



# ICLG

The International Comparative Legal Guide to:

## **Vertical Agreements and Dominant Firms 2019**

**3rd Edition**

A practical cross-border insight into vertical agreements and dominant firms

Published by Global Legal Group, with contributions from:

ALRUD Law Firm

AZB & Partners

Baker Botts LLP

Barun Law LLC

Callol, Coca & Asociados

DDPV Studio Legale

DeHeng Law Offices

Dickson Minto

ELIG Gürkaynak Attorneys-at-Law

Gorrissen Federspiel

HLG Avocats

Johnson Winter & Slattery

Kennedy Van der Laan

Lee & Lee

Nagashima Ohno & Tsunematsu

Noerr LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Pinheiro Neto Advogados

Stavropoulos & Partners Law Office

SyCip Salazar Hernandez & Gatmaitan



**Contributing Editors**  
Charles F. (Rick) Rule  
& Andrew J. Forman  
Paul, Weiss, Rifkind,  
Wharton & Garrison LLP

**Sales Director**  
Florjan Osmani

**Account Director**  
Oliver Smith

**Sales Support Manager**  
Toni Hayward

**Editor**  
Nicholas Catlin

**Senior Editors**  
Caroline Collingwood  
Rachel Williams

**CEO**  
Dror Levy

**Group Consulting Editor**  
Alan Falach

**Publisher**  
Rory Smith

**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Ashford Colour Press Ltd  
August 2019

Copyright © 2019  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-912509-76-8  
ISSN 2054-3786

Strategic Partners



## Country Question and Answer Chapters:

1	<b>Australia</b>	Johnson Winter & Slattery: Sar Katdare & Jaime Campbell	—
2	<b>Brazil</b>	Pinheiro Neto Advogados: Leonardo Rocha e Silva & Daniel Costa Rebello	—
3	<b>China</b>	DeHeng Law Offices: Ding Liang	—
4	<b>Denmark</b>	Gorrissen Federspiel: Martin André Dittmer & Kristian Helge Andersen	—
5	<b>European Union</b>	Baker Botts LLP: Matthew Levitt & Daniel Vasbeck	—
6	<b>France</b>	HLG Avocats: Helen Coulibaly-Le Gac & Pierre Laforet	—
7	<b>Germany</b>	Noerr LLP: Peter Stauber & Robert Pahlen	—
8	<b>Greece</b>	Stavropoulos & Partners Law Office: Evanthia Tsiri & Efthymia Armata	—
9	<b>India</b>	AZB & Partners: Hemangini Dadwal & Aakarsh Narula	—
10	<b>Italy</b>	DDPV Studio Legale: Luciano Vasques	—
11	<b>Japan</b>	Nagashima Ohno & Tsunematsu: Kaoru Hattori & Yusuke Kaeriyama	—
12	<b>Korea</b>	Barun Law LLC: Gwang Hyeon Baek & Ye Eun Choi	—
13	<b>Netherlands</b>	Kennedy Van der Laan: Annemieke van der Beek & Martijn van Bommel	—
14	<b>Philippines</b>	SyCip Salazar Hernandez & Gatmaitan: Rolando V. Medalla, Jr.	—
15	<b>Russia</b>	ALRUD Law Firm: Alla Azmukhanova & Daniil Lozovsky	—
16	<b>Singapore</b>	Lee & Lee: Tan Tee Jim, S.C.	—
17	<b>Spain</b>	Callol, Coca & Asociados: Pedro Callol & Laura Moya	—
18	<b>Turkey</b>	ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Hakan Özgökçen	—
19	<b>United Kingdom</b>	Dickson Minto: Ajal Notowicz & Maria Ziprani	—
20	<b>USA</b>	Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Andrew J. Forman	—

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# France

Helen Coulibaly-Le Gac



Pierre Laforet



## HLG Avocats

### 1 General

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

The French Competition Authority (*l'Autorité de la concurrence* or "ADLC") is an independent administrative authority empowered to investigate and enforce French competition law, including the rules governing vertical agreements and abuse of dominance.

It is worth noting that the Minister for Economic Affairs has authority to impose injunction remedies and settlements for practices affecting local markets when the turnover generated in France by each undertaking concerned (during the last audited financial year) does not exceed 50 million euros and their combined turnover does not exceed 200 million euros. Under the authority of the Minister, the amount of the settlement shall not exceed 150,000 euros or 5% of the turnover of the undertakings if this figure is lower.

Commercial litigation in relation to the application of rules governing vertical agreements and abuse of dominance (namely Articles L. 420-1 to L. 420-5 of the Commercial Code ("CC")) is entrusted to eight French commercial courts (Marseille, Bordeaux, Lille, Fort de France, Lyon, Nancy, Paris, and Rennes). The Paris Court of Appeals ("PCA") has exclusive jurisdiction to adjudicate all the appeals from the decisions rendered by the aforementioned eight commercial courts.

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

In France, two types of investigation (ordinary or judicial) may occur. Investigations may be conducted either by the ADLC itself or by the agents of the Directorate General for Competition, Consumer Affairs and the Prevention of Fraud ("DGCCRF").

During an ordinary investigation, officials of the ADLC or the DGCCRF may access any place used as professional offices or professional means of transport, and are empowered to request delivery and copies of professional documents, and to interview employees provided the latter have been informed of the purpose of the investigation.

During a judicial investigation (dawn raid), officials investigate under the control of the judge and usually in the presence of police officers. Under this procedure, officials shall be entitled to access private and business premises to conduct searches and seizure

operations. They can obtain or take copies of any documents that may be useful for the purpose of the investigation (either hard or electronic copies), including electronic mailboxes, except if the documents are legally privileged (e.g. legal opinions from external lawyers). They are entitled to request statements from employees.

A European Directive (2019/1) enacted on December 11, 2018 increased the investigative powers of the ADLC. However, this Directive shall not be effective until it is transposed into national law. The deadline for transposition is February 4, 2021.

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

During a preliminary phase (non-adversary proceedings), the ADLC studies the evidence available. If the preliminary investigation leads it to consider that the practices may be anti-competitive, the ADLC's head of investigation services (*Rapporteur Général* or "RG") shall issue a statement of objections ("SO"). From this issuance, the notified parties shall be entitled to study the ADLC's file (including all evidence available) and provide a statement of defence within two months.

Then, an investigative report shall be sent by the investigation services to the notified parties. The parties then have two additional months to reply to this report.

Finally, the parties are entitled to express their views and positions during a hearing before the ADLC ("the College").

The ADLC then issues a decision either:

- to dismiss the case (no grounds to follow the proceedings);
- to settle the proceedings with a moderated fine due to the settlement; or
- to impose fines on the parties, as well as injunctions, and/or to demand commitments to modify their behaviour or to comply with law. The ADLC may also order the publication (or an extract) of the decision.

Finally, in very few cases (hard-core conduct involving natural persons), the ADLC can refer the case to criminal courts.

It is to be noted that, after the preliminary phase, the ADLC may also decide not to open the adversary phase for different reasons:

- lack of legal interest;
- the case being time-barred; or
- lack of relevant evidence.

Interim measures may also be adopted at the beginning of the proceedings under specific conditions.

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

The ADLC is entitled to adopt interim measures to stop the practices or suspend an illicit action. Those measures must be strictly limited to what is necessary.

In addition, as mentioned in question 1.3, the ADLC:

- shall request the cessation of the anti-competitive practices and/or the modification, through injunctions or commitments, of the illicit behaviour, as well as compliance with competition law in future;
- shall impose a fine of up to 10% of the highest worldwide turnover achieved by the group of companies concerned in any financial year during the period the illicit practices took place;
- shall impose fines of up to 5% of the daily average turnover achieved by the party concerned, per day of delay in implementing an injunction or a commitment; and
- shall order the publication of the decision in a well-known newspaper and sometimes on the website of the parties concerned.

The ADLC is not entitled to award damages to the plaintiffs or the victims of the anticompetitive practices.

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

The criteria used to determine the financial penalties are set out by law and were specified by the ADLC in 2011. Thus, the fine must be proportionate to the seriousness of the violation and to the damage caused to the economy. The financial situation of the undertaking sanctioned shall also be taken into consideration, as well as the reiteration, if any, of an anticompetitive practice. Fines are determined and justified individually for each undertaking sanctioned.

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

**Commitment proceedings** are an efficient tool for the regulation of commercial practices and enforcement of competition law. The implementation of commitment proceedings assumes that no SO has been issued by the RG. The RG shall issue its preliminary assessment of the alleged practices to the undertakings concerned which, then, have to formalise and submit their commitments within a minimum period of one month. Then, the RG shall transfer the commitments to the plaintiff, if any, and to the public ministry and shall publish a summary of the case with the proposed commitments to allow third parties to provide their observations, if any. All the observations must be communicated to the RG within a minimum period of one month. Undertakings concerned shall also have the opportunity to present observations during an oral hearing. Then, the ADLC shall adopt a binding decision of acceptance.

The ADLC shall monitor the implementation of the commitments regularly during a specified period and reporting documents from the undertakings concerned must be provided on a regular basis.

**Settlement proceedings** may be enforced after the communication of an SO, providing the parties agree not to challenge the grounds on which the SO is based. The settlement shall fix the minimum and the maximum amount of the potential fines to be adopted by the College in its sentencing decision. The parties may also offer to modify their behaviours and to comply with competition law in the settlement.

#### 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?

No, they do not.

#### 1.8 What is the appeals process?

The parties and the Minister of Economic Affairs may appeal the decision of the ADLC before the PCA, within one month after the notification of the decision to the parties.

After the notification of the judgment of the PCA, the judgment may be referred before the *Cour de Cassation* (Higher Civil Court) within one month.

Interim measures may also be challenged before the First President of the PCA within 10 days following the notification of the interim measures. The PCA may suspend interim measures until the appeal is adjudicated on the merits when it finds that the interim measures are likely to have clearly excessive consequences should the ADLC decision be subsequently completely or partially reversed.

Decisions to appeal are not suspensive. However, upon specific request, the president of the PCA may suspend the implementation of a decision if it is likely that the decision of the ADLC will have manifestly excessive consequences or where new facts of excessive gravity are raised.

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

As mentioned in question 1.1, paragraph 3, any entity demonstrating a legal interest has the possibility to bring a case before the commercial court to obtain the ending of the illicit practices, the payment of civil damages and eventually the nullity of an agreement in relation to anticompetitive practices. Appeals of those judgments are also dealt with by the PCA.

Public entities (the State and territorial authorities) may also bring a case before the administrative court if they have the standing to do so. Most of these cases are brought against companies involved in bid-rigging.

A class action regime is also available under French law. It allows certain authorised consumers' associations to launch collective actions before civil and commercial courts for damages suffered by individuals as a result of the application of an anticompetitive practice.

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

Under Article L. 464-6-1 of the CC, the ADLC shall decide not to pursue the procedure concerning anticompetitive practices when the combined market share of the undertakings concerned does not exceed:

- 10%, when the parties to the agreement are actual or potential competitors in the concerned market; or
- 15%, when the parties to the agreement are not actual or potential competitors in the concerned market.

The “*de minimis*” exemption shall not apply to hard-core restrictions such as price-fixing, limitation of production or sales, etc.

Regarding vertical agreements, European Regulation No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the

Functioning of the European Union to categories of vertical agreements and concerted practices (the “EU vertical block exemption”), which sets forth a safe harbour for vertical agreements, providing that the supplier and the buyer have a market share below 30%, shall also be used as guidance. Hard-core restrictions are not covered by the exemption.

Leniency programmes are available to companies that have infringed Article L. 420-1 of the CC, which prohibits anticompetitive practices. However, this procedure applies mainly to cartels between competitors involving hard-core restrictions such as price-fixing, market sharing, and bid-rigging.

---

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

---

The ADLC does mention variation of enforcement between industries or businesses. In 2018 and early 2019, the sectors involved in a decision, commitments or ongoing proceedings are varied (agriculture, publicity, the healthcare industry, wine and spirits, taxis, luxury watch retail, household appliance manufacture, etc.).

---

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

---

The ADLC shall duly take into consideration regulatory constraints when assessing practices. In any event, in France, regulatory rules do not prevent the application of competition law.

---

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

---

The ADLC is an independent administrative authority and its actions should not be influenced by the political environment or changes in government.

---

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

---

Potentially all sectors and industries are under the scrutiny of the ADLC. However, in a press release dated January 11, 2019, the ADLC announced that it would particularly focus on the following sectors: digital economy; health; food retail; energy; regulated professions; as well as all anticompetitive practices occurring in French overseas departments.

---

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

---

Regarding abuses of dominant positions, the company Amadeus brought a complaint before the ADLC against Google. In its decision 19-MC-01 of January 31, 2019, the ADLC considered that Google (i) held a dominant position on the French market for search-related online advertising, and (ii) abused its dominant position by discriminatorily suspending some of Amadeus’s accounts with Google AdWords (now Google Ads) and by refusing most of its ads since January 2018. As a result, the ADLC imposed interim measures on Google. Interestingly, the ADLC defined the market of search-related online advertising, holding that it differs significantly from other forms of online advertising. Also, the ADLC stated that the

substantial investments and time required to develop a competing platform constitute barriers to entry into this market.

Regarding vertical agreements, the ADLC fined the company Stihl France SAS for prohibiting the sale of certain products such as chainsaws, brushcutters, pole-saws or electric pruners on its distributors’ websites. The ADLC found that requiring hand-delivery of this type of product by the distributor to the buyer removed any interest in online retail and was therefore anticompetitive. The ADLC also prescribed interim measures which Stihl France SAS appealed before the PCA. While an appeal decision on the merits is still awaited, the PCA decided to suspend the interim measures, as it found that implementing these measures would mean that Stihl would need to change its whole distribution network and incur substantial expenses.

---

## 2 Vertical Agreements

---



---

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

---

Vertical agreements shall be actively scrutinised by the ADLC and competent jurisdictions. The ADLC has a strong knowledge of the distribution and retail sectors in France and shall monitor them regularly.

---

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

---

In this respect, the ADLC shall follow the European Commission’s practice and shall examine if the undertakings concerned have mutually exchanged their consent, whether in oral or written form, tacitly or expressly.

Then, the ADLC identifies whether the parties to an agreement are active at different stages of the production chain of a product or a service (by opposition to a competitor which competes at the same level of the chain) to classify the agreement as vertical.

---

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

---

The law governing vertical agreements is covered by Article L. 420-1 of the Commercial Code, which prohibits express or implied agreements and concerted practices and coalitions which – as their object or effect – prevent, restrict or distort competition. Articles 101 and 101-3 of the Treaty on the Functioning of the EU (“TFEU”) are also enforceable when the vertical agreements restrict competition within the common market or a substantial part of it and affect trade between the EU Member States.

Article L. 420-4 of the CC provides for specific conditions where a vertical agreement considered as anticompetitive under Article L. 420-1 may benefit from an exemption pursuant to Article L. 420-4 (see question 2.5). Specific regulations may exempt certain types of agreements. In addition, an anticompetitive agreement can be exempted if the undertakings concerned are able to demonstrate that the agreement (i) enables economic progress, (ii) ensures that the profitability is fairly passed on to the end-user, and (iii) does not eliminate the competition for a substantial part of the products/services concerned. Finally, restrictions on competition must be limited to what is strictly indispensable to implement the agreement in the context of economic progress.

---



---

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


---



---

See question 1.10.

---



---

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


---



---

As a rule of thumb, the ADLC follows the common practice of the European Commission for assessing vertical restraints.

After having defined the market(s) concerned, the ADLC uses – as guidance – the EU vertical block exemption to assess a vertical agreement. The ADLC examines whether each of the parties’ respective market share(s) on the relevant market(s) exceeds 30% and whether the vertical agreement includes a hard-core restriction listed under the EU vertical block exemption. Providing the parties’ markets shares do not exceed 30% and the agreement does not contain hard-core restrictions (except in very specific situations, such as penetration of a new market (new entrant)), the agreement will be exempted. By contrast, if market shares are over 30%, the ADLC shall assess whether the vertical agreement has an anticompetitive object or effect.

However, an agreement considered anticompetitive may benefit from an exemption (see question 2.3).

---



---

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


---



---

The ADLC uses the analytical framework of the European Commission. The product market and the geographical market must be identified, in order to define the relevant market.

The relevant product market is defined as any goods or service regarded by consumers as interchangeable, by reasons of characteristics, prices or intended uses. The geographical market is defined as the area in which the companies are involved in the supply or demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from the neighbouring geographical area.

---



---

**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?**


---



---

Following EU law, dual distribution is treated as a vertical agreement when: (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; and (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

---



---

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


---



---

Under French law, the calculation of market share is crucial and indispensable when assessing a vertical agreement and determining whether it shall fall under the EU vertical block exemption regime. It also provides for the market power of the undertaking concerned, which is a key element in assessing an anticompetitive practice.

---



---

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


---



---

Economic analysis may be used by the ADLC, notably to compare the effects of the vertical agreement with a scenario which would have arisen if the agreement had not been concluded. The undertaking concerned may also use economic studies to demonstrate the efficiencies of the vertical agreement or the absence of damage to the economy.

---



---

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


---



---

Efficiencies are notably used to demonstrate that although a vertical agreement restrains competition, it can benefit from an individual exemption.

---



---

**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?**


---



---

No, there are not.

---



---

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


---



---

The ADLC does not have to demonstrate anticompetitive effects of a restriction which is considered as having an anticompetitive object (for example, retail price maintenance). Otherwise, the anticompetitive effects must be demonstrated.

---



---

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


---



---

As mentioned in question 2.3, the ADLC will determine if the four conditions, including efficiencies, are met in order to determine the application of an individual exemption.

---



---

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


---



---

See questions 2.3, 2.5 and 2.10.

---



---

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


---



---

The ADLC relies on the formal guidelines issued by the European Commission for the implementation of the EU vertical block exemption.

---



---

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


---



---

Resale price maintenance is considered an anticompetitive restriction by object and, as such, is seen as a hard-core restriction preventing the application of the EU vertical block exemption and Article L. 464-6-1 of the CC.

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

Exclusive dealing clauses in vertical agreements are not forbidden *per se* (except for French overseas territories where those practices are regulated). The ADLC and courts shall examine if those clauses have an anticompetitive effect, following several criteria: the market power of the parties; the nature and proportion of products involved in the agreement; the duration of the exclusivity; the presence or not of other similar contracts; the existence of justifications and the economic counterpart obtained by the party bound by the exclusivity, etc. If a sale, transfer or lease agreement contains an exclusivity supply provision, the contract term shall be limited to 10 years, pursuant to Article L. 330-1 of the CC.

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

Tying obligations are only examined under the potential abuse of a dominant position, except in case of evidenced unfair trading practices.

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

Price discrimination claims are mainly examined under the law regarding potential abuse of a dominant position.

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

Loyalty discount claims are mainly examined under the prohibition of the abuse of a dominant position.

### 2.21 How do enforcers and courts examine multi-product or “bundled” discount claims?

Multi-product or “bundled” discount claims are mainly examined under the prohibition of the abuse of a dominant position.

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

The ADLC closely scrutinises all vertical restraints which have as their object or effect the possibility of monitoring the consumer prices, the various channels of distribution (resale) (including Internet) of the distributor, the sharing of customers, etc.

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

Under Article L. 442-6 II d) of the CC, clauses or contracts allowing a party to benefit automatically from more advantageous terms granted to competing undertakings by the co-contracting party are null and void. Thus, most-favoured-nation (“MFN”) clauses are prohibited under French law.

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

On May 25, 2018, TF1 (a French television channel) notified the

ADLC of its acquisition of sole control of Newen (a company which produces programmes broadcast on television). The ADLC dismissed the risk of vertical effects. The ADLC held that any effect on the market for broadcast stock (fiction, documentaries, etc.), including fiction programmes in original French language and “flow” programmes (entertainment), was unlikely since the new entity will hold a limited position in these markets and TF1 will represent less than 30% of the total market purchase. This decision is in line with the established practice of the ADLC under which a vertical merger is not likely to produce vertical effects when the undertaking resulting from the merger does not hold more than 30% of the market shares on the concerned markets.

## 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)?

Abuse of dominant position is actively scrutinised by the ADLC and courts.

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

Article L. 420-2 of the CC prohibits the abuse of dominant position by an undertaking or group of undertakings when it has as its object of effect the prevention, restriction or distortion of competition. In the first paragraph, it provides a non-exhaustive list of examples, such as: refusal to sell; tying practices; discriminatory terms of sale; or the termination of established commercial relationships for the sole reason that the partner refuses to accept unjustified commercial terms.

Article L. 420-4 of the CC provides for individual exemptions, providing the undertaking concerned demonstrates the economic efficiency of the practice and the fair sharing of the benefits of the practice with the consumers.

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

The ADLC uses the analytical framework used by the European Commission and provided by EU law. 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?

Under French law, there is no market share threshold above which enforcers or a court have to consider a firm as dominant or a monopolist. However, the ADLC considers that market share gives a first substantial indication and a very large share – more than 50% – usually evidences dominance.

The ADLC may characterise dominance when market share is over 40%, depending on the nature of the market, the market shares of the other competitors, the constraints exerted by other competitors, the type of customers involved (countervailing purchasing power), and the maturity of the market.

---

### 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?

---

Being “dominant” is not illegal *per se* and does not have any consequences as long as the undertaking does not abuse its dominant position. However, certain practices must be monitored as soon as the undertaking has a significant market share, such as refusal to sell, tying practices, etc.; not only are effective effects scrutinised, but also potential effects.

---

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

---

Economic analysis is a useful and efficient tool to assess market dominance and notably to define the relevant product and geographical markets, to determine the methodology of calculation of market share, and to define the degree of actual competition, the potential competitors and the potential or actual countervailing buying power of the customers.

---

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

---

Market share plays a key role in assessing market dominance, as discussed in question 3.4.

---

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

---

Article L. 420-4 of the CC provides for exemptions to the prohibition of abuse of dominant position, such as:

- practices resulting from the application of statute or regulation; and
- practices meeting the following cumulative criteria: i) the practices lead to economic progress including by creating or maintaining jobs; ii) they reserve a fair share of the resulting profit for end-users; iii) they do not eliminate competition for a substantial part of the products in question; and iv) they do not include restrictions which go beyond what is indispensable to achieve the economic progress targeted.

---

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

---

See question 3.8.

---

### 3.10 Do the governing laws apply to “collective” dominance?

---

The law also applies to “collective” dominance under Article L. 420-2 of the CC. The ADLC examines three cumulative criteria provided by EU case law (e.g. TPICE, T-342/99, *Airtours v Commission*; Cons. Conc. decision n°06-D-02), i.e.: i) transparency of the market, meaning that each member of the group concerned must have the possibility to know the behaviour of the other members in order to determine whether they are following the same course of action; ii) the possibility of tacit and sustainable coordination; and iii) the absence of foreseeable contestability from competitors and customers to the expected results of the common policy.

The undertakings must be able to adopt a common policy on the market and to hinder the maintenance of effective competition on the relevant market by allowing them to act, to a considerable extent, independently from their competitors, their customers, and from consumers (CJCE, 16 March 2000, C-395/96 P, *Compagnie Maritime Belge Transports SA v Commission*). Collective dominance does not necessarily involve an absence of competition between parties (TPICE, 30 September 2003, T-191/98, *Atlantic Container Line v Commission*).

---

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

---

French law applies similarly to both dominant purchasers and dominant suppliers.

---

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

---

Potentially abusive conduct, which falls under the scope of Article L. 420-2 of the CC, includes, among others: rebate schemes; pricing discrimination; exclusive dealings; margin squeezes; disparagement; predatory pricing; tying and bundling practices; and use on a competitive market of advantages derived from a legal monopoly.

Furthermore, as per Article 102 TFEU, the following may constitute abusive conduct: “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”; “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”; “*limiting production, markets or technical development to the prejudice of consumers*”; and “*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*”.

---

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

---

Intellectual property (“IP”) can play a role in analysing dominant firm behaviours. The use of IP rights from an undertaking can be abusive when this one has a dominant position. For instance, the refusal to treat or to grant a licence can be considered abusive, in particular if the IP right is classified as an essential facility. Nevertheless, the possession of a patent or any other intellectual property rights does not necessarily give the firm a dominant position.

---

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

---

“Direct effects” evidence is not really relevant under French law.

---

### 3.15 How is “platform dominance” assessed in your jurisdiction?

---

To date, no specific case law may be used to support the way platform dominance is analysed. However, it is certain that the multi-side markets in which an actor can play over the customers via a dominant platform may have an impact on the market power of the undertaking concerned. The judgment of the *Cour de Cassation* dated December 6, 2017, confirming the decision of the PCA dated May 12, 2016, illustrates the complexity of determining the platform’s relevant market and thus platform dominance. The event-driven online sales



market could not be identified since the actors are direct competitors with other suppliers, offline and online, who organise or also make flash sales. Therefore, the dominant position of “[vente-privee.com](http://vente-privee.com)” could not be evidenced.

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

Refusals to deal are not prohibited *per se*. Nevertheless, in certain circumstances, they may be considered anticompetitive when the undertaking concerned is in a dominant position. Concerning refusal to sell, three cumulative criteria have to be gathered in order to determine whether the refusal to access or to supply the product is abusive or not: i) the essential character of the product of which access is refused; ii) the effect on the competition; and iii) the innovative nature of the product (Aut. Conc. n° 12-D-01, January 10, 2012). Also, in a more recent decision (Aut. Conc. n° 17-D-24, December 10, 2017), the ADLC held that the burden is on the claimant to bring evidence that a request to deal was made or at least that the claimant tried to initiate discussions.



**Helen Coulibaly-Le Gac**

HLG Avocats  
1, rue Gilbert Dru  
13002 Marseille  
France

Tel: +33 4 8425 5403  
Email: [h.coulibalylegac@hlgavocats.fr](mailto:h.coulibalylegac@hlgavocats.fr)  
URL: [www.hlgavocats.fr](http://www.hlgavocats.fr)

The founding partner of HLG Avocats, Helen is specialised in competition law, distribution law and contract law. Helen has acquired significant international experience through her positions as both in-house and outside legal counsel. Helen holds a Ph.D. in French Law from the University of Paris 1 Panthéon-Sorbonne, for which she received the highest distinction with congratulations of the jury. She is a former member of the Paris Bar and she is currently a member of the Marseille Bar.

Helen has also worked as in-house counsel in the pharmaceutical industry and contributed to the setting up of a wholesalers' network in a strictly regulated environment.

She regularly advises international firms in their development of franchise networks in France.

**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.**

In vertical franchise agreements, the franchisor has to provide its prospective franchisee with a pre-contractual information document at least 20 days before the signing of the contract, or before any payment related to it. The document shall disclose extensive information about the franchisor and the franchise organisation and is intended to give to the potential franchisee enough information for its decision-making process.



**Pierre Laforet**

HLG Avocats  
1, rue Gilbert Dru  
13002 Marseille  
France

Tel: +33 4 8489 4144  
Email: [p.laforet@hlgavocats.fr](mailto:p.laforet@hlgavocats.fr)  
URL: [www.hlgavocats.fr](http://www.hlgavocats.fr)

Pierre is an associate attorney of HLG Avocats. He is currently a member of the Marseille Bar.

Prior to joining HLG Avocats, he worked in the defence industry and in the “Contracts, Competition and Distribution” department of a law firm as an associate.

Pierre holds a Master’s degree in Tax and Business Law from Aix-Marseille University and an LL.M. from the University of Georgia School of Law. He also passed the New York State Bar examination.

Pierre speaks English and French.



HLG Avocats is a French independent law firm specialised in competition, distribution, consumer law and contract law, and advises clients throughout the development of their contractual relationships with suppliers or distributors.

HLG Avocats has extensive experience of the French and international legal environments, and is able to work with small businesses and larger companies, in terms of B2B and B2C relationships. In particular, the firm advises and assists clients in the drawing up and negotiation of business contracts (franchise agreements, commercial agency agreements, pre-contractual information documents, general conditions of sale, etc.). The firm also has extensive experience in French and European competition law, such as anti-competitive practices, merger filings, or unfair competition law.

HLG Avocats has developed specific skills in the health, retail distribution, food processing, sports and electronics industries.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Foreign Direct Investment Regimes
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Sanctions
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

**glg** global legal group

59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [info@glgroup.co.uk](mailto:info@glgroup.co.uk)

[www.iclg.com](http://www.iclg.com)