

Estonia

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

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

- The Competition Act (as amended 1.07.2006) (in English: <http://www.konkurentsiamet.ee/?id=10643>)
- The Penal Code, Division 7 (in English: <http://www.legaltext.ee/indexen.htm>)
- The Government of Republic Regulation No. 195 of 18 June 2002 “Grant of permission to enter into vertical agreements which restrict or may restrict free competition” – the Block Exemption (in Estonian: <https://www.riigiteataja.ee/ert/act.jsp?id=817289>)
- The Government of the Republic Regulation No. 130 of 26 April 2004 “Grant of permission to enter into motor vehicle distribution and servicing agreements which restrict or may restrict competition” (in Estonian: <https://www.riigiteataja.ee/ert/act.jsp?id=744648>)

- 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 of vertical restraint and the types of vertical restraints (except exclusive supply and non-competition commitment) are not defined in Estonian antitrust law. The concept is based on the practice of the EU.

The vertical restraints subject to antitrust law are:

- **Exclusive customer allocation:** In an exclusive customer allocation agreement, the supplier agrees to sell its product to only one distributor for resale to a particular class of customers.
- **Tying of goods:** This is an agreement by which the supplier makes the sale of one product or service conditional on the purchase of another product or service from the supplier or someone designated by the supplier.
- **Exclusive distribution:** In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory.
- **Selective distribution:** In selective distribution system, the supplier agrees only to supply specified approved distributors, who meet certain minimum criteria, and the distributors in return agree only to supply end users or other distributors or dealers within the approved network.
- **Exclusive supply:** An exclusive supply obligation causes the supplier to sell the goods or services to only one buyer for the purposes of a specific use or for resale in an agreed territory.
- **Single branding:** This includes non-compete clauses and quantity-forcing on the buyer.

- **Franchising:** Under a franchise agreement, one party allows the other party to exploit the franchiser’s trademarks and expertise for the sale and distribution of goods or services.
- **Restriction of prices:** This is the restriction of the buyer’s ability to determine its sale price.

- 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.

There are particular rules applicable to the assessment of vertical restraints in the motor vehicle sector. The rules governing this sector can be found from the Government of the Republic Regulation No. 130 of 26 April 2004 “Grant of Permission to Enter into Motor Vehicle Distribution and Servicing Agreements Which Restrict or May Restrict Competition”. This regulation is only available in Estonian: <https://www.riigiteataja.ee/ert/act.jsp?id=744648>

- 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 law is to safeguard competition in the interest of free enterprise. The objective is not 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?

Both the Competition Board and the courts are responsible for enforcing prohibitions on anti-competitive vertical restraints. The government and ministers do not have a role.

- 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 Estonian antitrust law if it is performed in Estonia or if it is committed outside the territory of Estonia but restricts competition in Estonia.

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

Competition law applies to agreements concluded by state-owned and public undertakings. Furthermore, competition law applies also to the state and local governments if they participate in a product market.

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

Certain types of agreements (tying, application of dissimilar conditions to equivalent agreements, exchanging information restricting competition) benefit from the de minimis rule. For the de minimis rule to apply, the combined market share of the undertakings which enter into the agreement cannot exceed 15 per cent for each party.

- 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?

Yes, the Competition Board will look at the big picture and take into account the network of agreements when assessing one 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?

If the agent and the principal operate together as a 'true agency', they are treated as a single economic unit and the agent is usually considered to fall outside the competition rules. However, if the agent operates independently from the principal (eg takes risks on his own account), the agency agreement may be caught by the antitrust rules.

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

The difference is that the Block Exemption applies to provisions contained in vertical agreements concerning the IP rights on the condition that these provisions: (i) do not constitute the primary object of the implementation of such agreements; and (ii) are directly related to the use, sale or resale of the goods by the purchaser or their clients.

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

In general, intra-group agreements in a vertical relationship are not caught by antitrust rules. Antitrust law applies only to agreements between a parent and a related company if there is competition between such undertakings. The term 'related company' is not defined in the Estonian competition law.

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

Yes, it can. For example, antitrust rules might not apply to an agreement due to the fact that the market share of the undertakings is 10 per cent. If the market share increased to 25 per cent, de minimis rule would not apply and the agreement could be in breach of the competition law.

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

The assessment of vertical restraints involves four steps:

- The definition of the relevant market in order to establish the market share of the supplier or the buyer.
- If the market share is below the 30 per cent threshold, the vertical agreement is covered by the Block Exemption. However, this regulation contains five hardcore provisions in which case the Block Exemption does not apply:
 - any element of price-fixing or minimum resale price maintenance;
 - any restriction upon the territory into which, or upon the customers to whom, the buyer may sell the contract goods or services;
 - any restrictions on sales to end users by retail-level dealers in a selective distribution system;
 - any restrictions on cross-supplies between any distributors in a selective distribution system;
 - any restriction on sales of spare parts by the supplier to end users who are not buyer's own repairers.
- In case the market share is above the 30 per cent threshold, it is necessary to assess whether the vertical agreement distorts competition (consideration should be given to entry barriers, nature of the product, the market position of the supplier, competitors and the buyer).
- In case the vertical agreement falls within §4 of the Competition Act (equivalent of article 81(1)), it should be checked whether it fulfils the conditions for exemption.

An exemption applies if the agreement, practice or decision:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress or to protecting the environment;
- does not impose on the undertakings which enter into the agreement, engage in concerted practices or adopt the decision any restrictions which are not indispensable to the attainment of the objectives mentioned above;
- does not afford the undertakings which enter into the agreement, engage in concerted practices or adopt the decision the possibility of eliminating competition in respect of a substantial part of the goods market.

- 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.

Yes, there is a block exemption that covers vertical agreements. This is the Government of Republic Regulation No. 195 of 18 June 2002 "Grant of permission to enter into vertical agreements which restrict or may restrict free competition".

This creates a presumption of legality for vertical agreements depending on the market share of the supplier or the buyer. The Block Exemption applies on condition that the market share held by the supplier does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services. In the case of exclusive supply obligations the Block Exemption applies on condition that the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services.

The Block Exemption does not apply to:

- vertical agreements regulated by other block exemptions;
- vertical agreements containing similar vertical restraints where parallel networks of vertical agreements cover more than 50 per cent of the relevant market;
- agreement, practice or decision which does not contribute

to improving the production or distribution of goods or to promoting technical or economic progress or to protecting the environment;

- agreement, practice or decision which does impose on the undertakings which enter into the agreement, engage in concerted practices or adopt the decision restrictions which are not indispensable to the attainment of the objectives mentioned above;
- agreement, practice or decision which does afford the undertakings which enter into the agreement, engage in concerted practices or adopt the decision the possibility of eliminating competition in respect of a substantial part of the goods 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?

Any agreement or a part of it which has as its object or effect the consequences of an infringement of antitrust law is void.

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

Establishing a fixed or minimum resale price to be observed by the buyer is a hardcore restriction set out in §2(1) 1) of the Block Exemption.

However, the provision of a list of recommended prices or maximum prices by the supplier to the buyer is covered by the Block Exemption when the market share of the supplier does not exceed the 30 per cent threshold. The important factors when assessing the anti-competitive effects of maximum or recommended resale prices are (i) the market position of the supplier and (ii) the market position of competitors.

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?

In general, restricting the territory into which a buyer may resell contract products is prohibited. However, a supplier may prevent a direct buyer from *actively* selling into an exclusive territory. A territory is exclusive if it is either (i) exclusively allocated to another buyer, or (ii) exclusively reserved to 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?

In general, restricting the customers to whom a buyer may resell contract products is prohibited. However, there are four exceptions to this rule:

- restrictions on active sales by the buyer. A buyer can be prevented from actively selling to a group of customers exclusively allocated to another buyer;
- sales by wholesalers to end-users;
- restrictions on the resale of components by the buyer; and
- selective distribution systems.

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

In general, restricting the uses to which a buyer puts the contract products is prohibited under antitrust law if the effect was the restriction of competition.

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

Selective distribution agreements may give rise to reduced intra-brand competition and foreclosure of certain types of distributors and the facilitation of collusion between suppliers or buyers. However, selective distribution system might not be caught by §4 of the Competition Act (equivalent of article 81(1)) if the dealers are selected on the basis of qualitative criteria, the restrictions imposed on distributors are not excessive and the selective distribution is necessary to insure proper distribution.

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 subject to a limitation in time of five years for the non-compete obligation. In case the market share exceeds 30 per cent anti-competitive effects of non-compete obligations need to be assessed. It is necessary to assess: the market position of the supplier, the extent and the duration for which they apply a non-compete obligation, the market position of the competitors, countervailing power and entry barriers.

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 buyer's ability to stock products might have anti-competitive effect, because it may (i) restrict inter-brand competition, (ii) prevent buyer from dealing in other competing brands, or (iii) have a foreclosure effect by excluding competing suppliers from access to distribution channels.

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. An obligation imposed on the buyer to buy more than 80 per cent of the contract goods or services or their substitutes from the supplier is covered by the Block Exemption only if imposed for five years or less.

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 as defined in §1(8) of the Block Exemption is exempted up to 30 per cent market share of the buyer. In case the market share is above this threshold it is important to assess: 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.

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 expertise, the more easily the vertical restraints fulfil the conditions for exemption.
- a non-compete obligation on the goods or services purchased by the franchisee falls outside §4(1) of the Competition Act (equivalent of article 81(1)) when the 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.

In general, if a most-favoured customer clause only applies to equivalent volumes of products within an equivalent time period, it is not considered anti-competitive. However, a most-favoured customer clause which, in the context of an oligopoly would reduce the incentive to cut price, can have anti-competitive effects.

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?

The Competition Board has no formal notification procedure in Estonia for agreements containing vertical restraints.

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 in Estonia 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?

Yes, the Competition Board gives oral and written guidance.

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

Yes, it is possible to file an application for the commencement of administrative proceedings (alternatively, proceedings can be started with a public prosecutor). As regards possible decisions please see question 36.

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

The Competition Board and the courts processes somewhere between two and eight cases 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 Board can only issue a precept, for penalties it needs to have a recourse to the court system.

The court can impose the following sanctions to a natural person:

- a pecuniary punishment of 30 to 500 daily rates (calculated on the basis of the average daily income of the convicted offender); or
- up to three years' imprisonment.

The court can impose a pecuniary punishment on a legal person of between €3,200 and € 16 million.

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

The Competition Board has the right to request information, explanations and documents at the Competition Board or on site and inspect the seat and place of business of an undertaking. The public prosecutor has wider investigative powers.

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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?

There have been so few cases, that no trends can be identified. The Competition Board can issue a precept in the administrative procedure. In the case of failure to comply with the precept, the Competition Board may impose a payment of up to €3,200 on natural persons and up to €6,400 on legal persons. In addition, a criminal sanction may be imposed, up to €17 million on legal persons or three years' imprisonment/pecuniary punishment on natural persons.

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

Yes. Even if the act or omission directed at restricting competition is committed outside the territory of Estonia, but it restricts competition in Estonia, sanctions can be imposed.

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?

Damages caused by anti-competitive agreements are subject to compensation by way of civil procedure. Only damages, which have actually occurred to the plaintiff, may be awarded. Such damages may include direct damages and loss of profit. Private enforcement can take one to two years.

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

No, the assessment of vertical restraints in Estonia follows the assessment of the European Commission.