LEXOLOGY
Getting The Deal Through

Vertical Agreements

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Contributors

USA

Karen Kazmerzak
kkazmerzak@sidley.com
Sidley Austin LLP

Ryan M. Sandrock
rsandrock@sidley.com
Sidley Austin LLP

LEGAL FRAMEWORK

Antitrust law

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 (2012)). 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 (2012)). 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 refrains from buying a competitor's goods if the effect may be to substantially lessen competition (15 USC, section 14 (2012)).

Finally, section 5(a)(1) of the Federal Trade Commission Act (the FTC Act) has application to vertical restraints. This declares unlawful unfair methods of competition (15 USC, section 45(a)(1) (2012)). Section 5(a)(1) violations are solely within the jurisdiction of the Federal Trade Commission (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

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 under the terms of the agreement;

- 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 geographical area. Pursuant to such an agreement, the manufacturer may not establish its own distribution outlet in the area or sell to other distributors;
- 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; and
- hub-and-spoke conspiracies – an agreement between two or more parties at the same level of the distribution structure to enter into a series of agreements with the same counterparty at another level of the distribution structure.

Legal objective

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

The goal of US antitrust law is to maximise consumer welfare and economic efficiency.

Responsible authorities

Which authority is responsible for enforcing prohibitions on anticompetitive 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 anticompetitive effects.

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.

Finally, private plaintiffs also pursue actions against alleged restraints.

Jurisdiction

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 (Hartford Fire Ins Co v California , 509 US 764, 796 (1993); United States v Aluminum Company of America , 148 F2d 416, 443-44 (Second Circuit 1945)). The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) delineates what extraterritorial conduct is governed by the antitrust laws of the United States and what lies beyond their reach. The FTAIA added section 6a to the Sherman Act, which provides that the other sections of the Sherman Act shall not apply to foreign commerce (other than import trade or commerce), except where the conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce (15 USC, section 6a (2012)). See Minn-Chem Inc, et al v Agrium Inc , et al, 683 F3d 845, 856-58 (Seventh Circuit 2012); see also United States v Hsiung , 778 F3d 738 (Ninth Circuit 2015); Motorola Mobility LLC v AU Optronics Corp , 775 F3d 816 (Seventh Circuit 2014); and Lotes Co, Ltd v Hon Hai Precision Indus Co , 753 F3d 395, 410 (Second Circuit 2014). The FTAIA also added section 5(a)(3) to the Federal Trade Commission Act, 15 USC, section 45(a)(3), which closely parallels section 6a.

In Biocad, JSC v F Hoffman-La Roche, Ltd , 2017 WL 4402564 (SDNY 30 September 2017), the district court dismissed claims against Hoffman-La Roche, including an allegation of illegal tying and bundling its drugs, because the conduct occurred in Russia. The court found that Biocad’s injury occurred in Russia and that injury led to the direct effect on US imports and Biocad’s domestic business rather than Hoffman-La Roche’s conduct (ibid at *10).

In Animal Science Products, Inc v Hebei Welcome Pharmaceutical Co Ltd , 138 S Ct 1865 (2018), the Supreme Court considered a case in which Chinese sellers of vitamin C sought dismissal on the ground that Chinese law required them to fix prices. The Ministry of Commerce of the People’s Republic of China (Ministry) supported dismissal. The District Court denied the Chinese sellers’ motion. The Second Circuit reversed, holding that federal courts are ‘bound to defer’ to foreign government’s construction of its own law. The Supreme Court vacated that decision, holding that ‘A federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements’ (ibid at 1868).

Agreements concluded by public entities

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 (Sixth Circuit 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 anticompetitive conduct in question. When a state legislature acts by adopting legislation and where a state's highest court enacts rules, its actions are exempt from the antitrust laws. Private parties and subordinate government entities also might be immune from the antitrust laws. 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 programme established by the California legislature that regulated the marketing of raisins. The Parker doctrine has a two-pronged test for the application of antitrust immunity for private parties and subordinate government entities (see California Retail Liquor Dealers Ass'n v Midcal Aluminum Inc , 445 US 97, 105 (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. 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 (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

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.

Additionally, certain regulations may influence a court's view on whether and how a particular vertical restraint affects competition. (See, for example, Asphalt Paving Sys Inc v Asphalt Maintenance Solutions , 2013 WL 1292200, at 5 (ED Pa 28 March 2013) dismissing exclusive dealing claims brought under the Clayton Act where municipal regulation, not contracts at issue, prevented competitors' use of equivalent alternative products.)

General exceptions

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.

TYPES OF AGREEMENT

Agreements

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)). Agreements may be informal and need not be in writing.

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, 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 company-related agreements

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 (ie, an agreement) between two or more separate economic actors. 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 not separate economic actors and 'are incapable of conspiring with each other for purposes of section 1 of the Sherman Act'. The Supreme Court has said that the key is not whether the defendant is legally a single entity or whether the parties '"seem" like one firm or multiple firms in a metaphysical sense', but rather 'whether there is a "contract, combination . . . or conspiracy" among separate economic actors pursuing separate economic interests such that the agreement "deprives the marketplace of economic centers of decisionmaking"' American Needle v NFL , 560 US 183, 195 (2010) (citations omitted).

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; and
- a wholly owned subsidiary and a partially owned subsidiary of the same parent corporation.

Today, courts generally hold the Copperweld exception to be inapplicable to partial holdings at or below 50 per cent.

Agent–principal agreements

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.

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 (Fourth Circuit 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

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. In 2017, the Department of Justice and Federal Trade Commission issued revised joint Antitrust Guidelines for the Licensing of Intellectual Property (www.justice.gov/atr/IPguidelines/download), which account for US intellectual property and antitrust legal developments since the guidance was last issued in 1995. The guidelines are guided by three general principles of the agencies' antitrust analysis in the context of intellectual property. First, the Federal Trade Commission and Department of Justice apply the same general antitrust principles to intellectual property as applies any other form of property. Second, the agencies do not presume that IPRs, particularly in the form of patents, create market power (see 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); see also Mediacom Commc'ns Corp v Sinclair Broad Grp , 460 F Supp 2d 1012, 1027–28 (SD Ia 2006) (applying Independent Ink to copyright)). And finally, the Federal Trade Commission and Department of Justice 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

Framework

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 anticompetitive harm. The reviewing authority, whether it be a court, the Federal Trade Commission or the Department of Justice, 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 anticompetitive 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 anticompetitive 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 anticompetitive effects, the rule-of-reason analysis may sometimes be shortened via a 'quick look' analysis. But in June 2018, the Supreme Court held that a plaintiff cannot rely solely on a showing of actual anticompetitive effects of a vertical restraint and instead must also show market power within a defined relevant market (Ohio v American Express Co , 138 S Ct 2274, 2285 n7 (2018): 'Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market').

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 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 anticompetitive 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.

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 anticompetitive 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 (Service & Training Inc v Data General Corp, 963 F2d 680, 683 (Fourth Circuit 1992); see also Cates v Crystal Clear Technologies, LLC, 874 F3d 530 (Sixth Circuit 2017) (finding that a pleading of a one-time set-up fee of US$1,500 followed by monthly assessments for each household in three separate neighbourhoods could have a 'substantial' impact on the relevant tied market) (Telerate Sys v Caro, 689 F Supp 221, 234 (SDNY 1988) (applying a de minimis requirement that a not-insubstantial absolute dollar amount of commerce must be affected)).

Tying arrangements may still be illegal under a rule-of-reason analysis even if the arrangement fails to meet the elements required for a per se claim (Collins Inkjet Corp v Eastman Kodak Co , 781 F3d 264 (Sixth Circuit 2015)). In Oracle America Inc v Terix Computer Company , 2014 WL 5847532, at 2 (ND Cal 7 November 2014), the district court specifically held that tying claims are subject to a rule-of-reason analysis. Also, in Schuykill Health System v Cardinal Health 200 LLC, 2014 WL 3746817, at 5, n8 (ED Pa 30 July 2014), the court denied a motion to dismiss the tying claim, allowing the claim to proceed under a rule-of-reason theory despite a lack of market power because plaintiff could prevail if they demonstrated an adverse effect on competition. But, as the Tenth Circuit recently observed, there is a circuit split as to whether a tying case advanced under a rule-of-reason theory requires a detailed showing of a defendant's market power (see Suture Express, Inc v Owens & Minor Distribution, Inc , 851 F3d 1029, 1039-40, n5 (Tenth Circuit 2017) (finding the defendants' declining profit margins showed a lack of market power)).

Under a rule-of-reason theory, plaintiffs must also show that a substantial amount of interstate commerce in the tied product is affected and there has been an antitrust injury (see Sutures Express at 851 F3d at 1045 (finding plaintiff failed to show antitrust injury where overall revenues in the market were increasing as defendants' margins were decreasing); In re Cox Enterprises, Inc , 871 F3d 1093, 1108–09 (Tenth Circuit 2017) (granting judgment as a matter of law for defendant because there can be no foreclosure of competition in the tied market where there are no competitors in the tied market)).

Market shares

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, is often central to the wide-ranging analysis of vertical restraints under the rule-of-reason. 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 court for further proceedings, the plaintiff argued that, under the rule-of-reason, Leegin's conduct caused anticompetitive harm in the market for 'women's accessories', among others (PSKS Inc v Leegin Creative Leather Prods Inc , 615 F3d 412, 418-19 (Fifth Circuit 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).

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 used by buyers in the market?

Although 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 (Fifth Circuit 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.

A recent case to address this issue is Cascades Computer Innovation LLC v RPX Corp (2013 WL 6247594 (ND Cal 3 December 2013)), allowing a patent troll's claims of a hub-and-spoke conspiracy and monopsonisation among Android device makers and a defensive patent aggregator, or 'anti-troll'. The device makers allegedly agreed not to license the patent troll's patents and refused to deal with the patent troll independently, and only would do so through the anti-troll (ibid, at 14 ('[Plaintiff] alleges a monopsony in the market to buy [its] patents, not a monopoly in the market to sell them')). Importantly, the relevant market alleged was patents owned by the patent troll.

The buyer's market share was also relevant to the analysis in another recent case. In In re Musical Instruments & Equip Antitrust Litig (798 F3d 1186 (Ninth Circuit 2015)), a retail buyer with large market share pressured its suppliers to adopt minimum advertised price policies. Plaintiffs who purchased from the retailer alleged a hub-and-spoke conspiracy among the suppliers. The court of appeals affirmed the district court's dismissal of the case and noted that it was in the independent interest of the suppliers to heed the demands of an important customer that exercised considerable market power over the suppliers.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

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

Assessment of restrictions

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.

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. To the contrary, the Supreme Court in Leegin noted that 'resale price maintenance . . . can increase inter-brand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer"' (551 US at 891 (quoting Continental TV, Inc v GTE Sylvania, Inc , 433 US 36 (1977)).

Relevant decisions

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 anticompetitive 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.

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 (Leegin Creative Leather Products Inc v PSKS Inc , 551 US 877, 890–92 (2007); see also P&M Distribs Inc v Prairie Farms Dairy Inc , 2013 WL 5509191, at 3 (CD Ill 4 October 2013), citing Leegin).

Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

It is likely that pricing relativity agreements would not be held to warrant per se treatment under this standard, and instead such a case would be analysed under the rule of reason because '[r]esort to per se rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output"' (Leegin Creative Leather Products Inc v PSKS Inc , 551 US 877, 886–87 (2007), citing Business Elecs Corp v Sharp Elecs Corp , 485 US 717, 723 (1988)).

Suppliers

Explain how a supplier 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.

It is likely that wholesale most-favoured nations (MFNs) would not be held to warrant per se treatment under the Leegin standard. In 2010, the US Department of Justice and the State of Michigan filed a lawsuit against the health insurer Blue Cross Blue Shield of Michigan (BCBSM), alleging that the wholesale MFNs contained in BCBSM's contracts with healthcare providers barred market entry, raised prices and discouraged discounting. This is the most recent challenge to the validity of wholesale MFNs, but the case was dismissed without a decision on the merits in March 2013 because a Michigan law was enacted that outlawed MFN provisions in contracts between insurers and hospitals in Michigan, thus mooting the litigation by prohibiting BCBSM from continuing to include the challenged MFNs in its contracts. A related class action was settled and the district court approved the settlement in March 2015 (Shane Group Inc v Blue Cross Blue Shield of Michigan , 2015 WL 1498888 (ED Mich 31 March 2015)).

Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

Genuine agency relationships are presumed to be lawful under the antitrust laws and a supplier's use of an agency arrangement with internet platforms may avoid antitrust issues. It is likely, however, that a case involving retail MFNs, even if contained within a presumptively lawful agency agreement, would be analysed under the rule of reason in a manner similar to the analysis of wholesale MFNs.

Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The Federal Trade Commission (FTC) 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 participation in the cooperative advertising programme and to advertise and charge its own prices.

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.

Although research has not uncovered any recent decisions in this area, it is likely that such a case would be analysed under the rule of reason in a manner similar to the analysis of wholesale MFNs.

Restrictions on territory

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 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.

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

Territorial restrictions pertaining to online sales are subject to the rule-of-reason analysis, regarding territorial restrictions generally.

Restrictions on customers

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 rule-of-reason analysis, regarding territorial restrictions.

Restrictions on use

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

A usage restriction will be subject to the rule-of-reason analysis, regarding territorial restrictions.

Restrictions on online sales

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

Restrictions of this nature are subject to the rule-of-reason analysis, regarding minimum advertised price policies.

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The Supreme Court's opinion in Apple v Pepper (139 S Ct 1514 (2019)) concluded that consumers who purchased iPhone Apps from Apple were direct purchasers with standing to sue Apple. Some commentators thought that the Supreme Court might use the decision to discuss how antitrust doctrines apply to technology platforms. The Court did not discuss this issue. However, the case remains pending in the Northern District of California and it would not be surprising for future decisions to discuss antitrust issues regarding platforms.

Selective distribution systems

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.

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?

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.

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 subject to the rule of reason analysis. 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.

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.

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.

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.

Other restrictions

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

Such a challenge is likely to be analysed under the rule of reason.

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.

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 5 of the Federal Trade Commission (FTC) Act, and section 3 of the Clayton Act, but section 3 challenges would not apply to conduct involving services or intangibles. This is because section 3 of the Clayton Act is limited to arrangements involving 'goods, wares, merchandise, machinery, supplies, or other commodities'. 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 their 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 anticompetitive effects of such foreclosure. See In re Pool Prods Dist Mkt Antitrust Litig , 940 F Supp 367, 390-91 (ED La 2013) (citing Leegin and Toys 'R' Us, Inc v FTC, 221 F3d 928 (Seventh Circuit 2000) to hold that, under the rule of reason, plaintiffs adequately alleged anticompetitive harm as result of a distributor's exclusive agreements with three manufacturers). See also Asphalt Paving Sys Inc v Asphalt Maintenance Solutions , 2013 WL 1292200, (ED Pa 28 March 2013). See also McWane Inc v FTC , 783 F3d 814 (Eleventh Circuit 2015) (finding unlawful exclusive dealing in violation of section 5 of the FTC Act); American Needle Inc v New Orleans Louisiana Saints , 2014 WL 1364022, at 1 (ND Ill 7 April 2014)) where, because of demonstrated pro-competitive effects, the court declined to apply quick-look treatment, instead applying a full rule-of-reason analysis to exclusive dealing claims.

In 2012, GN Netcom, a manufacturer of telephone headsets, sued rival manufacturer Plantronics for exclusive dealing. Plantronics had a 'Plantronics Only Distributor' programme that restricted participating distributors from purchasing headsets directly from competitors of Plantronics, such as GN Netcom, and prohibited the distributors from actively promoting rival brands. Plantronics moved for summary judgment, arguing that all of GN Netcom's claims should fail because any foreclosing effect of its Plantronics Only Distributor agreements was negated by GN's ability to access end users directly. On 29 September 2017 the court denied Plantronics' motion (GN Netcom, Inc v Plantronics, Inc , 2017 US Dist LEXIS 162135 (D Del 29 September 2017)). The court cautioned that for those attempting to shut down an exclusive dealing allegation, '[t]he mere existence of other avenues of distribution is not enough on its own. Instead, there must be an assessment of the alternative means' overall significance to the market, and such alternative means must be practical or feasible in the market as it exists and functions' (ibid at *8 (citations and quotations omitted)). The case went to trial in October 2017 and the jury, after a quick deliberation, cleared Plantronics on all counts. While the jury found that GN Netcom had proved a relevant market, it had not proved all the elements of any of its claims.

In 2015, the Department of Justice and several states challenged a form of exclusive dealing arrangement under section 1 of the Sherman Act; United States v American Express Co , 2015 WL 1966362 (EDNY 30 April 2015). The plaintiffs filed a complaint against American Express (Amex), MasterCard and Visa alleging that the defendants 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, Amex had a 24 per cent share of the general-purpose credit card market, and Amex, MasterCard and Visa together had approximately 94 per cent market share. MasterCard and Visa reached an out-of-court settlement with the plaintiffs, whereby they were enjoined from enforcing certain rules of this type. Amex declined to settle the claims against it, and defended them at a trial that concluded in October 2014. The district court issued a decision against Amex in February 2015 and issued an injunction in April 2015. The Court of Appeals for the Second Circuit reversed, noting that the plaintiffs did not properly define the market because it focused entirely on merchants in evaluating harm while ignoring the interests of cardholders (838 F3d 179 (Second Circuit 2016)). The state plaintiffs sought Supreme Court review and the Court upheld and entered judgment for Amex (aff'd 138 S Ct 2274 (2018)), holding that the Department of Justice did not properly define the market because it focused entirely on merchants in evaluating harm while ignoring the interests of cardholders.

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.

Explain how restricting the supplier's ability to supply to other buyers is assessed.

Such a case would be subject to the rule-of-reason analysis in a similar manner to exclusive dealing arrangements because, just as those arrangements may harm competition by foreclosing competitors of the supplier from marketing their products to a buyer, agreements restricting the supplier's ability to supply to other buyers may harm competition by foreclosing competitors of the buyer from seeking to acquire products from a supplier.

Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Such a case would be subject to the rule-of-reason analysis.

Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No.

NOTIFICATION

Notifying agreements

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

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 Federal Trade Commission (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 section 1.3(c)). In addition to issuing advisory opinions, the FTC promulgates industry guides often in conjunction with the Department of Justice (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 that 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.

ENFORCEMENT

Complaints procedure for private parties

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 Federal Trade Commission (FTC) may make an 'application for complaint'. Although 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 Department of Justice may lodge complaints by letter, telephone, over the internet or in person. The Department of Justice maintains an 'antitrust hotline' to accept telephone complaints. Sophisticated parties frequently retain counsel to lodge complaints with either agency.

Regulatory enforcement

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 Federal Trade Commission (FTC) and Department of Justice (DoJ) file few vertical restraint cases in any given year. Recent examples include DoJ's enforcement action against American Express (Amex) pertaining to exclusive dealing arrangements and FTC's challenge to Qualcomm's licensing practices and exclusive chip deal agreements.

The DoJ's case against Amex resulted in an injunction barring Amex from engaging in the complained-of behaviour (United States v American Express Co , 2015 WL 1966362 (EDNY 30 April 2015)), as well as an out-of-court settlement with the other two defendants, MasterCard and Visa. The Court of Appeals for the Second Circuit, however, reversed and the Supreme Court upheld and entered judgment for Amex (838 F3d 179 (Second Circuit 2016), aff'd 138 S Ct 2274 (2018)). The Supreme Court held that the DoJ did not properly define the market because it focused entirely on merchants in evaluating harm while ignoring the interests of cardholders.

More recently, the FTC filed a complaint against Qualcomm alleging the company unreasonably restrained trade by placing contractual conditions on its customers, smartphone manufacturers, that had the effect of excluding competitors and impeding innovation in baseband processors. Among other allegations, the FTC asserted that the company used its monopoly power in baseband processors to force smartphone manufacturers into paying elevated royalties on Qualcomm's FRAND-encumbered patents if the customer used a competitor's baseband processors in its devices and extracted exclusivity from Apple in exchange for reduced patent royalties (www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf). The district court sided with the FTC and enjoined the conduct, finding that Qualcomm had engaged in this behaviour to eliminate competition and that the conduct harmed rivals, customers and end-consumers (Federal Trade Commission v Qualcomm , 2019 WL 2206013 (ND Cal 3 September 2019).

Other government challenges to vertical restraints include DoJ's case against Blue Cross Blue Shield of Michigan pertaining to MFN provisions (and the related class case, Shane Group Inc v Blue Cross Blue Shield of Michigan , 2015 WL 1498888 (ED Mich 31 March 2015)), which resulted in an out-of-court settlement that was approved by the district court in March 2015 (Shane Group Inc v Blue Cross Blue Shield of Michigan , 2015 WL 1498888 (ED Mich 31 March 2015)), the DoJ's successful challenge to the exclusive dealing practices of a manufacturer of artificial teeth (see US v Dentsply Int'l Inc , 399 F3d 181 (Third Circuit 2005), cert denied, 546 US 1089 (2006)), and the FTC's resolution by settlement of 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. State attorneys general and private parties have been somewhat more active in challenging vertical restraints.

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, a contract containing a prohibited vertical restraint will be held enforceable 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' (see Kelly v Korsuga , 358 US 516, 518-520 (1959); see also Kaiser Steel Corp v Mullins , 455 US 72 (1982)).

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) (2012)). Section 5(l) of the FTC Act authorises the FTC to bring actions in federal district court for civil penalties of up to US$42,530 per violation, or in the case of a continuing violation, US$42,530 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 (15 USC, section 53(b)) 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 area of the vertical restraints. Pursuant to section 4 of the Sherman Act (15 USC, section 4) and section 15 of the Clayton Act (15 USC, section 25), 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 4A 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) (2012)).

Private parties may also enforce the federal antitrust laws and must bring cases in federal court.

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

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

The Federal Trade Commission (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 (2012)).

The most common investigative power utilised by the Department of Justice (DoJ) in conducting civil antitrust investigations is the civil investigative demand (CID). The Antitrust Civil Process Act (15 USC, sections 1311-1314 (2012)), 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 the DoJ nor FTC typically demand documents held abroad by a non-US entity. However, the 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

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 (15 USC, section 15) 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 (15 USC, section 26) 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 Federal Trade Commission 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)). In November 2018, the US Supreme Court heard argument in Apple v Pepper regarding who is a direct purchaser, with some authorities advocating a change to the direct purchaser/indirect purchaser paradigm. The Supreme Court did not follow the Antitrust Modernization Committee's suggestion to allow both direct and indirect purchaser suits for the same conduct. Instead, it found that a 'straightforward' application of the Illinois Brick rule dictated that consumers were direct purchasers from Apple (Apple v Pepper , 139 S Ct 1514 (2019)).

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

Other issues

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 4C of the Clayton Act (15 USC, section 15c) 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 anticompetitive 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)). California courts use Federal authority as an aid in interpreting California's antitrust statute, known as the Cartwright Act. The Cartwright Act, however, was patterned on sister state statutes at the turn of the 20th century, not the Sherman Act, and it is broader and deeper in some respects (In re Cipro Cases I & II , 61 Cal 4th 116, 142, 160–61 (2015)).

In the past decade, 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.

UPDATE AND TRENDS

Recent developments

What were the most significant two or three decisions or developments in this area in the last 12 months?

In November 2018, the Supreme Court heard arguments in Apple v Pepper regarding whether purchasers of an iPhone app were 'direct' or 'indirect' purchasers. If the Supreme Court held that these purchasers were direct purchasers of Apple, the iPhone app purchasers would have had standing to sue Apple for anticompetitive overcharges. They would not have had standing to sue, however, if the court held that the app purchasers were indirect purchasers because they purchased from the app developers. This conclusion would have barred them under the Court's holding in Illinois Brick Company v Illinois , 431 US 720 (1977) that allows only the direct purchaser in a distribution chain to recover from the antitrust violator.

In May 2019, the Supreme Court issued its opinion in Apple v Pepper (139 S Ct 1514 (2019)). The Court applied the Illinois Brick rule and concluded that iPhone owners qualified as direct purchasers because they purchased apps directly from Apple. The opinion did not purport to alter Illinois Brick in any way. Justice Gorsuch, joined by Chief Justice Roberts, Justice Thomas and Justice Alito, dissented. The dissent warned that the Court let a 'pass-on case proceed' and faulted the Court for overruling Illinois Brick without saying so.

More recently, the Federal Trade Commission (FTC) filed a complaint against Qualcomm alleging the company unreasonably restrained trade by placing contractual conditions on its customers, smartphone manufacturers, that had the effect of excluding competitors and impeding innovation in baseband processors. Among other allegations, the FTC asserted that the company used its monopoly power in baseband processors to force smartphone manufacturers into paying elevated royalties on Qualcomm's FRAND-encumbered patents if the customer used a competitor's baseband processors in its devices and extracted exclusivity from Apple in exchange for reduced patent royalties (www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf).

In September 2019, the district court sided with the FTC and enjoined the conduct, finding that Qualcomm had engaged in this behaviour to eliminate competition and that the conduct harmed rivals, customers and end-consumers (*FTC v Qualcomm* , 2019 WL 2206013 (ND Cal 3 September 2019)).