# European Union

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## 1 General

### 1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The European Commission (Commission) plays a central role in the enforcement of the EU competition rules and has taken high-profile enforcement action to protect competition within the Single Market. Competition enforcement in the EU is decentralised, as national competition authorities and courts also have jurisdiction to enforce the EU competition rules if there is an effect on trade between EU Member States. Coordination with national authorities is undertaken by the Commission through the network of European competition authorities (ECN).

### 1.2 What investigative powers do the responsible competition authorities have?

The Commission has extensive investigative powers. It has the power to carry out unannounced inspections at the premises of companies (undertakings) and, in certain circumstances, at other premises, including private premises. It can also order – through written requests – undertakings and associations to provide all necessary information that is relevant to an investigation. In addition, the Commission can interview natural or legal persons with their consent to obtain relevant information. The Commission can also exchange information with members of the ECN. The Commission's powers of investigation are subject to certain limitations (e.g. privilege against self-incrimination and the protection of legal professional privilege).

### 1.3 Describe the steps in the process from the opening of an investigation to its resolution.

An investigation may be opened following a complaint or at the Commission's own initiative (a cartel investigation may be initiated following a leniency application, but such procedures are outside the scope of this guide). The Commission will carry out an initial assessment and determine whether to conduct a preliminary investigation, refer the case to a national authority or decide that the case does not merit investigation.

If the Commission decides after a preliminary investigation that a case should be subject to further investigation, it will open formal proceedings (this step is often publicised). The Commission will carry out further fact-finding and will normally hold meetings with the parties under investigation, complainant(s) and other interested third parties. It will also hold state-of-play meetings with the parties under investigation at critical stages of the proceedings.

Once the Commission has concluded its investigation, it will determine how to proceed with a case. In particular, it may (i) proceed towards issuing a statement of objections (which sets out the accusations) with the aim of adopting a prohibition decision, (ii) engage in discussions with the parties under investigation with a view to adopting a commitment decision (see question 1.6), or (iii) decide to close the proceedings in relation to all or some of the parties under investigation.

There are a number of important procedural steps that the Commission must follow before it can adopt a prohibition decision. This includes providing the parties under investigation with a statement of objections in order that they can make written and (as part of an oral hearing) oral representations. The Commission also provides the parties with access to a non-confidential version of the investigation file.

### 1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

The Commission has broad discretion when deciding how to address anticompetitive conduct. It typically orders the parties to cease their anticompetitive conduct and imposes substantial fines (see question 1.5). However, it can craft remedies that will help to restore the competitive process (see question 1.5). The Commission can also achieve a resolution of the case by adopting a commitment decision (see question 1.6). Unlike some national competition authorities, the Commission can neither impose criminal sanctions nor seek director disqualification orders.

### 1.5 How are those remedies determined and/or calculated?

The Commission can impose any remedy, whether behavioural or structural, that is necessary to bring an infringement of the EU competition rules to an end, provided such remedies are effective and proportionate. The type of remedy that is applied is closely connected to the nature of the anticompetitive practices or conduct. The Commission will also monitor the proper implementation of remedies by the parties.

However, it will impose fines if it considers that an antitrust infringement is sufficiently harmful that it should be punished. Fines are calculated in accordance with a formula that takes into account the seriousness of the infringement and the undertaking's turnover


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generated with the products concerned by the infringement, the duration of the infringement and any aggravating or mitigating factors (e.g. cooperation, repeat offender, etc.). The fine is capped at 10% of the worldwide annual turnover of the undertaking concerned (i.e. the economic entity, which may be the corporate group).

### 1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Parties under investigation can inform the Commission at any stage of the investigation (preferably at an early stage) that they are prepared to offer commitments to address possible competition concerns. They do not need to make any admission of guilt and no fines are imposed if a commitment decision is adopted. If the Commission is interested in pursuing a commitment decision (since it believes such a procedure is appropriate and the parties have a genuine interest in achieving such an outcome), it will generally hold a state-of-play meeting with the parties under investigation, where it will set out its preliminary competition concerns and give a timeframe for concluding the process. It will subsequently provide them with a preliminary assessment, which will assist the parties to formulate appropriate commitments. The Commission must carry out a market test of the commitments if it wishes to formally adopt them through a decision. The Commission has broad discretion as to whether to proceed with a commitment decision.

In addition, recently, the Commission has increasingly relied on an informal cooperation procedure for non-cartel conduct; in particular, in vertical restraints and abuse of dominance cases. As part of this procedure, parties may receive a fine reduction (which represented between 10% and 50% in recent cases) in exchange for acknowledging their liability for the infringement and further cooperating by providing evidence and/or proposing suitable remedies.

### 1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

Decisions made by the Commission can be appealed to the General Court of the Court of Justice of the EU and subsequently on points of law to the Court of Justice. The General Court does not carry out a reassessment of the case on the merits (i.e. a full appeal), but instead undertakes a form of judicial review. Factual and legal issues are generally subject to a comprehensive and thorough review by the General Court. However, the Commission retains a wider margin of discretion in specific areas; in particular, as regards complex economic assessments.

### 1.8 What is the appeals process?

See question 1.7.

### 1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Parties who have suffered injury as a result of anticompetitive practices or conduct can bring a claim for damages before the national courts in accordance with domestic court procedures. The Commission adopted a directive on antitrust damages actions in 2014 in order to make it easier for claimants to pursue claims. Such damages actions are separate from the Commission's enforcement activity.

### 1.10 Describe any immunities, exemptions, or safe harbours that apply.

There are a number of exemptions and safe harbours that are available under the EU competition rules. In particular, the Commission has adopted a vertical block exemption regulation that exempts the majority of vertical agreements provided the criteria set out in the regulation are met (see section 2). It is also possible for a dominant undertaking to argue that its abusive conduct is objectively necessary or produces substantial efficiencies which outweigh any anticompetitive effects (see section 3).

### 1.11 Does enforcement vary between industries or businesses?

Given its limited resources, the Commission prioritises enforcement in areas where its actions will produce the greatest economic benefit for the EU and for consumers. This will include focusing on particular sectors or conduct (e.g., historically, cartels). It is currently particularly active in applying the competition rules in digital markets. The Commission also continues to take action against anticompetitive practices and conduct that impede the functioning of the Single Market.

### 1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The Court of Justice of the EU has consistently tried to ensure the broadest application of the competition rules and has considerably limited the opportunity for parties to invoke a "regulatory defence" on the grounds of concurrent and conflicting application of sector-specific regulations and competition rules. In the *Deutsche Telekom* case (2010), the Court of Justice ruled that the company was liable under Article 102 of the Treaty on the Functioning of the European Union (TFEU) despite national regulatory approval, as it had sufficient scope to end or reduce the abusive conduct (margin squeeze) within the limits imposed by regulation. Direct conflict between the EU competition rules and national regulations is increasingly rare due to increased convergence between the rules and improved coordination between authorities.

### 1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

The Commission's enforcement action in the area of antitrust is not influenced in individual cases by political considerations. Generally, the Commission's goals and priorities are influenced by policy considerations; in particular, ensuring a competitive Single Market.

### 1.14 What are the current enforcement trends and priorities in your jurisdiction?

See question 1.11.

### 1.15 Describe any notable case law developments in the past year.

The Commission has been particularly active in enforcing the competition rules in digital and technology markets. Following its enforcement action against Google in 2017 in relation to abuses


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concerning its comparison shopping services, it adopted two further prohibition decisions against the company in 2018 and 2019 for abusive practices relating to Android mobile devices and its online search advertising intermediary service, AdSense (see also question 3.1). The Commission is also investigating the conduct of other major tech companies, including Amazon and Apple.

## 2 Vertical Agreements

### 2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

The Commission put in place a framework for assessing vertical agreements under the EU competition rules (see questions 2.3 and 2.5) and largely left enforcement to national competition authorities and courts. However, this changed following the e-commerce sector enquiry conducted by the Commission between 2015 and 2017. This led to a string of investigations, some of which resulted in decisions with substantial fines. As a result, the Commission has become increasingly active in investigating vertical restraints, particularly those concerning online sales.

### 2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

The key criterion to determine whether there is an agreement within the meaning of Article 101 TFEU (Article 101) is the existence of a concurrence of wills between two or more independent economic entities (undertakings), which typically excludes intra-group agreements and certain agency agreements. A concurrence of wills typically supposes an invitation to adopt certain conduct by one party and an acquiescence by another party, both of which may be implicit. Article 101 also captures concerted practices, i.e. a form of coordinated conduct that falls short of an agreement, although this type of conduct is generally less relevant to vertical agreements. An agreement is of a vertical nature where (i) it is entered into between undertakings operating at different levels of the production or distribution chain, and (ii) it relates to the conditions under which either party may purchase, sell or resell certain goods or services.

### 2.3 What are the laws governing vertical agreements?

Under EU competition rules, vertical agreements are governed primarily by Article 101. In addition, the Commission has developed a framework for the assessment of the prohibition on anticompetitive vertical agreements, which includes, in particular, the Vertical Block Exemption Regulation (VBER) and the Commission's Guidelines on Vertical Restraints. There are also certain other specific block exemption regulations (and guidelines), namely those relating to motor vehicles and technology transfer agreements. However, this section focuses on the general rules set out in the VBER. Article 102 TFEU (Article 102), which may also apply to vertical agreements, is covered in section 3.

### 2.4 Are there any types of vertical agreements or restraints that are absolutely ("*per se*") protected?

Agreements that can be regarded as, by their very nature, harmful to competition are considered "by object" restrictions within the meaning of Article 101(1). The classification as a "by object" restriction means that it is unnecessary to demonstrate that these agreements produce anticompetitive effects. Examples of vertical restraints generally considered as "by object" restrictions include resale price maintenance and certain forms of market partitioning by territory and/or customer group. While "by object" restrictions are not, strictly speaking, prohibited *per se*, in practice the Commission considers that it is unlikely that such restrictions meet the conditions for an exemption under Article 101(3) (see questions 2.10 and 2.13).

### 2.5 What is the analytical framework for assessing vertical agreements?

The VBER creates a safe harbour for certain vertical agreements (see question 2.8). It is therefore important to first determine whether an agreement meets the conditions for exemption under the VBER. If so, it is generally unnecessary to undertake further analysis. If not, it is necessary to assess on a case-by-case basis (i) whether the agreement appreciably restricts competition within the meaning of Article 101(1) either by its object or its effects and (ii) if so, whether the agreement meets the conditions for an individual exemption under Article 101(3) (see questions 2.10 and 2.13). Additionally, Article 101 only applies to agreements that are capable of appreciably affecting trade between EU Member States, although this condition is applied broadly and generally is easily met.

### 2.6 What is the analytical framework for defining a market in vertical agreement cases?

Markets in vertical agreement cases are defined in the same manner as in other EU competition law cases, i.e. in light of competitive constraints such as demand substitutability and supply substitutability.

### 2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so-called "dual distribution")? Are these treated as vertical or horizontal agreements?

In the event of an agreement involving undertakings which (i) are actual or potential competitors, and (ii) also operate at different levels of the value chain, it is generally necessary to distinguish between the horizontal and the vertical aspects of the agreement. Horizontal aspects are assessed under the (stricter) rules governing cartels and horizontal agreements, whereas vertical aspects are assessed under the rules governing vertical agreements; in particular, the Commission's Guidelines on Vertical Restraints. The VBER generally does not apply to vertical agreements between competitors, except as regards non-reciprocal agreements in certain situations of dual distribution.

### 2.8 What is the role of market share in reviewing a vertical agreement?

Market shares are particularly important in determining whether a vertical agreement falls within the scope of the VBER. Indeed, an agreement is exempted under the VBER where (i) the supplier's and the buyer's market share in the relevant markets each do not exceed 30%, and (ii) the agreement meets the other criteria of the VBER and, in particular, does not contain "hardcore" restrictions of competition, i.e. restrictions which are generally treated as "by object" restrictions. The inclusion of so-called "excluded restrictions" (e.g. non-compete obligations exceeding five years) disapplies the benefit of the VBER with regard to those restrictions. Below the 30% market share threshold, the VBER exempts the vertical agreement, which avoids the need for further analysis.




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### 2.9 What is the role of economic analysis in assessing vertical agreements?

To ascertain whether a vertical agreement is exempted under the VBER, it is necessary to define the relevant markets and to conduct a market share assessment, which may involve economic analysis. Outside the scope of the VBER, unless the vertical restraint is classified as a "by object" restriction (which does not require an assessment of anticompetitive effects), economic analysis may be relevant to determine whether the agreement appreciably restricts competition (see question 2.12).

### 2.10 What is the role of efficiencies in analysing vertical agreements?

Where an agreement is considered to appreciably restrict competition within the meaning of Article 101(1), it may nevertheless be individually exempted under Article 101(3) if the undertaking establishes that four cumulative criteria are met: (i) there are efficiency gains (e.g. technical progress); (ii) a fair share of the benefit is reserved for consumers; (iii) the restriction is indispensable; and (iv) there is no possibility to eliminate competition. The threshold for such an individual exemption is thus high and, as noted (see question 2.4), if the agreement includes a "by object" restriction, the Commission considers it unlikely that the conditions for an exemption will be met.

### 2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

Where vertical agreements contain provisions relating to the assignment to the buyer or use by the buyer of intellectual property rights and those provisions (i) do not constitute the primary object of such agreements, and (ii) are directly related to the use, sale or resale of goods or services by the buyer or its customers, the VBER applies in principle in the same way as to other types of agreements. Where those conditions are not met, vertical agreements fall outside the VBER, but may still fall within the scope of the Commission's Technology Transfer Block Exemption Regulation (TTBER). The TTBER covers technology transfer agreements, through which a licensor permits a licensee and/or its sub-contractor to exploit technology rights such as patents, know-how, or software, for the production of goods and services. Similar to the VBER, vertical agreements benefit from a safe harbour under the TTBER provided that they do not include certain hardcore restrictions of competition and that certain market share thresholds are not exceeded.

### 2.12 Does the enforcer have to demonstrate anticompetitive effects?

No such demonstration is required for "by object" restrictions. In other cases, the Commission has to demonstrate that the vertical agreement has the effect of appreciably restricting competition, which typically involves a counterfactual assessment, i.e. a comparison of the actual or likely future situation in the relevant market with the vertical restraints in place, with the situation that would prevail in the absence of the vertical restraints in the agreement.

### 2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

Efficiencies are typically taken into account within the framework of Article 101(3). While the Commission bears the burden of proof that the vertical agreement restricts competition within the meaning of Article 101(1), it is for the undertaking to establish that the conditions for an exemption under Article 101(3) are met (see question 2.10).

### 2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

See questions 2.5 and 2.10 above.

### 2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes, the Commission's Guidelines on Vertical Restraints set out the framework for the assessment of vertical agreements. See also question 2.3.

### 2.16 How is resale price maintenance treated under the law?

Resale price maintenance (RPM) is considered a hardcore restriction, which prevents the agreement from being exempted under the VBER. As such, it is presumed that the agreement is unlikely to meet the conditions of Article 101(3). Nevertheless, undertakings still have the theoretical possibility to rely on an efficiency defence under Article 101(3) in an individual case. The Commission's Guidelines on Vertical Restraints acknowledge that RPM may lead to efficiencies in certain specific cases; in particular, where it is supplier-driven, such as in the context of the introduction of a new product. However, the conditions for an exemption under Article 101(3) are very strictly applied.

### 2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements, i.e. single branding obligations which prevent or restrict the buyer's ability to purchase competing goods or services, are exempted under the VBER where both the supplier's and buyer's market share each do not exceed 30% in the relevant markets and the duration of the obligation does not exceed five years. Outside the VBER, exclusive dealing obligations are assessed on a case-by-case basis, particularly in light of their capability to result in anticompetitive foreclosure.

### 2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying is exempted under the VBER if the market share of the supplier, in both the market of the tied product and the market of the tying product, and the market share of the buyer, in the relevant upstream markets, each do not exceed 30%. Outside the VBER, tying is assessed on a case-by-case basis. The Commission considers, in particular, that tying may lead to anticompetitive foreclosure effects and/or may directly lead to supra-competitive prices. The market position of the supplier in the market of the tying product is of particular importance in the assessment of possible anticompetitive effects.

### 2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination is typically examined under Article 102. It is exempted under the VBER if both the supplier's and buyer's market



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share each do not exceed 30% (provided the other criteria for the application of the VBER are met).

**2.20 How do enforcers and courts examine loyalty discount claims?**

Loyalty discounts are typically examined under Article 102. They are exempted under the VBER if both the supplier's and buyer's market share each do not exceed 30% (provided the other criteria for the application of the VBER are met).

**2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?**

See questions 2.18 and 2.20.

**2.22 What other types of vertical restraints are prohibited by the applicable laws?**

There is no exhaustive list of vertical restraints that are prohibited by Article 101. However, the VBER provides useful guidance by listing a number of hardcore restrictions which give rise to the presumption that the agreement is anticompetitive. In summary, these hardcore restrictions are the following: (i) RPM; (ii) certain forms of market partitioning by territory and/or customer group; (iii) the restriction of active or passive sales to end-users by members of a selective distribution network; (iv) the restriction of cross-supplies between appointed distributors within a selective distribution network; and (v) agreements that prevent or restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. Outside the VBER, vertical restraints have to be assessed on a case-by-case basis.

**2.23 How are MFNs treated under the law?**

In the context of the e-commerce sector inquiry, the Commission considered that (i) most-favoured-nation clauses (MFNs) are exempted under the VBER if both the supplier's and buyer's market share each do not exceed 30%, and (ii) outside the VBER, an individual assessment of their anticompetitive effects is required. However, in recent years, enforcement action against MFNs in the EU has primarily taken place at the national level, with various national competition authorities having initiated investigations against MFNs in digital markets. National competition authorities and courts have taken partly diverging approaches. Moreover, some of the investigations or court cases are still pending. As a result, there remains some uncertainty as to the legal assessment of MFNs under Article 101.

**2.24 Describe any notable case developments concerning vertical merger analysis.**

While the Commission's concerns and interventions in merger cases have traditionally focused on horizontal issues, there are a number of recent cases in which the Commission has raised significant vertical concerns. For example, in 2018, the Commission conducted an in-depth investigation in relation to the *Apple/Shazam* merger although the parties primarily offered complementary services and did not compete with each other. Eventually, the Commission cleared the transaction unconditionally. In 2017, vertical concerns played a role in the Commission's prohibition decision involving two of the principal European stock exchanges (*Deutsche Börse/LSE*).

## 3 Dominant Firms

**3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?**

The Commission has actively enforced high-profile abuse of dominance cases in recent years, as illustrated by several decisions leading to significant fines or commitments, as well as the opening of new formal investigations. Recent examples include the trio of Google infringement decisions (i.e. *Google Search (Shopping)* in 2017, *Google Android* in 2018 and *Google Search (AdSense)* in 2019) involving multi-billion euro fines, infringement decisions in the *Qualcomm (Exclusivity Payments)* (EUR 997 million fine, 2018) and *AB InBev Beer Trade Restrictions* (EUR 200 million fine, 2019) cases, as well as the commitment decision in the *Upstream gas supplies in Central and Eastern Europe* ("*Gazprom*") case (2018).

**3.2 What are the laws governing dominant firms?**

Under EU competition law, abuse of dominance is governed by Article 102. The Commission also issued a guidance document which sets out its enforcement priorities in applying Article 102; in particular, in respect of exclusionary conduct (Guidance on the Commission's enforcement priorities in applying Article 102).

**3.3 What is the analytical framework for defining a market in dominant firm cases?**

The analytical framework is the same as in relation to vertical agreements (see question 2.6).

**3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?**

A market share of 50% or more gives rise to a rebuttable presumption of dominance. Conversely, the Commission considers that dominance is not likely below a market share of 40%. However, the Commission's practice is to conduct an overall assessment of market power taking into account all relevant circumstances, and market shares serve in this context as a useful first indication (see also question 3.6).

**3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?**

Holding a dominant position does not in itself constitute an infringement of Article 102. However, dominant companies have a special responsibility not to abuse their market power by harming competition, either in the market where they are dominant or in separate related markets (see question 3.12).

**3.6 What is the role of economic analysis in assessing market dominance?**

The role of economic analysis in assessing dominance within the meaning of Article 102 is important, as the concept of dominance itself is an economic one. It has been defined by EU courts as a





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position of economic strength which confers on an undertaking the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of consumers. This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. The assessment of dominance takes into account the competitive structure of the market; in particular, the market position of the dominant undertaking and its competitors, constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors, and countervailing buyer power. Economic analysis may assist in the assessment of each of these factors.

### 3.7 What is the role of market share in assessing market dominance?

As noted (see question 3.4), market shares typically constitute the starting point of the Commission's assessment of market power and may form the basis of a presumption of dominance (above 50%) or instead be indicative of a lack of substantial market power (below 40%). However, the Commission will typically reach a conclusion only after having conducted an overall assessment.

### 3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The main defences include the following: (i) the undertaking does not hold a dominant position in the relevant market (see questions 3.4, 3.6 and 3.7); (ii) the alleged conduct is not abusive within the meaning of Article 102 (see question 3.12); and (iii) the conduct is objectively necessary or produces substantial efficiencies which outweigh any anticompetitive effects (see question 3.9).

### 3.9 What is the role of efficiencies in analysing dominant firm behaviour?

Undertakings may claim that their conduct is justified because it produces substantial efficiencies which outweigh any anticompetitive effects (although such defences are rarely successful). According to the Guidance on the Commission's enforcement priorities in applying Article 102, the dominant undertaking is generally expected to demonstrate that the following cumulative conditions are met: (i) the efficiencies have been, or are likely to be, achieved as a result of the conduct; (ii) the conduct is indispensable to achieve those efficiencies; (iii) the likely efficiencies generated by the conduct outweigh any likely negative effects; and (iv) the conduct does not eliminate effective competition.

### 3.10 Do the governing laws apply to "collective" dominance?

Yes, under Article 102, a group of undertakings may be considered collectively dominant where, from an economic point of view, they present themselves or act together in a particular market as a collective entity. However, such cases are very rare.

### 3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Article 102 is equally applicable to all dominant undertakings, irrespective of their position in the supply chain, which therefore includes dominant purchasers.

### 3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

Article 102 prohibits any abuse of a dominant position. Abusive conduct has been defined by the Court of Justice of the EU as conduct which, through recourse to methods different from those governing normal competition (i.e. conduct which is not competition on the merits), has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Specific conditions may apply to particular categories of abuse. Examples of conduct that may be abusive include predatory pricing, exclusivity obligations and loyalty rebates, tying and bundling, refusal to supply, the application of dissimilar conditions to equivalent transactions with other trading parties, and the imposition of unfair prices or other trading conditions. Certain types of conduct have been categorised by the case-law as abusive by their very nature, whereas others require a comprehensive analysis of actual or potential anticompetitive effects. However, this distinction has become less relevant in recent years, particularly under the influence of the 2017 *Intel* judgment, which has marked a shift towards an effects-based approach in the assessment of abusive conduct.

### 3.13 What is the role of intellectual property in analysing dominant firm behaviour?

While the exercise of an exclusive right linked to an intellectual property right by a dominant undertaking does not in itself constitute an infringement of Article 102, it may constitute an abuse in exceptional circumstances. For example, a refusal to license intellectual property rights may infringe Article 102 where the conditions for an anticompetitive refusal to supply are met, or in the specific context of standard essential patents (see also question 3.16).

### 3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

The Commission typically assesses dominance within the meaning of Article 102 with regard to the structure and characteristics of the relevant markets (see question 3.6). Therefore, direct effects, i.e. inferences which are not drawn from market definition and market concentration, are generally less relevant. However, they may be taken into account if they contribute to establishing a position of economic strength.

### 3.15 How is "platform dominance" assessed in your jurisdiction?

Platform dominance is, in principle, assessed in light of the same test as for other businesses (see questions 3.4, 3.6 and 3.7). In the three recent Google decisions (see question 3.1), dominance was primarily established with regard to the classical criterion of market shares, although other criteria, including the existence of barriers to entry due to, for example, network effects, were also taken into account. Other investigations by the Commission into platforms are ongoing, including Amazon and Apple, and it is not yet clear whether/how dominance will be established. In a report on "Competition Policy for the digital era" published in April 2019, a panel of academic advisers to the Commission suggested that the assessment of market power should take into account, *inter alia*, (i) the intermediation power that platforms may have, and (ii) data which is not available to market entrants and provides a strong competitive advantage.



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**3.16 Under what circumstances are refusals to deal considered anticompetitive?**

A refusal to supply only constitutes an abuse within the meaning of Article 102 under strict conditions. While the precise terminology used in the case-law is not always consistent, the following cumulative conditions must typically be met: (i) the goods or services are indispensable for the supply of a product or service in a downstream market; (ii) the refusal is likely to eliminate all effective competition in the market; (iii) the refusal prevents the emergence of a new product (in cases relating to intellectual property rights); and (iv) there is no objective justification for the refusal.

## 4 Miscellaneous

**4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regard to vertical agreements and dominant firms.**

The Commission started a review of the VBER (and guidelines) in October 2018 to determine whether the regulation needs to be updated, and carried out a public consultation in February and March 2019. The review is not expected to lead to substantial changes to the VBER, but there may be changes to the guidelines. The current VBER expires on 31 May 2022.

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With the globalisation of competition law and enforcement, Matthew Levitt helps clients navigate the increasingly challenging international antitrust environment. He helps clients develop and deliver the joined-up strategies which are essential when faced with the growing power of antitrust authorities globally and their increased ability to coordinate enforcement activity in international investigations and merger clearance processes. He is cited in the 2018 edition of *The Legal 500* as having "a better understanding of commercial needs than other lawyers" and in *Chambers 2018* as "a 'very good competition lawyer' who is 'very thorough in investigation'". Mr. Levitt has over 20 years' experience.

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The firm's highly ranked competition practice represents many of the world's leading companies in M&A, complex civil antitrust litigation, international cartel matters, and investigations and proceedings by US, European and other international antitrust enforcement agencies. As one of *Global Competition Review*'s top 20 'Global Elite', we are recognised for taking on and winning high-stakes competition challenges around the world. Our transatlantic team of over 60 competition lawyers regularly handles the highest-profile, 'bet the company' matters for our clients across a range of industries, including energy, technology, media, life sciences and healthcare. Members of our team have engaged at the highest levels in the development of European, US and international competition law and policy and we advocate regularly before the Fair Trade Commission, the Department of Justice, state attorneys general, the European Commission and its Member States, and other international administrative and regulatory agencies.

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