitrust law.

Article 5 of the Lithuanian Competition Law prohibits establishing a resale price directly or indirectly, because such restraint is deemed to have as its object the restriction of competition. Establishing of a fixed or minimum resale price is a hardcore restriction, which may not be exempted under the block exemption or de minimis rule.

- 18** Briefly explain how restricting the territory into which a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to customers in certain territories?

Generally, vertical agreements, which restrict the territory into which or the customers to whom the buyer may sell the contract

products, are prohibited. Such restraints are also regarded as hardcore restrictions and do not benefit from the block exemption, except if the agreement restricts:

- active sales into the exclusive territory or to an exclusive group of customers reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
- sales to end users by a buyer operating at the wholesale level of trade;
- sales to unauthorised distributors by the members of a selective distribution system;
- the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

- 19** Briefly explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. Under what circumstances may a supplier require a buyer of its products not to resell the products to certain customers?

Please see question 18.

- 20** Briefly explain how restricting the uses to which a buyer puts the contract products is assessed under antitrust law.

Such a restriction would be prohibited under the Lithuanian Competition Law, if the effect were the restriction of competition in the territory of Lithuania.

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

Although the selective distribution systems do not have as their object the restriction of competition, such systems may reduce intra-brand competition and may therefore be caught by the prohibition of article 5 of the Lithuanian Competition Law. This is the case except if the resellers are chosen on the basis of objective criteria of a qualitative nature relating to technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory way.

- 22** Briefly explain how restricting the buyer's ability to source the supplier's products from alternative sources is assessed under antitrust law.

Single branding is exempted by the block exemption if the supplier's market share does not exceed 30 per cent and if duration of the non-compete obligation is not unlimited and does not exceed five years, unless the buyer's premises are owned or leased by the supplier, in which case non-compete can last for the period of occupancy by the buyer.

- 23** Briefly 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.

Restricting the buyer's ability to stock products competing with those supplied by the supplier might have anti-competitive effect, since it may restrict inter-brand competition, prevent the buyer from dealing in other competing brands or may have a foreclosure effect by excluding competing suppliers from access to distribution channels.

Update and trends

At present the draft law on amendment of the Lithuanian Competition Law is being prepared. Pursuant to the draft amendments, the officials of the Competition Council will also have the right to inspect and search the private homes and vehicles of the managers and employees of the undertaking under investigation.

- 24** Briefly explain how requiring the buyer to purchase from the supplier a certain amount, or minimum percentage of its requirements, of the contract products is assessed under antitrust law.

The assessment of different forms of quantity forcing will depend on their effect on the market, however, quantity-forcing on the buyer has similar but weaker foreclosure effects than a non-compete obligation. If the buyer is required to purchase from the supplier more than 80 per cent of the buyer's total purchases of the contract products or their substitutes, it is regarded as a single branding (non-compete) agreement under the antitrust law (see question 22).

- 25** Briefly explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

Exclusive supply obligations are exempted under the block exemption, if the market share of the buyer does not exceed 30 per cent. In case the threshold is exceeded the market share of the buyer on the upstream purchase market, the extent and duration for which the exclusive supply obligation is applied, the market position of the competing buyers, entry barriers, countervailing power and the level of trade will have to be assessed.

- 26** Briefly explain to what extent, if any, franchise agreements incorporating licences of intellectual property rights, relating to trademarks or signs and know-how for the use and distribution of products, are assessed differently from 'simple' distribution agreements under antitrust law.

The franchise agreements are assessed differently from the 'simple' distribution agreements in the following way:

- the more important the transfer of the know-how, the more easily vertical restraints fulfil the conditions for exemption;
- a non-compete obligation on the goods or services purchased by the franchisee falls outside article 5 of the Lithuanian Competition Act when such obligation is necessary to maintain the common identity and reputation of the franchised network.

- 27** Briefly 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.

Such a restriction would be prohibited under article 5 of the Lithuanian Competition Law, if the effect of the restriction were the restriction of competition in the territory of Lithuania.

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

There is no formal notification procedure established in Lithuania for agreements containing vertical restraints. Thus, undertakings are entitled without applying to the Competition Council to enter into the agreements which, although restrict competition, however, meet the conditions of granting an exemption (block exemption or exemption under article 6 of the Lithuanian Competition Law (see question 14).

- 29** If there is a formal notification procedure, how does it work, what type of ruling does the agency deliver at the end of the procedure, and what time period is normally required to obtain it? Is a reasoned decision published at the end of the procedure?

There is no formal notification procedure established in Lithuania for agreements containing vertical restraints.

- 30** 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 Competition Council provides undertakings with required verbal and written guidance.

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

Private parties whose interests have been violated owing to restrictive practices have the right to request the Competition Council by submitting a written request to start investigation of such restrictive practices. Alternatively, an investigation may be started upon application of public and local authorities, associations and unions representing the interests of undertakings and consumers and by the Competition Council itself.

Written request to start investigation has to describe actual circumstances of actions restricting competition and contain documentary evidences on that. The Competition Council has within 30 days as of receipt of the request to decide on whether to start or not to start the investigation. The investigation by the Competition Council has to be finished in five months; however, the term of investigation may be prolonged up to three months for an unlimited number of times. Usually investigations last from one to two years.

- 32** How frequently is antitrust law applied to vertical restraints by the agency?

Generally, the Competition Council takes decisions on between two and seven cases of prohibited agreements per year.

- 33** Is the agency empowered to impose penalties itself or does it need to have recourse to the court system or another administrative or government agency? What sanctions and remedies can the agency impose when enforcing the antitrust law prohibition of vertical restraints?

The Competition Council is entitled to impose fines and/or certain legal obligations (eg, an obligation to amend the provisions of a vertical agreement) on undertakings. The fine may amount up to 10 per cent of the turnover of an undertaking in the previous financial year.

34 Briefly, what investigative powers does the agency have when enforcing the antitrust law prohibition of vertical restraints?

The inspectors of the Competition Council have the right to enter and to check any premises, land and means of transport used by the undertaking (only with court sanction), examine the documents of the undertaking, the notes of the employees of the undertaking, as well as information stored in computers and magnetic disks, make their copies and extracts (only with court sanction), get oral and written explanations from the persons related to the activity of the undertakings under investigation, etc.

Under the Lithuanian Competition Law the inspectors are not entitled to search private homes and vehicles of the employees of the undertaking under investigation (see Update and trends box).

35 Please give an indication of the level or nature of any sanctions or remedies imposed in particular cases. Can any recent trends in the imposition of sanctions or remedies be identified?

When deciding upon the amount of a fine, the Competition Council has to take into account the severity and duration of the breach of the Lithuanian Competition Law and mitigating or aggravating circumstances. No trends can be identified, since there have been rather few cases so far.

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

The Lithuanian Competition Law is also applicable to the activity of undertakings not registered in Lithuania, if such activity restricts competition in the domestic market of the Republic of Lithuania.

37 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?

Direct and indirect damage caused by anti-competitive agreements are subject to compensation by way of civil procedure in regular courts. Non-parties to the agreements which have suffered damage because of the vertical restraints are entitled to bring damages claims. Also, damage caused to undertakings by illegal actions of the Competition Council or its officers may be compensated to the parties in administrative courts. Private enforcement lasts between 11 and 14 months (until the final appeal). The legal costs are covered by the losing party.

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

Generally the Lithuanian Competition Law is modelled upon EU competition law, thus there are no unique points relating to the assessment of vertical restraints in Lithuania.

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