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GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 36 jurisdictions worldwide

2013

Contributing editor: Stephen Kinsella OBE

Published by
Getting the Deal Through
in association with:

SIDLEY AUSTIN LLP
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Vertical Agreements 2013

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Vertical Agreements 2013
Published by
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ISSN 1753-9250

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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United States

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Antitrust law

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

A number of federal statutes bear directly on the legality of vertical restraints. Section 1 of the Sherman Act is the federal antitrust statute most often cited in vertical restraint cases. Section 1 prohibits 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade' (15 USC, section 1 (2006)). Section 1 serves as a basis for challenges to such vertical restraints as resale price maintenance, exclusive dealing, tying, and certain customer or territorial restraints on the resale of goods.

Unlike section 1, section 2 of the Sherman Act reaches single-firm conduct. Section 2 declares that 'every person who shall monopolise or attempt to monopolise [...] any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony' (15 USC, section 2 (2006)). In the distribution context, section 2 may apply where a firm has market power significant enough to raise prices or limit market output unilaterally.

Section 3 of the Clayton Act makes it unlawful to sell goods on the condition that the purchaser refrain from buying a competitor's goods if the effect may be to substantially lessen competition (15 USC, section 14 (2006)).

Finally, section 5(a)(1) of the Federal Trade Commission Act (FTC Act) has application to vertical restraints. This declares unlawful unfair methods of competition (15 USC, section 45(a)(1) (2006)). Section 5(a)(1) violations are solely within the jurisdiction of the FTC. As a general matter, the FTC has interpreted the FTC Act consistently with the sections of the Sherman and Clayton Acts applicable to vertical restraints. In December 2009, however, the FTC filed a complaint against Intel Corp in which the FTC asserted a stand-alone claim that certain vertical restraints constituted unfair methods of competition under section 5 (in addition to conventional monopolisation claims) (see complaint, *In re Intel Corp, FTC* Dkt No. 9341 (16 December 2009), available at www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf). In doing so, the FTC appeared to assert enforcement authority under section 5 that it viewed as entirely independent of the limits on the Sherman and Clayton Acts. Although no court has yet addressed whether such independent enforcement authority exists (the FTC reached an out-of-court settlement of its claims against Intel in August 2010), the FTC's action against Intel suggests that it may seek to expand its powers under section 5 in the future.

Numerous states have also enacted state antitrust laws that prohibit similar conduct as the federal antitrust laws do. Nevertheless, unless otherwise specified below, these responses focus solely on federal antitrust law.

Types of vertical restraint

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

The varying forms of vertical restraints are not expressly defined by statute. Rather, these concepts have evolved through judicial decision making, which is commonly referred to as the 'common law' of antitrust. Numerous types of vertical restraints have been the subject of review under the applicable antitrust laws, the most common of which are the following:

- resale price maintenance – agreements between persons at different levels of the distribution structure on the price at which a customer will resell the goods or services supplied. Resale price maintenance can take the form of setting a specific price; but commonly it involves either setting a price floor below which (minimum resale price maintenance) or a price ceiling above which (maximum resale price maintenance) sales cannot occur;
- customer and territorial restraints – these involve a supplier or upstream manufacturer of a product prohibiting a distributor from selling outside an assigned territory or particular category of customers;
- channel of distribution restraints – these function similarly to customer or territorial restraints in that an upstream manufacturer or supplier of a product prohibits a distributor from selling outside an approved channel of distribution. Commonly, such restraints involve a luxury goods manufacturer prohibiting its distributors from selling over the internet;
- exclusive dealing arrangements – these require a buyer to purchase products or services for a period of time exclusively from one supplier. The arrangement may take the form of an agreement forbidding the buyer from purchasing from the supplier's competitors or of a requirements contract committing the buyer to purchase all, or a substantial portion, of its total requirement of specific goods or services only from that supplier. These arrangements may to some extent foreclose competitors of the supplier from marketing their products to that buyer for the period of time specified in the agreement;
- exclusive distributorship arrangements – these typically provide a distributor with the right to be the sole outlet for a manufacturer's products or services in a given geographic area. Pursuant to such an agreement, the manufacturer may not establish its own distribution outlet in the area or sell to other distributors; and
- tying arrangements – an agreement by a party to sell one product (the tying product), but only on the condition that the buyer also purchases a different (or tied) product. Tying can involve services as well as products. Such tying arrangements may force the purchaser to buy a product it does not want or to restrict the purchaser's freedom to buy products from sources other than the seller.

Legal objective

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

Yes, in modern federal antitrust enforcement and jurisprudence, the sole goal of antitrust is to maximise consumer welfare.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

Finally, state attorneys general can enforce federal antitrust laws based upon their parens patriae authority and state antitrust laws based upon their respective state statutes. Parens patriae authority allows the state to prosecute a lawsuit on behalf of citizens or natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act (see question 52).

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The long-standing rule in the United States is that conduct that has a substantial effect in the United States may be subject to US antitrust law regardless of where the conduct occurred (*United States v Aluminum Company of America*, 148 F2d 416, 443-44 (2d Cir 1945)). The Foreign Trade Antitrust Improvements Act of 1982 limits the subject-matter jurisdiction of the antitrust laws, however, by providing that the Sherman Act shall not apply to commerce or trade with foreign nations except where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce (15 USC, section 6a (2006)). Analogous jurisdictional principles also apply to the extraterritorial application of both the Clayton and FTC Acts.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

In the United States, the federal government is not subject to the Sherman Act (see *United States Postal Service v Flamingo Industries (USA) Ltd*, 540 US 736 (2004)). Litigation against federal entities thus often turns on whether the relevant entity is a 'person' separate from the United States itself. The United States Postal Service, for example, is immune from suit under the Sherman Act because it is designated, by statute, as an 'independent establishment of the executive branch of the Government of the United States' (ibid at 746). By contrast, the Tennessee Valley Authority, which was established by Congress as an independent federal corporation, is not immune from antitrust liability, despite the fact that it maintains certain public characteristics (see *McCarthy v Middle Tennessee Electric Membership Corp*, 466 F3d 399, 413–14 (6th Cir 2006)).

As to claims against state entities, under the 'state action' doctrine, the US Supreme Court has allowed defendants to show that the operation of a state regulatory scheme precludes the imposition of antitrust liability, thereby shielding the anti-competitive conduct in question. In the landmark case of *Parker v Brown*, 317 US 341 (1943), the Supreme Court upheld, as an 'act of government which the Sherman Act did not undertake to prohibit', a Californian programme that regulated the marketing of raisins. The Parker doctrine has been interpreted as requiring two standards for the application of antitrust immunity (see *California Retail Liquor Dealers Ass'n v Midcal Aluminum Inc*, 445 US 97 (1980)). First, the challenged restraint must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. And second, the policy must be actively supervised by the state itself. Departures from competition immunised by the state action doctrine can be independently authorised by state legislatures or the state's highest court. The availability of state action immunity to other lesser instrumentalities of the state varies depending upon how clearly articulated the state policy is under which the challenged activity is undertaken – namely, whether the challenged activity was a foreseeable result of a specific grant of authority.

Finally, foreign sovereigns may be shielded from US antitrust laws under the Foreign Sovereign Immunities Act (the FSIA). Under the FSIA, a foreign sovereign or any of its agents or instrumentalities is immune from suit in the United States unless, among other things, the suit involves the sovereign's commercial activities that occurred within, or directly affected, the United States (see *Republic of Argentina v Weltover Inc*, 504 US 607 (1992)).

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

There are no particular rules or sections of the applicable federal antitrust laws that focus on a specific sector of industry. Nevertheless, in regulated industries, such as agriculture, communications, energy, and healthcare, there may be industry-specific laws enforced by the relevant regulatory agency that regulate vertical restraints or vest the agency with power to do so.

General exceptions

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

There are no such general exceptions.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Under US antitrust law, an 'agreement' entails 'a conscious commitment to a common scheme designed to achieve an unlawful objective' (*Monsanto Co v Spray-Rite Service Corp*, 465 US 752, 768 (1984)).

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The long-standing rule is that 'no formal agreement is necessary to constitute an unlawful conspiracy' (*American Tobacco Co v United States*, 328 US 781, 809 (1946)). Further, there is no requirement that the agreement be written. In *Monsanto Co v Spray-Rite Service Corp*, 465 US 752 (1984), the plaintiff alleged the existence of an unwritten agreement among a manufacturer of agricultural herbicides and various distributors to, among other things, fix resale prices of the manufacturer's herbicides. The US Supreme Court held that, in order to prove a vertical price-fixing conspiracy in such circumstances, the plaintiff was required to present 'evidence that tends to exclude the possibility that the manufacturer and […] distributors were acting independently' (ibid at 764).

Parent and related-company agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

A violation of section 1 of the Sherman Act requires a showing of concerted action on the part of the defendants. In *Copperweld Corp v Independence Tube Corp*, 467 US 752, 777 (1984), the US Supreme Court held that, as a matter of law, a corporation and its wholly owned subsidiaries 'are incapable of conspiring with each other for purposes of section 1 of the Sherman Act'. The Copperweld exception has been applied by lower courts to numerous other situations including:
- two wholly-owned subsidiaries of a parent corporation (sister corporations);
- two corporations with common ownership;
- a parent and its partially owned subsidiary;
- a wholly-owned subsidiary and a partially owned subsidiary of the same parent corporation; and
- companies that have agreed to merge.

At least one court has extended the Copperweld exception to claims under section 3 of the Clayton Act where the purchaser and the seller are affiliated. Courts generally hold the Copperweld exception to be inapplicable to partial holdings approaching or below 50 per cent. The Copperweld exception, however, is inapplicable to section 2 of the Sherman Act which contains no requirement of concerted action on the part of the defendant.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Consignment and agency arrangements between a manufacturer and its dealer do not constitute a vertical pricing restraint subject to Sherman Act liability as long as they are bona fide. Where a manufacturer does not transfer title to its products but rather consigns them, the manufacturer is free to unilaterally dictate the sale prices for those products. Moreover, in light of the US Supreme Court's recent decision eliminating the distinction between price and non-price restraints for the purposes of Sherman Act liability, see *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007), a 'sham' consignment or agency arrangement will be subject to analysis under the rule of reason (see question 15). Recent press reports in the United States indicate that there are active governmental investigations into the bona fides of certain agency agreements.

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

A court assessing the validity of an agency agreement is likely to begin by determining whether the parties intended to establish an agency arrangement and whether, under their agreement, title to goods sold transfers directly from the principal to the end-consumer, bypassing the agent. Beyond these fundamental requirements, US courts examining the bona fides of an agency agreement look to three general factors:
- whether the principal or the purported agent bears 'most or all of the traditional burdens of ownership';
- whether the agency arrangement 'has a function other than to circumvent the rule against price fixing'; and
- whether the agency arrangement 'is a product of coercion'. (*Valuepest.com of Charlotte Inc v Bayer Corp*, 561 F3d 282, 290–91 (4th Cir 2009)).

For example, in the landmark case of *United States v General Electric*, 272 US 476, 479 (1926), the government asserted that General Electric's (GE) use of a consignment system to fix the retail price of its patented incandescent lamps 'was merely a device to enable [GE] to fix the resale prices of lamps in the hands of purchasers', and that 'the so-called agents were in fact wholesale and retail merchants'. The US Supreme Court rejected the government's position, determining instead that GE's distributors were bona fide agents because GE:
- set retail prices for the lamps and dealers received fixed commissions;
- retained title to the lamps in the possession of dealers until the lamps were sold to end-consumers;
- assumed the risk of loss resulting from disaster or price decline; and
- paid taxes on the lamps and carried insurance on the dealers' inventory (ibid at 481–83).

Intellectual property rights

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

Restraints involving intellectual property are analysed under the same principles of antitrust that are applied in other contexts. The DoJ and FTC have jointly issued Antitrust Guidelines for the Licensing of Intellectual Property (www.usdoj.gov/atr/public/guidelines/0558.htm), which lays out three general principles that guide the agencies' antitrust analysis in the context of intellectual property. First, the FTC and DoJ regard intellectual property as essentially comparable to any other form of property. Second, the agencies do not presume that IPRs, particularly in the form of patents, create market power. *Illinois Tool Works Inc v Independent Ink*, 548 US 28, 42–43 (2006) (holding that there should be no presumption that a patent confers market power on the patentee). And finally, the FTC and DoJ recognise that, often, intellectual property licensing allows firms to combine complementary factors of production and, as such, is generally pro-competitive.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

In recent years, most vertical restraints have been analysed under the rule of reason. Rule-of-reason analysis begins with an examination of the nature of the relevant agreement and whether it has caused or is likely to cause anti-competitive harm. The reviewing authority, whether it be a court, the FTC, or the DoJ, conducts a detailed market analysis to determine whether the agreement has or is likely to create or increase market power or facilitate its exercise. As part of the analysis, a variety of market circumstances are evaluated, including ease of entry. If the detailed investigation into the agreement and its effect on the market indicates anti-competitive harm, the next step is to examine whether the relevant agreement is reasonably necessary to achieve pro-competitive benefits that are likely to offset those anti-competitive harms. The process of weighing an agreement's reasonableness and pro-competitive benefits against harm to competition is the essence of the rule of reason. Where the pro-competitive benefits outweigh the harms to competition, the agreement is likely to be deemed lawful under the rule of reason. Where there is evidence that the arrangement has actually had anti-competitive effects, the rule-of-reason analysis may sometimes be shortened via a 'quick look' analysis.

Minimum resale price maintenance was long treated as per se illegal under federal antitrust law, rather than as subject to the rule of reason. In the recent case of Leegin, however, the US Supreme Court struck down the per se rule against minimum resale price maintenance agreements, ruling instead that such restraints will be subject to rule-of-reason analysis. The court explained that agreements should fall into the 'per se illegal' category only if they always or almost always harm competition; for example, horizontal price fixing among competitors. Minimum resale price maintenance, on the other hand, can often have pro-competitive benefits that outweigh its anti-competitive harm. The court explained that resale price maintenance agreements are not per se legal, and suggested that such agreements might violate federal antitrust laws where either a manufacturer or a retailer that is party to such an agreement possesses market power (see question 16).

Likewise, tying arrangements, which are a type of vertical non-price restraint, are treated in a somewhat different manner by the courts. Although courts have been recently inclined to consider the business justifications for tie-ins and have analysed the economic effects of the tying arrangement, hallmarks of a rule-of-reason analysis, a tying arrangement may be treated as per se illegal (ie, irrefutably presumed to be illegal without the need to prove anti-competitive effects) if the following elements are satisfied:
- two separate products or services are involved;
- the sale or agreement to sell one product or service is conditioned on the purchase of another;
- the seller has sufficient market power in the tying product market to enable it to restrain trade in the tied product market; and
- a substantial amount of interstate commerce in the tied product is affected.

To the extent that these conditions are not met and a tying arrangement is not found to be per se unlawful, it may still be unlawful under a fully-fledged rule-of-reason analysis.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Detailed market analysis, including consideration of market shares, market structures and other economic factors, often is central to the wide-ranging analysis of vertical restraints under the rule of reason (see questions 9 and 15). Indeed, under the rule of reason, a reviewing agency or court generally will attempt to define a relevant market, one with both product and geographic dimensions, and then analyse whether the entity imposing an individual restraint exercises market power within the defined market. The Supreme Court has defined 'market power' as 'the ability to raise prices above those that would be charged in a competitive market' (*NCAA v Board of Regents*, 468 US 85, 109 n38 (1984)). An entity's market share is an important, and sometimes decisive, element in the analysis of market power – an analysis that, by its very nature, requires consideration of the market positions of competitors. For instance, following the US Supreme Court's decision in Leegin, which remanded the case to the lower courts for further proceedings, the plaintiff argued that, under the rule of reason, Leegin's conduct caused anti-competitive harm in the market for 'women's accessories', among others (*PSKS Inc v Leegin Creative Leather Prods Inc*, 615 F3d 412, 418–19 (5th Cir 2010)). The US Court of Appeals for the Fifth Circuit rejected the plaintiff's claim, however, explaining that '[t]o allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power', and that 'it is impossible to imagine that Leegin could have power' over such a broad and vaguely defined market (ibid).

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

While the significant majority of cases involve monopoly power of entities acting as sellers, a limited number of cases involve allegations of buyers' market power over prices or access, which is referred to as 'monopsony power'. (See, for example, *In re Beef Industry Antitrust Litig*, 600 F2d 1148, 1154–60 (5th Cir 1979) affirming dismissal of a price-fixing claim by cattle ranchers, who alleged that the wholesale price of beef paid by large retail chains to middlemen (ie, meatpackers) is established by the retail chains acting in concert).

Block exemption and safe harbour

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

There are no such block exemptions or safe harbour provisions relevant to the analysis of vertical restraints.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Resale price maintenance agreements, whether setting minimum or maximum prices, are evaluated under a rule-of-reason analysis under federal law (*Leegin Creative Leather Products*).

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

Research has not uncovered any recent decision addressing resale price maintenance in these circumstances. Under federal antitrust law, however, the rule of reason is used to evaluate resale price maintenance no matter the context (*Leegin Creative Leather Products*).

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Research has not uncovered any significant post-*Leegin* decisions involving the interrelation of resale price maintenance and other forms of restraint. In *Leegin*, however, the court identified several instances where resale price maintenance may warrant heightened scrutiny in an effort to ferret out potentially anti-competitive practices. For example, the court suggested that resale price maintenance should be subject to increased scrutiny if a number of competing manufacturers in a single market adopt price restraints, because such circumstances may give rise to illegal manufacturer or retailer cartels. Likewise, the court explained that if a resale price maintenance agreement originated among retailers and was subsequently adopted by a manufacturer, there is an increased likelihood that the restraint would foster a retailer cartel or support a dominant, inefficient retailer.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In *Leegin*, the Supreme Court described several potentially pro-competitive benefits of resale price maintenance, including, among other things, increasing inter-brand competition and facilitating market entry for new products and brands. Research has not uncovered any decisions to date directly assessing such efficiencies in fact-specific contexts.

23 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Territorial restrictions prohibit a distributor from selling outside an assigned territory. These restrictions may stifle intra-brand competition, but also simultaneously stimulate inter-brand competition. In light of the complex market impact of these vertical restrictions, the US Supreme Court, in *Continental TV Inc v GTE Sylvania Inc*, 433 US 36 (1977), concluded that territorial restraints should be reviewed under a rule-of-reason analysis. In order for a territorial restriction (and as referenced in question 24, a customer restriction) to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition. Courts have examined the purpose of the vertical restriction, the effect of such restriction in limiting competition in the relevant market, and, importantly, the market share of the supplier imposing the restraint in ascertaining the net impact on competition. So long as inter-brand competition is strong, courts typically find territorial restraints lawful under the rule of reason.

24 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Customer restrictions of this nature are subject to the same rule-of-reason analysis detailed in question 23 regarding territorial restrictions.

25 How is restricting the uses to which a buyer puts the contract products assessed?

A usage restriction will be analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 23.

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

Research has not uncovered any recent decisions dealing with restrictions on internet selling. The FTC, however, has taken the general position that the rule of reason applies to any 'minimum advertised price' (MAP) policy, whereby a manufacturer restricts a reseller's ability to advertise resale prices below specified levels and conditions its provision of cooperative advertising funds on the reseller's compliance with the advertising restrictions (see Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs – Rescission, 6 Trade Reg Rep (CCH) paragraph 39,057, at 41728 (FTC 21 May 1987)). The FTC indicated that such MAP policies should permit a reseller the freedom to decline to participate in the cooperative advertising programme and to advertise and charge its own prices. To some extent, the FTC's position on MAP policies appears to have had an impact on the manner in which resellers advertise prices on the internet.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

Research has not uncovered any decisions or guidelines distinguishing between different types of internet sales channels.

28 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Agreements establishing selective distribution systems are analysed under the rule of reason in a manner similar to the analysis of territorial restraints set forth in question 23.

29 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Although research has not uncovered any decisions on this subject, it is likely that selective distribution systems are more easily justified under the rule of reason where retailers are required to provide significant point-of-sale services.

30 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

Restrictions on internet sales by approved distributors will be analysed under the rule of reason in a manner similar to other selective distribution systems. In order for a restriction on internet sales to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition.

31 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

Research has not uncovered any recent decisions in this area.

32 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Pursuant to the rule-of-reason analysis under which selective distribution systems are analysed, the possible cumulative effect of overlapping selective distributive systems operating in the same market may be considered in assessing harm to competition.

33 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

Research has not uncovered any recent agency decisions dealing with potential links between selective distribution systems and resale price maintenance policies.

34 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

Research has not uncovered any recent agency decisions or guidance concerning distribution arrangements that combine selective distribution with territorial restrictions.

35 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Research has not uncovered any recent decisions challenging an agreement restraining a buyer's ability to purchase the supplier's products from alternative sources. Such a challenge is likely to be analysed under the rule of reason.

36 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

Restrictions on a buyer's ability to sell non-competing products that the supplier deems 'inappropriate' are assessed under the rule of reason.

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

Exclusive dealing arrangements as described above may harm competition by foreclosing competitors of the supplier from marketing their products to that buyer. Exclusive dealing is subject to challenge under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act, and section 5 of the FTC Act. Because section 3 of the Clayton Act is limited to arrangements involving 'goods, wares, merchandise, machinery, supplies, or other commodities', when services or intangibles are involved, exclusive dealing can be challenged only under the Sherman Act or FTC Act. Exclusive dealing arrangements have not been considered to be per se unlawful and the courts and agencies have therefore analysed such conduct under the rule of reason. In conducting such analysis, the courts and agencies have considered a number of factors, the most important being, perhaps, the percentage of commerce foreclosed within a properly defined market, and the ultimate anti-competitive effects of such foreclosure.

Recently, the DoJ filed a complaint against American Express, MasterCard and Visa, seeking to enjoin an alleged form of exclusive dealing arrangement under section 1 of the Sherman Act. DoJ's complaint alleged that American Express, MasterCard and Visa each maintained rules prohibiting merchants from encouraging consumers to use lower-cost payment methods when making purchases; for example, by prohibiting merchants from offering discounts or other incentives to consumers in order to encourage them to pay with credit cards that cost the merchant less money. According to the complaint, in 2009, American Express had a 24 per cent share of the general-purpose credit card market, and American Express, MasterCard and Visa together had approximately 94 per cent market share. MasterCard and Visa reached an out-of-court settlement with DoJ, whereby they were enjoined from enforcing certain rules of this type. American Express declined to settle the claims against it, and litigation is ongoing.

38 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Requirements contracts are analysed under the same standards as exclusive dealing arrangements (see question 37).

39 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

Similar to the territorial restrictions discussed in question 23, exclusive distributorship arrangements are subject to the rule-of-reason analysis.

40 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

Both types of agreements are subject to rule-of-reason analysis. For instance, to prevent dilution of its trademark, a franchisor may impose strict regulations on a franchisee, such as on product packaging and labelling, sourcing for product ingredients, employee appearance, and appearance of the franchised facility. Typically, these restrictions do not run foul of federal antitrust laws because they are deemed not to unreasonably restrain trade.

41 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 that it will not supply the contract products on more favourable terms to other buyers is assessed.

Most-favoured nations clauses (MFNs) have not been found illegal by the courts. In *Blue Cross & Blue Shield United v Marshfield Clinic*, 65 F3d 1406 (7th Cir 1995), cert denied, 516 US 1184 (1996), the Seventh Circuit rejected a challenge to an MFN clause, explaining that MFNs 'are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favourable as their other customers […] and that is the sort of conduct that the antitrust laws seek to encourage. It is not price fixing'. MFNs, however, have led to a number of enforcement actions by the FTC and DoJ, some of which have resulted in consent decrees, on the theory that they encourage coordinated pricing or discourage price-cutting to particular customers by forcing the seller to make the lower price available to one or more other customers. In a recent example, DoJ filed a civil antitrust lawsuit against the health insurer Blue Cross Blue Shield of Michigan (BCBSM), alleging that MFN clauses in its agreements with hospitals raised hospital prices, prevented other insurers from entering the marketplace and discouraged discounts. DoJ's complaint alleged that BCBSM was the largest provider of commercial health insurance in Michigan, covering more than 60 per cent of the market, and that some of its MFN clauses required that hospitals actually charge BCBSM's competitors more than they charge BCBSM. This litigation is ongoing.

42 Explain whether and in what circumstances a supplier may apply different prices or conditions to similarly placed buyers and explain how, in such circumstances, the application of different prices or conditions is assessed?

Although not typically analysed as a vertical restraint, a discrimination in price charged by a manufacturer to two competing distributors may violate the Robinson Patman Act 15 USC section 13a (also known as section 2a of the Clayton Act). The Robinson-Patman Act was enacted during the Great Depression of the 1930s in order to protect small stores from the competitive pressures of large discount chains. Unlike the modern antitrust goal of promoting consumer welfare by fostering lower prices and greater efficiency, the goal of the Robinson-Patman Act was to preserve a way of life characterised by so-called 'mom and pop' stores. Today, the government rarely enforces the Act, and most modern cases are brought by disfavoured distributors against the manufacturer.

The elements of a price discrimination claim are: proof of '(1) a difference in price, (2) in reasonably contemporaneous sales to two buyers purchasing form a single seller, (3) involving commodities, (4) of like grade and quality, (5) that may injure competition'. (ABA Section of Antitrust Law, Antitrust Law Developments (7th ed 2012) at 504). See generally, *FTC v Anheuser-Busch, In.*, 550 US 544 (1960). In addition, plaintiffs must prove that the sale of goods involved were by persons who were engaged 'in commerce'. See *Gulf Oil Corp v Copp Paving Co*, 419 US 186 (1974).

There are a number of defences to an alleged violation of the Act, most notably the 'meeting competition' defence (see *Great Atlantic & Pacific Tea Co v. FTC*, 440 US 69 (1979), the 'cost justification defence' (see *Texaco v Hasbrouck*, 496 US 543 (1990) and the 'functional availability defence' (see *FTC v Morton Salt*, 334 US 37 1948).

43 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

Research has not uncovered any instance in which a US court or governmental agency has addressed this issue. In any event, such restrictions would be subject to analysis under the rule of reason.

Notifying agreements

44 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

No, there is no formal notification procedure.

Authority guidance

45 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Parties considering a course of action may request advice from the FTC concerning their proposed activity (see 16 CFR, section 1.1 to 1.4 (2009)). Parties may seek advisory opinions for any proposed activity that is not hypothetical or the subject of an FTC investigation or proceeding and that does not require extensive investigation (see 16 CFR at section 1.3). Formal advisory opinions issued by the FTC are provided only in matters involving either a substantial or novel question of law or fact or a significant public interest. (See 16 CFR at section 1.1(a)). The FTC staff may render advice in response to a request when an agency opinion would not be warranted (see 16 CFR at section 1.1(b)). Staff opinions do not prejudice the FTC's ability to commence an enforcement proceeding (see 16 CFR at 1.3(c)). In addition to issuing advisory opinions, the FTC promulgates industry guides often in conjunction with the DoJ. Industry guides do not have the force of law and are therefore not binding on the commission. Finally, the FTC advises parties with respect to future conduct through statements of enforcement policy which are statements directed at certain issues and industries.

While the DoJ does not issue advisory opinions, it will upon request review proposed business conduct and it may in its discretion state its present enforcement intention with respect to that proposed conduct. Such statements are known as business review letters. A request for a business review letter must be submitted in writing to the assistant attorney general who heads the DoJ Antitrust Division and set forth the relevant background information, including all relevant documents and detailed statements of any collateral or oral understandings (see 28 CFR, section 50.6 (2008)). The DoJ will decline to respond when the request pertains to ongoing conduct.

Complaints procedure for private parties

46 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

A party who wishes to lodge a complaint with the FTC may make an 'application for complaint'. While there is no formal procedure for requesting action by the FTC, a complainant must submit to the FTC a signed statement setting forth in full the information necessary to apprise the FTC of the general nature of its grievance (see 16 CFR, section 2.2(b) (2009)). Parties wishing to register complaints with the DoJ may lodge complaints by letter, telephone, over the internet or in person. The DoJ maintains an 'antitrust hotline' to accept telephone complaints. Sophisticated parties frequently retain counsel to lodge complaints with either agency.

Enforcement

47 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The FTC and DoJ have filed comparatively few vertical restraint cases in the past few years. Recent examples, however, include DoJ's enforcement actions against American Express, MasterCard and Visa pertaining to exclusive dealing arrangements (see question 37), and against Blue Cross Blue Shield of Michigan pertaining to MFN provisions (see question 41). DoJ also recently brought a successful challenge to the exclusive dealing practices of a manufacturer of artificial teeth (see *US v Dentsply Int'l Inc*, 399 F3d 181 (3d Cir 2005), cert denied, 546 US 1089 (2006)). The FTC also recently resolved by settlement its enforcement action against Intel Corp, which included, among other things, the charge that Intel Corp engaged in exclusive dealing practices in an effort to thwart competition from rival computer chip makers, including by punishing its own customers for using rivals' products (see question 1). State attorneys general and private parties have been somewhat more active in challenging vertical restraints (see questions 48 and 51).

48 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

An agreement found to be in restraint of trade is invalid as against public policy. However, where an agreement constitutes 'an intelligible economic transaction in itself', apart from any collateral agreement in restraint of trade, and enforcing the defendant's obligations would not 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act', a contract containing a prohibited vertical restraint will be held enforceable (See Kelly v Korsuga, 358 US 516, 518–520 (1959); see also *Kaiser Steel Corp v Mullins*, 455 US 72 (1982)).

49 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The FTC can institute enforcement proceedings under any of the laws it administers, as long as such a proceeding is in the public interest (see 16 CFR, section 2.31 (2009)). If the FTC believes that a person or company has violated the law, the commission may attempt to obtain voluntary compliance by entering into a consent order. If a consent agreement cannot be reached, the FTC may issue an administrative complaint. Section 5(b) of the FTC Act empowers the FTC, after notice and hearing, to issue an order requiring a respondent found to have engaged in unfair methods of competition to 'cease and desist' from such conduct (15 USC, section 45(b) (2008)). Section 5(l) of the FTC Act authorises the FTC to bring actions in federal district court for civil penalties of up to US$16,000 per violation, or in the case of a continuing violation, US$16,000 per day, against a party that violates the terms of a final FTC order (15 USC, section 45(l)). Section 13 of the FTC Act authorises the FTC to seek preliminary and other injunctive relief pending adjudication of its own administrative complaint (15 USC, section 53). Additionally, section 13(b) of the FTC Act authorises the FTC in a 'proper case' to seek permanent injunctive relief against entities that have violated or threaten to violate any of the laws it administers. The FTC has successfully invoked its authority to obtain monetary equitable relief for violations of section 5 in suits for permanent injunction pursuant to section 13(b) of the FTC Act.

The DoJ has exclusive federal governmental authority to enforce the Sherman Act and shares with the FTC and other agencies the federal authority to enforce the Clayton Act. Sections 1 and 2 of the Sherman Act confer upon the DoJ the authority to proceed against violations by criminal indictment or by civil complaint, although it is unusual for the DoJ to seek criminal penalties in the vertical restraints area. Pursuant to section 4 of the Sherman Act and section 15 of the Clayton Act, the DoJ may seek to obtain from the courts injunctive relief 'to prevent and restrain violations' of the respective acts and direct the government 'to institute proceedings in equity to prevent and restrain such violations'. Pursuant to section 14A of the Clayton Act, the United States acting through the DoJ may also bring suit to recover treble damages suffered by the United States as a result of antitrust violations (15 USC, section 15a). Finally, a party under investigation by the DoJ may enter into a consent decree with the agency. Procedures governing approval of consent decrees are set forth in the Tunney Act (15 USC, section 16(b)-(h) (2008)).

In vertical restraints cases, federal agencies have tended to focus their efforts on cases where injunctive relief was necessary or where the law might be clarified, as opposed to pursuing cases seeking monetary remedies.

Investigative powers of the authority

50 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The FTC may institute an investigation informally through a 'demand letter' which requests specific information. A party is under no legal obligation to comply with such requests. Additionally, the FTC may use a compulsory process in lieu of or in addition to voluntary means. Section 9 of the FTC Act provides that the FTC or its agents shall have access to any 'documentary evidence' in the possession of a party being investigated or proceeded against 'for the purpose of examination and copying' (15 USC, section 49; 16 CFR, section 2.11 (2009)). Section 9 of the FTC Act gives the Commission power to subpoena the attendance and testimony of witnesses and the production of documentary evidence (15 USC, section 49 (2008)).

Update and trends

There have been no significant decisions of the US Supreme Court or federal appellate courts or newly enacted legislation affecting vertical restraints in the year since last year's edition of this publication. One case worth watching is the alleged price-fixing case brought against five e-book publishers and Apple by the DOJ, 33 state attorneys general in their capacities as parens patriae and representatives of a putative private class, for allegedly conspiring to fix the price at which the e-book versions of certain hardback new release books are sold to consumers. In addition to issues relating to alleged horizontal collusion, the case raises concerns as to the standard of proof in an alleged hub-and-spoke vertical conspiracy and the potential culpability of a non-dominant retailer that enters a market in a manner that allegedly 'facilitates' horizontal collusion. The case is pending in the Federal District Court for the Southern District of New York. At the time of going to press, the five publisher defendants have each settled with the plaintiffs and a trial on the DOJ's injunctive relief against Apple is scheduled to commence in June 2013.

The most common investigative power utilised by the DoJ in conducting civil antitrust investigations is the civil investigative demand (CID). The Antitrust Civil Process Act (15 USC, sections 1311–1314 (2008)), authorises the DoJ to issue CIDs in connection with actual or prospective antitrust violations. A CID is a general discovery subpoena that may be issued to any person whom the attorney general or assistant attorney general has reason to believe may be in 'possession, custody or control' of material relevant to a civil investigation. A CID may compel production of documents, oral testimony or written answers to interrogatories.

Neither DoJ nor FTC typically demand documents held abroad by a non-US entity. However, DoJ and FTC are likely to demand such documents from any non-US entity if the court in which an action is brought possesses subject-matter jurisdiction under US antitrust laws, as well as personal jurisdiction over the non-US entity.

Private enforcement

51 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and 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?

Section 4 of the Clayton Act permits the recovery of treble damages by 'any person […] injured in his business or property by reason of anything forbidden in the antitrust laws'.

Section 16 of the Clayton Act similarly provides a private right of action for injunctive relief.

While sections 4 and 16 of the Clayton Act permit a private right of action for violations arising under both the Sherman and Clayton Acts, it does not permit a private right of action under section 5 of the FTC Act. Both sections 4 and 16 of the Clayton Act provide that a successful plaintiff may recover reasonable attorneys' fees. The amount of time it takes to litigate a private enforcement action varies significantly depending upon the complexity and circumstances of the litigation.

A private plaintiff seeking antitrust damages must establish antitrust standing, which requires, among other things, that the plaintiff show that its alleged injury is of the type that the antitrust laws were designed to protect. With certain exceptions, an indirect purchaser (ie, a party that does not purchase directly from the defendant) is not deemed to have suffered antitrust injury and is therefore barred from bringing a private action for damages under section 4 of the Clayton Act (see *Illinois Brick v Illinois*, 431 US 720 (1971)).

Both parties and non-parties to agreements containing vertical restraints can bring damage claims so long as they successfully fulfil the requirements for standing.

Other issues

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

In addition to private and federal agency enforcement of vertical restraints, section 4(c) of the Clayton Act authorises the states through their respective attorneys general to bring a parens patriae action, defined as an action by which the state has standing to prosecute a lawsuit on behalf of a citizen or on behalf of natural persons residing in its state to secure treble damages arising from any violation under the Sherman Act. In pursuing treble damages, state attorneys general often coordinate their investigation and prosecution of antitrust matters with other states. Additionally, pursuant to section 16 of the Clayton Act, states may bring actions for injunctive relief in their common law capacity as a parens patriae in order to forestall injury to the state's economy.

Many states also have passed legislation analogous to the federal antitrust laws. For example, New York's antitrust statute, known as the Donnelly Act, is modelled on the federal Sherman Act and generally outlaws anti-competitive restraints of trade. New York's highest court has determined that the Donnelly Act 'should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justifies such a result' (*Anheuser-Busch Inc v Abrams*, 71 NY 2d 327, 335 (1998)).

Within the past 10 years the states have commenced a number of coordinated investigations involving allegations of resale price maintenance, most of which have resulted in settlements providing for monetary and injunctive relief. Monetary settlements have ranged from as little as US$7.2 million to as much as US$143 million. Although the Supreme Court's decision in *Leegin* is likely to diminish the frequency of such litigation for the foreseeable future, enforcement authorities in a number of states have continued to investigate, and have brought actions attempting to prohibit resale price maintenance under both federal and state laws. In *California v Bioelements* (Cal Sup Ct 2010), for example, the attorney general of California filed a complaint against a cosmetics manufacturer asserting that the manufacturer violated California's antitrust laws by engaging in resale price maintenance. The parties entered into a settlement decree that enjoined Bioelements from reaching any agreement with a distributor regarding resale price. Likewise, in *New York v Herman Miller Inc* (SDNY 2008), the attorneys general of New York, Illinois and Michigan filed a complaint asserting that a furniture manufacturer's resale price maintenance policy violated section 1 of the Sherman Act and various state laws. The action was resolved by a settlement decree prohibiting Herman Miller from reaching any agreement with distributors regarding the resale price of its products.

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 ISSN 1753-9250