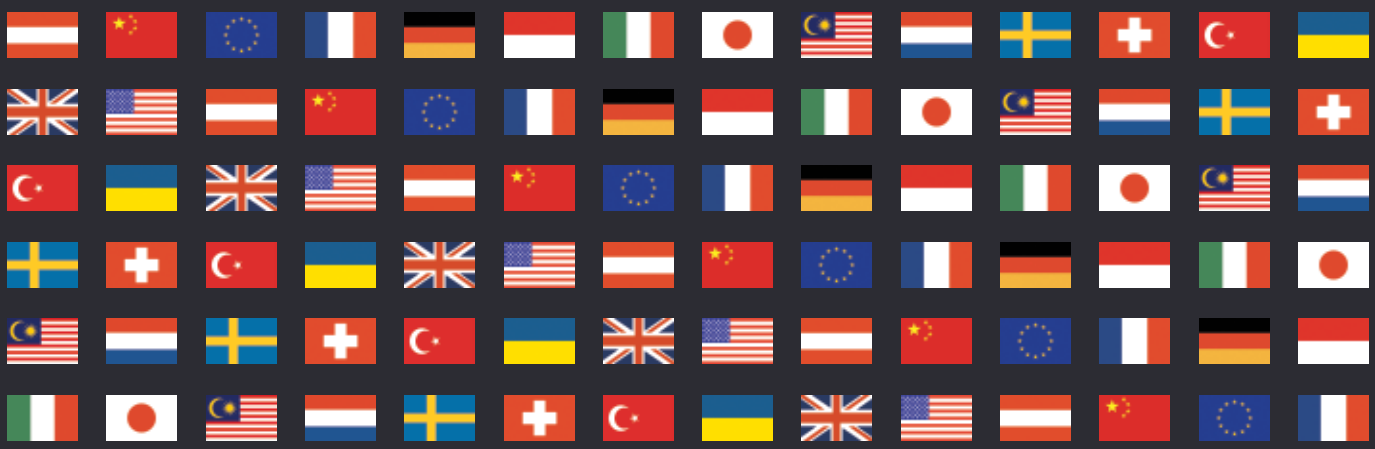
Vertical Agreements 2021

Contributing editor
Patrick J Harrison



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Vertical Agreements*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick J Harrison of Sidley Austin LLP, for his continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

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United States

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LEGAL FRAMEWORK

Antitrust law

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

Several federal statutes bear 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). Section 1 serves as a basis for challenges to these vertical restraints as resale price maintenance (RPM), 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). 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).

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)). 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.

Numerous states have also enacted state antitrust laws that prohibit similar conduct as the federal antitrust laws do. Nevertheless, unless otherwise specified, this chapter deals solely with 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 but have developed through judicial decision-making, commonly referred to as the 'common law' of antitrust. Numerous types of vertical restraints have been subject to review under the antitrust laws, the most common of which include:

- RPM – agreements between persons at different levels of the distribution structure on the price at which a customer will resell the goods or services supplied. RPM can take the form of setting a specific price, but commonly it involves either setting a price floor below which (minimum RPM) or a price ceiling above which (maximum RPM) sales cannot occur under the terms of the agreement;
- customer and territorial restraints – these involve an upstream supplier or manufacturer of a product prohibiting a distributor from selling outside an assigned territory or particular category of customers;
- the channel of distribution restraints – these function similarly to customer or territorial restraints in that an upstream supplier of a product prohibits a distributor from selling outside an approved channel of distribution. Commonly, these 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 some 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 the specific good or service only from that supplier. These arrangements may foreclose competitors of the supplier from marketing their products to that buyer for the term of 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. Under 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. These 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. Although some reform efforts seek to broaden the relevant considerations, the goal of US antitrust law remains to maximise consumer welfare and economic efficiency.

Responsible authorities

4 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 under which matters are generally 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 under 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 sue 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

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 (*Hartford Fire Ins Co v California*, 509 US 764, 796 (1993)). 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). 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.

For example, 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 (and the Ministry of Commerce of the People's Republic of China supported) dismissal of a cartel action on the ground that Chinese law required them to fix prices. On appeal, the Supreme Court vacated the Second Circuit's decision supporting dismissal, 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

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

The US 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. For example, the US Postal Service is not subject to 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, even though it maintains certain public characteristics (see *McCarthy v Middle Tennessee Electric Membership Corp*, 466 F3d 399, 413–14 (Sixth Circuit 2006)).

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

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, securities, communications, energy and healthcare, there may be industry-specific laws enforced by the relevant regulatory agency that regulate vertical restraints or vest an agency with the 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 general exceptions.

TYPES OF AGREEMENT

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

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 is 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 these 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

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 (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 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 where the ownership interest of one entity in the other is at or below 50 per cent.

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 provided 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.

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 assess 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 also examine:

- 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 US Supreme Court held that General Electric had established a bona fide principal-agent relationship because General Electric:

- 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.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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, which 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 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 had anticompetitive effects, the rule of reason analysis may sometimes be shortened via a 'quick-look' analysis. 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 properly defined relevant market (*Ohio v American Express Co*, 138 S Ct 2274, 2285 n7 (2018).

Minimum resale price maintenance (RPM) was treated as per se illegal under federal antitrust law until the US Supreme Court decision in *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (2007), in which the US Supreme held that these restraints will be analysed under the rule of reason. 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 RPM, on the other hand, can often have pro-competitive benefits that outweigh its anticompetitive harm. The court explained that RPM agreements are not per se legal, and suggested that these agreements might violate federal antitrust laws where either a manufacturer or a retailer that is a 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 (*Eastman Kodak Co. v Image Technical Services*, 504 US 451, 461–62 (1992)).

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 (see *Jefferson Parish Hospital District No. 2 v Hyde, 466 US 2, 29-31 (1984)*, but it is not well defined and generally still requires a plaintiff to show the defendant has market power in the tying product.

Market shares

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?

Supplier market shares are often a key consideration in assessing whether a defendant has market power, a key element of any rule of reason analysis and a prerequisite for a per se illegal tie-in. 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, with higher market shares indicating possible market power – an analysis that, by its very nature, requires consideration of the market positions of competitors.

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 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'.

For example, 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

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 block exemptions or safe harbour provisions relevant to the analysis of vertical restraints.

TYPES OF RESTRAINT

Assessment of restrictions

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

Resale price maintenance (RPM) agreements, whether setting minimum or maximum prices, are evaluated under a rule of reason analysis under federal law, but certain states may treat resale price restrictions as per se illegal.

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 RPM in these circumstances.

Relevant decisions

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 recent decisions involving the interrelation of RPM and other forms of restraint. In *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877, 890–92 (2007), however, the court identified several instances where RPM may warrant heightened scrutiny to ferret out potentially anticompetitive practices, including where multiple competing manufacturers in a single market adopt price restraints. Likewise, the court explained that if an RPM 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 Creative Leather Products Inc v PSKS Inc*, 551 US 877, 890–92 (2007), the Supreme Court described several potentially pro-competitive benefits of RPM, 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 | 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.

Pricing relativity agreements likely 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.

Suppliers

24 | 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.

Wholesale most-favoured nations (MFNs) likely would not be held to warrant per se condemnation. In 2010, the 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 these MFN provisions in healthcare contracts in Michigan, thus mooting the litigation.

25 | 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 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 like the analysis of wholesale MFNs.

26 | 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 these MAP policies should permit a reseller the freedom to decline participation in the cooperative advertising programme and to advertise and charge its own prices.

27 | 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, such a case would likely be analysed under the rule of reason like the analysis of wholesale MFNs.

Restrictions on territory

28 | 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 limit 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. 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 a 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.

29 | 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?

Restrictions on online sales are subject to the same rule of reason analysis applicable to territorial restrictions generally.

Restrictions on customers

30 | 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 applicable to territorial restrictions.

Restrictions on use

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

Usage restrictions are subject to the same rule of reason analysis applicable to territorial restrictions, although courts may be more sceptical of the procompetitive benefits of restrictions on a bona fide purchaser's freedom to use a product as it wishes.

Restrictions on online sales

32 | 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 applicable to MAP policies.

33 | 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

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

As a general matter, sellers have broad discretion to select the distributors through which they will distribute their products. *Novell, Inc v Microsoft Corp*, 731 F3d 1064 (Tenth Cir 2013). The specific terms establishing selective distribution systems are analysed under the rule of reason like the analysis of territorial restraints.

35 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?

Selective distribution systems are likely to be more easily justified under the rule of reason where retailers are required to provide significant point-of-sale services.

36 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 such a restriction to be upheld under the rule of reason, the pro-competitive benefits of the restraint must offset any harm to competition.

37 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.

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

Under 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.

39 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, but the cumulative effects of these arrangements would be considered under the rule of reason.

Other restrictions

40 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.

41 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.

42 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 may harm competition by foreclosing competitors of the supplier from marketing their products to that buyer. Exclusive dealing arrangements are analysed under the rule of reason.

In conducting their analysis, the courts and agencies have considered several factors, the most important being, perhaps, the percentage of commerce foreclosed within a properly defined market, and the ultimate anticompetitive effects of that foreclosure. See *McWane Inc v FTC*, 783 F3d 814 (Eleventh Circuit 2015).

43 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.

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

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

45 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.

46 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

47 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

48 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 may request advice from the Federal Trade Commission (FTC) concerning their proposed course of action (see 16 CFR, section 1.1 to 1.4). Parties may seek advisory opinions for any proposed activity that is not hypothetical or the subject of a pending FTC investigation or proceeding and that does not require extensive investigation (see 16 CFR at section 1.3). Formal advisory opinions are issued 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 respond to a request when a commission 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 concerning 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 state its present enforcement intention concerning that proposed conduct. These statements are known as business review letters. A request for a business review letter must be submitted in writing to the head of 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). The DOJ will decline to respond when the request pertains to ongoing conduct.

ENFORCEMENT

Complaints procedure for private parties

49 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 complain to 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 appraise the FTC of the general nature of its grievance (see 16 CFR, section 2.2(b)). Parties wishing to register complaints with the Department of Justice (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.

Regulatory enforcement

50 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 file few vertical restraint cases in any given year. Recent examples include the DOJ's enforcement action against American Express (Amex) on exclusive dealing arrangements and FTC's challenge to Qualcomm's licensing practices and exclusive chip deal agreements. In both cases, the government lost on appeal. The case against Amex was concluded after the Supreme Court held that the government failed to show Amex had market power in the market as a whole. In the FTC's case against Qualcomm, the Ninth Circuit held that Qualcomm's conduct (ie, refusals to license its standard-essential patents to rivals, refusals to supply original equipment manufacturers unless they executed a licence, and making exclusivity payments to Apple) was not anticompetitive.

State attorneys general and private parties have been somewhat more active in challenging vertical restraints.

51 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 in other respects where the other elements constitute 'an intelligible economic transaction in itself', apart from any collateral agreement in restraint of trade, and enforcing the defendant's other 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)).

52 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 an enforcement proceeding if the proceeding is in the public interest (see 16 CFR, section 2.31). If the FTC believes a violation has occurred, 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 Federal Trade Commission Act (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 that conduct (15 USC, section 45(b)). Section 5(l) of the FTC Act authorises the FTC to bring actions in federal district court for civil penalties of up to US$43,280 per violation, or in the case of a continuing violation, US$43,280 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 a permanent injunction under section 13(b) of the FTC Act but was recently held by one court not to have the power to obtain disgorgement of profits. *FTC v AbbVie Inc*, 976 F3d 327 (Third Circuit 2020).

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. Under 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 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'. Under 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 outlined in the Tunney Act (15 USC, section 16(b)–(h)).

State attorneys general and 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 is necessary or where the law might be clarified, as opposed to pursuing cases seeking monetary remedies.

Investigative powers of the authority

53 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 these 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 and 16 CFR, section 2.11). It also gives the Commission power to subpoena the attendance and testimony of witnesses and the production of documentary evidence.

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), 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 the 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 these documents from any non-US entity if the court in which an action is brought possesses personal jurisdiction over the non-US entity.

Private enforcement

54 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 an 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)). Indirect purchasers may bring claims under certain state antitrust laws. 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

55 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 to bring a parens patriae action, defined as an action by which the state has the 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 antitrust matters, state attorneys general often coordinate with other states. Additionally, under section 16 of the Clayton Act, states may bring actions for injunctive relief in their common law capacity as a parens patriae to forestall injury to the state's economy.

Many states have their own 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 (1988)). 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 several coordinated investigations involving allegations of resale price maintenance (RPM), 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. In *California v Bioelements* (Cal Sup Ct 2010), for example, California filed a complaint against a cosmetics manufacturer asserting that the manufacturer violated California's antitrust laws by engaging in RPM. 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), New York, Illinois and Michigan filed a complaint asserting that a furniture manufacturer's RPM 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

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

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.

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, but in August 2020 the Ninth Circuit reversed, holding that Qualcomm's conduct (ie, refusals to license its standard-essential patents to rivals, refusals to supply original equipment manufacturers unless they executed a licence, and making exclusivity payments to Apple) was not anticompetitive.

Anticipated developments

57 Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

While US antitrust enforcement and policy concerning vertical restraints has seen little change over the past three decades, state attorneys general have become more active and will continue to do so, particularly if they do not perceive increased enforcement at the federal level. If Democrats win control of the Senate, they will likely undertake a significant revamp of antitrust law and enforcement, which could include a lower burden for the government to prove antitrust harm.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In the United States, the Department of Justice and the Federal Trade Commission issued joint antitrust guidance for covid-19-related collaborations, listing procompetitive activities that would likely be consistent with US antitrust laws, such as R&D efforts, sharing technical know-how and clinical best practices, most joint purchasing arrangements and certain government petitioning. The guidance also offers an expedited antitrust review for businesses seeking to collaborate on initiatives aimed at addressing the covid-19 pandemic. The expedited review commits the relevant agency to guide within seven days of receipt of a request. Any request to either agency must describe the nature and rationale of the proposal, how it relates to the covid-19 pandemic and any related documents that the parties can reasonably provide. The description must include a temporal and geographic scope of the arrangement and identify the parties to the proposed collaboration, the intended customers and other significant market participants. The agency's issued response to each proposal will remain in effect for one year from the date of its issuance but allows for parties to make a subsequent request under the same procedures if further time is necessary.

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