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Practical cross-border insights into vertical agreements and dominant firms

Vertical Agreements and Dominant Firms 2022

Sixth Edition

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1 General

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

Two separate federal agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct: the Antitrust Division of the Department of Justice (DOJ); and the Federal Trade Commission (FTC). State Attorneys General and private plaintiffs may also bring actions under the federal antitrust laws or state equivalents. Although State Attorneys General have been active in enforcing state and federal antitrust laws against vertical agreements, the variances and nuances of individual state laws are outside the scope of this chapter. The following responses will focus on federal antitrust laws and enforcers.

The DOJ's Antitrust Division is led by an Assistant Attorney General appointed by the President and confirmed by the Senate. Division staff are assigned to various civil sections located in Washington, D.C.: Defence, Industrials, and Aerospace; Financial Services, Fintech, and Banking; Healthcare and Consumer Products; Media, Entertainment, and Communications; Technology and Digital Platforms; Transportation, Energy, and Agriculture; and a Civil Conduct Task Force. There are also several criminal sections, an appellate section, a policy section, and an economic analysis group. Further, the Antitrust Division has three regional offices focusing on criminal enforcement in the following cities: Chicago; New York; and San Francisco.

The FTC is led by a five-member commission, with each commissioner appointed by the President and confirmed by the Senate to a staggered seven-year term. No more than three commissioners may be from the same political party. The President also designates the Chairman of the Commission. The FTC's Bureau of Competition has several enforcement divisions located in Washington, D.C.: Mergers I, II, III, and IV; Health Care; Technology Enforcement; and Anticompetitive Practices. The FTC also has consumer protection and economics bureaus, and regional field offices in the following cities: Atlanta; Chicago; Cleveland; Dallas; Los Angeles; New York; San Francisco; and Seattle.

1.2 What investigative powers do the responsible competition authorities have?

The DOJ and FTC both have the power to issue subpoenas and civil investigative demands (CIDs) for documents, data, and testimony prior to filing a complaint. The agencies may seek information from both targets and third parties. In addition to the use of compulsory process, the agencies frequently request information on a voluntary basis.

Within the DOJ, a CID must be approved by the Assistant Attorney General in charge of the Antitrust Division. At the FTC, the Commission must first vote to approve the compulsory process to investigate a matter. Individual CIDs and subpoenas must be signed by a commissioner assigned to review such requests. This duty rotates among the commissioners.

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

The antitrust agencies frequently open an investigation in response to a complaint by a party claiming to be injured by the conduct at issue or another interested party. The agencies may also initiate investigations based on information obtained from press reports, foreign antitrust authorities, Congressional oversight committees, or other information.

The agencies often begin an investigation with a voluntary request for information; however, they may also use subpoenas and CIDs in order to obtain information and conduct investigational hearings or depositions.

If the agency staff believe there is sufficient evidence to prove a violation after reviewing the investigation materials, the staff issue a recommendation to the decision-maker at the agency. At the FTC, final decisions are taken by the five commissioners, who vote on whether to bring an enforcement action. At the DOJ, the Assistant Attorney General in charge of the Antitrust Division generally makes final enforcement decisions.

Settlement is a common outcome of federal investigations; however, the agencies also have the power to prosecute claims through litigation. Both agencies can file an enforcement action in the federal district court; however, the FTC also has the option of filing for administrative adjudication before an administrative law judge (ALJ).

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

U.S. antitrust enforcement authorities can seek equitable relief in the form of injunctions against anticompetitive conduct. In addition, the DOJ may seek restitution for parties injured, or disgorgement of ill-gotten gains. In 2021, the Supreme Court ruled that the FTC does not have the authority to seek equitable monetary relief such as disgorgement or restitution under Section 13(b) of the FTC Act. Congress is currently considering proposed legislation to grant FTC statutory authority to pursue monetary relief.

Under the Sherman Act, the DOJ may also recover treble damages for injuries suffered by the U.S. as a consumer. Both agencies may seek fines or civil penalties for violations of existing consent decrees or orders. The DOJ has the power to prosecute criminal violations under the antitrust laws; vertical violations are not considered pernicious enough to warrant criminal treatment. The remedies available to State Attorneys General are similar, although in some cases may exceed those available to federal authorities. Assistant Attorney General for Antitrust Jonathan Kanter has recently stated that the DOJ is empowered to file criminal charges for monopolisation under Section 2 of the Sherman Act. Monopolisation charges under Section 2 could extend to vertical agreements; however, the Antitrust Division has historically been reluctant to bring such criminal cases due to the inherent difficulties of proving the elements of monopolisation "beyond a reasonable doubt" as required by the U.S. Constitution.

1.5 How are those remedies determined and/or calculated?

Injunctive, behavioural, or structural relief is devised in order to directly address the alleged harm. For example, an agreement found to be anticompetitive may be invalidated. If a firm is found to be abusing monopoly power, it may be forced to divest assets or divide its business.

Monetary damages are determined after calculating an estimate of the harm caused by the agreement or conduct. Various measures may be used, such as overpayment by consumers, ill-gotten profits by the defendant, etc. Under the Sherman Act, these amounts can then be trebled.

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

At any point during an investigation or enforcement action, the company under investigation can propose a settlement with the agency staff. The staff will evaluate whether the settlement addresses the competitive concerns, and the final decision is made either by the five commissioners at the FTC or the Assistant Attorney General at the DOJ, depending on which agency is conducting the investigation/instituting the enforcement action. Settlements with the DOJ are often through the issuance of a consent decree filed in federal court, whereas settlements with the FTC are referred to as consent orders issued by the FTC. DOJ consent decrees must be reviewed and approved by a federal court and are subject to a 60-day comment period required by the Tunney Act. The FTC is not required to seek approval from a federal court; however, a proposed order must receive preliminary approval by the Commission and then be published for a public comment period of at least 30 days before the Commission grants final approval.

Settlements vary based on the alleged conduct; even so, vertical settlements can include: a cease-and-desist order; fencing-in provisions to prevent a recurrence of the conduct; monitoring or reporting requirements; and, potentially, divestments. The agencies view a well-drafted settlement as an avenue to maintain or restore competition without using the time and resources required for litigation.

1.7 At a high level, how often are cases settled by voluntary resolution compared with adversarial litigation?

Both the FTC and the DOJ have the power to go to court to block a deal if they conclude that a merger may have the tendency to substantially lessen competition. Because such litigation is costly and time-consuming for the merging parties, the agencies have enormous leverage to negotiate a voluntary fix of any problematic overlap areas, e.g., via divestiture or by consent decree/order (however, the current DOJ has a strong preference for structural over behavioural remedies). Therefore, cases are far more likely to settle via voluntary resolution than via adversarial litigation. For example, the recent AT&T/Time Warner case was the first vertical merger case litigated to decision since 1977. The current DOJ has made public statements about the potential shortfalls of certain remedies and partial divestitures, suggesting that a more appropriate action would be to sue to enjoin anticompetitive transactions, particularly for complex divestitures or in dynamic industries.

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

Yes; in the U.S., the competition agency must prove a violation of law before a federal judge or an ALJ (in the case of the FTC) in order to obtain any relief. The DOJ may file suit in any federal district court of appropriate jurisdiction. The FTC may sue in either a federal district court or before an ALJ. Notably, administrative suits brought by the FTC are limited to only injunctive relief.

In order to file a complaint, staff in the Antitrust Division must get approval from the Assistant Attorney General. FTC staff submit recommendations to the Commission, which then formally votes on whether to file a complaint. When an agency brings civil claims in the federal district court, it must prove its case by a preponderance of the evidence. For FTC administrative trials, the agency must prove that their claims are supported by substantial evidence. For DOJ criminal matters, they are brought in the federal district court, and the DOJ must prove its case beyond a reasonable doubt.

1.9 What is the appeals process?

The appropriate appeals process depends on where the enforcement action was filed. Actions filed in the federal district court are appealable to the appropriate court of appeals under the federal rules. The district court's findings of fact are reviewed under a "clearly erroneous" standard, and conclusions of law are reviewed *de novo*.

In the case of an FTC action in front of an ALJ, the decision is appealable to the full Commission. In this role, the commissioners act as judges and conduct a *de novo* review of the facts and the law. A company can appeal the Commission's final decision to a federal court of appeals within 60 days of the issuance of the order. The standard of review for the Commission's decision is more deferential than that applied to district court judgments. The Commission's facts are reviewed under the lenient "substantial evidence" standard, whereby findings are conclusive if supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951). The Commission's conclusions of law are generally reviewed *de novo* but are given deference to the extent the agency is interpreting a statute the agency administers, such as the FTC Act.

A case challenging the regulatory and enforcement structure of the administrative court process at the FTC was granted *certiorari* and is currently pending before the Supreme Court (*Axon Enterprise, Inc. v. Federal Trade Commission*). The Court has limited its review to the question of whether federal district courts have jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence.

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

Private rights of action for violations of the federal antitrust laws are available under Section 4 of the Clayton Act, which states that any person injured by reason of a violation of the antitrust laws may file a lawsuit in a federal court. The Clayton Act enables successful private plaintiffs to recover treble damages, including costs and attorney's fees. Under Section 16 of the Clayton Act, a private plaintiff may also seek injunctive relief for threatened loss or damage caused by violation of the antitrust laws. Plaintiffs must demonstrate antitrust injury, meaning injury of the type that the antitrust laws were intended to prevent. Under the *Illinois Brick* case, only direct purchasers have standing to recover antitrust damages in a federal court; however, indirect purchasers may be able to seek equitable relief. State Attorneys General enforce the state antitrust laws, but they may also bring what are essentially private actions under the federal antitrust laws to seek injunctive relief or money damages. Private parties often bring claims under the state antitrust laws in addition to the federal statutes. State standing law often differs from the federal antitrust law, most notably in that a majority of states expressly permit indirect purchasers to recover damages.

1.11 Describe any immunities, exemptions, or safe harbours that apply.

There are very few immunities, exemptions, or safe harbours that apply; however, courts generally uphold vertical agreements that foreclose less than 20% of the market. There are several limited exemptions to antitrust law that could be relevant to vertical agreements or dominant firms such as the State Action Doctrine (exempting certain actions that are the intentional or foreseeable result of state policy), the Noerr-Pennington immunity (exempting collaboration in good-faith efforts to petition government entities or influence legislative and administrative processes), the filed-rate doctrine (exempting rates that are filed and approved by a government regulator from civil antitrust attack), and the statutory and non-statutory labour exemptions (exempting the functions of labour unions and collective bargaining agreements from federal antitrust laws).

In addition, there are few industry-specific immunities and exceptions to the antitrust laws. One of the most well known is the baseball exemption established 100 years ago in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*. Legislation has been proposed to eliminate this exemption, and the DOJ issued a Statement of Interest in a civil case, arguing that the exemptions should be read narrowly and apply only to "conduct that is central to providing professional baseball games to the public". There are other limited exemptions for certain activities in regulated industries such as agriculture, financial institutions, and others, but these are narrow exemptions and highly fact specific.

The McCarran-Ferguson Act, which explicitly conferred to the states the ability to regulate the business of insurance, was amended in January 2021 to clarify that the business of insurance would not be exempted from federal antitrust law.

1.12 Does enforcement vary between industries or businesses?

As noted above, the DOJ and FTC share enforcement of the antitrust laws in the U.S. In order to coordinate their overlapping jurisdiction, the two agencies have agreed upon a "clearance" process, by which each agency seeks clearance from the other prior to opening a new investigation. In addition, in order to facilitate the development of industry expertise and speed up the clearance process, the agencies have informally agreed upon a division of industries.

Occasionally, a merger or conduct investigation arises in which it is not immediately apparent which agency is best suited to handle the matter. In these cases, the back-and-forth between the agencies for clearance can drag on.

While it is uncommon for the FTC and DOJ to have significant disagreements over enforcement policy, variations in emphasis, priorities, and remedies sought may arise, especially as political administrations change. The enforcement priorities of the DOJ may change more rapidly since it is headed by a single presidential appointee that can change immediately with each election.

Nonetheless, the two agencies frequently collaborate on antitrust policy guidance and agreements with foreign jurisdictions.

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

The regulatory environment informs antitrust enforcement in an industry in two ways. First, the incentives, restrictions, and requirements imposed by regulations play an important role in how the agencies understand the competitive dynamics of the market. Whether or not a given course of conduct or agreement is exclusionary or anticompetitive will in large part depend on whether regulations require or amplify the effects of the act in question. For example, in the pharmaceutical industry, legal challenges to "reverse payment" agreements are heavily informed by the regulatory framework put in place by the Hatch-Waxman Act.

At the same time, there is a generally recognised principle that competition policy and regulation should be complementary. Where regulations attempt to govern the competitive dynamics of an industry, antitrust enforcers and courts will be more reticent to add competition oversight on top of this. See, for example, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

The federal antitrust enforcers will also consider possible statutory or implied antitrust exemptions under certain regulatory schemes. Although enforcers disfavour such exemptions, certain limited exemptions are applicable (see question 1.11).

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

Technically, the courts' interpretation of the antitrust statutes sets the metes and bounds of the enforcement powers of the antitrust enforcers. The political environment can affect the enforcers' enforcement discretion and their interpretation of the law. In the 1980s, for example, the antitrust agencies relying on the "Chicago School" used their discretion to limit – some would say to cease – enforcement of the federal antitrust laws against vertical practices and monopolisation. The stated policy of the Biden Administration is to reverse those changes by persuading the courts that the federal antitrust laws (and, where politically feasible, federal legislation) protect competition broadly understood (as opposed to just protecting "consumer welfare").

Antitrust enforcement policy was a topic of debate during the 2020 U.S. presidential election cycle. Several candidates that sought the Democratic Party's presidential nomination made competition policy a substantial part of their platform, with a particular focus on "big tech" and overall levels of concentration. President Joe Biden has signalled an interest in more stringent antitrust enforcement, for example, by choosing Lina Khan to be FTC Chair and Jonathan Kanter as Assistant Attorney General for Antitrust.

On March 25, 2021, then-acting FTC Chairwoman Rebecca Kelly Slaughter announced the creation of a new rulemaking group within the FTC's Office of the General Counsel to enable the FTC to strengthen existing rules and undertake new rulemakings to prohibit unfair or deceptive practices and unfair methods of competition. Rulemaking is poised to be a critical part of the FTC's toolbox to protect consumers from harm and to promote robust competition.

In Congress, the House Judiciary Committee is currently leading a bipartisan investigation into big tech companies (see question 3.16), recently releasing a 449-page report accusing big tech platforms of abusing monopoly power, and called for large-scale changes including restructurings. In the Senate, two antitrust bills have been introduced, one Republican banning both horizontal and vertical acquisitions by companies with a market cap of more than $100 billion, and one Democrat lowering the standard for the FTC and DOJ to bring a case to block a merger and switching the burden of proof in certain merger cases. Both the House and Senate Judiciary Committees have also voted to advance certain antitrust bills focused on big tech and competition online. Such bills are not uncommon and have generally stalled; however, bipartisan support of certain recent bills could suggest legislative action regarding competition online. Democrat control of Congress, the Senate, and the White House also signals the possibility of substantive legislative reforms with regard to antitrust.

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

In September 2021, the FTC under Chair Khan voted to withdraw its approval of the 2020 Non-Horizontal Merger Guidelines. Subsequently, in January 2022, the FTC and the DOJ jointly initiated a public inquiry process to inform potential revisions to the Horizontal Merger Guidelines as well as the Non-Horizontal Merger Guidelines.

The FTC has been active in *ex post* analysis to study whether the agency's enforcement standards have been too harsh or too permissive. In September 2020, the FTC's Bureau of Economics announced a revamped Merger Retrospective Program that will expand and formalise the years of research efforts analysing the effects of consummated mergers. The Retrospective Analysis aims to determine, after the fact, whether a merger has affected competition in one or more markets, helping to shed light on whether the agency's standard for bringing an action has been too permissive. In October 2019, the FTC commenced a retrospective workshop on Certificates of Public Advantage in healthcare markets. In addition, in July 2019, the FTC concluded a series of public hearings on "Competition and Consumer Protection in the 21st Century", examining whether economic changes might require adjustments to competition law.

Both agencies also continue to focus on investigating "big tech" (see question 3.16). In February 2020, the FTC launched a Technology Task Force "dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted" (https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology).

The FTC has also continued to put significant resources into antitrust enforcement in the healthcare industry. Most recently, the Commission negotiated a $50 million fine to settle charges that Reckitt Benckiser Group PLC anticompetitively thwarted lower-priced generic competition in the prescription drug space (https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc). In 2019, the Commission found that Impax had entered into an anticompetitive reverse payment settlement agreement to delay consumer access to a generic version of Opana ER (https://www.ftc.gov/news-events/press-releases/2019/03/ftc-concludes-impax-entered-illegal-pay-delay-agreement).

On March 30, 2021, the FTC unanimously voted to file a complaint to block Illumina's proposed acquisition of Grail, a company focused on multi-cancer early detection. The alleged harm, entirely vertical in nature, alleges that Illumina would have the incentive and ability to disadvantage Grail's competitors by foreclosing access to Illumina's must-have next-generation gene-sequencing technology. This case marks the first time in several decades that the FTC has challenged a vertical merger and is the first case brought under the then-operative Guidelines. Subsequently, on February 24, 2022, the DOJ sued to block UnitedHealth Group's proposed acquisition of Change Healthcare primarily under a vertical theory of harm that the transaction would give UnitedHealth a significant amount of its rival health insurers' competitively sensitive information through Change Healthcare's electronic data interchange clearinghouse software.

Big tech platforms (e.g., Google, Facebook (Meta), Amazon) and their vertical acquisitions have been subject to increasing antitrust scrutiny in the U.S., in part due to concerns about alleged market concentration and monopolisation. The enforcement actions brought against these entities are discussed further in response to question 3.16.

1.16 Describe any notable recent legal developments in respect of, e.g., vertical agreements, dominant firms and/or vertical merger analysis.

In late 2017, the DOJ filed suit to enjoin the merger of AT&T and Time Warner. The district court denied the DOJ's request for a permanent injunction and the denial was upheld on appeal in early 2019. *U.S. v. AT&T, Inc., et al.*, No. 18-cv-5214 (D.C. Cir. Feb. 26, 2019). The DOJ's theory of harm was vertical in nature, alleging that "costs for Turner Broadcasting System's content would increase after the merger, principally through threats of long term 'blackouts' during affiliate negotiations". *Id.* at 4. The unanimous court of appeals decision pointed to the defendants' proposed arbitration agreement, designed to protect carriers in the event of a contract or pricing dispute, and the entry of innovative competitors such as Netflix in affirming Judge Leon's decision that the DOJ had failed to prove that merger would harm competition. The DOJ announced that it would not appeal the District of Columbia Circuit's (D.C. Circuit) decision. Despite not succeeding in its attempt to enjoin the AT&T/Time Warner transaction, the DOJ, along with the FTC, have been increasingly active in analysing vertical effects of proposed transactions. The FTC has recently withdrawn its support of the Non-Horizontal Merger Guidelines as being insufficient in addressing potential harms from vertical transactions, and the FTC and the DOJ have jointly started a process to consider revisions to the Horizontal and Non-Horizontal Merger Guidelines (see questions 1.15 and 2.15).

Big tech platforms (e.g., Google, Facebook (Meta), Amazon) and their vertical acquisitions have been subject to increasing antitrust scrutiny in the U.S., in part due to concerns about alleged market concentration and monopolisation. The enforcement actions brought against these entities are discussed further in response to question 3.16.

2 Vertical Agreements

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

Generally, vertical agreements raise fewer antitrust concerns than horizontal agreements. The federal antitrust agencies have acknowledged that vertical agreements have the potential to enhance competition; however, both the FTC and the DOJ have recently indicated an interest in pursuing potential vertical theories of harm. Absent significant market power, a strong likelihood of anticompetitive effects, or strong intent of anticompetitive conduct, the agencies are unlikely to challenge a vertical agreement. This is in stark contrast to horizontal agreements, where a finding of an agreement itself may be unlawful *per se*. State antitrust enforcers or private plaintiffs may take a more aggressive posture in certain circumstances.

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

Evidence of an express agreement is helpful, although not necessary in analysing whether an agreement exists. The Supreme Court established the modern formula for evaluating whether there is an agreement in *Monsanto Co. v. Spray-Rite Service Corp.*, stating "the correct standard is that there must be evidence that tends to exclude the possibility of independent action". An agreement is vertical if it involves different levels in the chain of distribution. Vertically related firms are often in contact and therefore the existence of the agreement itself in vertical cases can be of less importance than agreement in horizontal cases.

2.3 What are the laws governing vertical agreements?

Vertical agreements are generally analysed under Section 1 of the Sherman Act, 15 USC § 1, which declares illegal any contract, combination or conspiracy in restraint of trade. A violation of Section 1 requires proof of three elements: (1) the existence of a contract, combination or conspiracy among two or more separate entities; that (2) unreasonably restrains trade; and (3) affects interstate or foreign commerce.

Section 2 of the Sherman Act, 15 USC § 2, may also apply to vertical agreements involving distribution. Section 2 applies to unilateral conduct and makes illegal the acquisition and maintenance of monopoly power by anticompetitive conduct. Section 2 applies where the defendant has monopoly power or near-monopoly power and engages in vertical conduct (often tying, bundling, or exclusive dealing) with the intention of foreclosing competition.

Plaintiffs may also bring a case involving exclusive dealing or tying under Section 3 of the Clayton Act, 15 USC § 14. Section 3 of the Clayton Act makes it illegal to condition any sale on the purchaser not dealing with a competitor if the effect may be to substantially lessen competition.

The FTC may also bring a case under Section 5 of the FTC Act, 15 USC § 45, to challenge vertical agreements. Moreover, the Robinson-Patman Act (Robinson-Patman) can be used to challenge certain vertical conduct such as price discrimination.

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

There are no purely vertical agreements that are *per se* protected or *per se* unlawful. Although there is Supreme Court precedent suggesting that certain vertical tying arrangements should be subjected to *per se* treatment, there are sufficient limitations that would require some level of factual analysis. Those limitations include that the defendant must have market power in the market for the tying product, the tying arrangement must result in substantial competitive foreclosure in the market for the tied product, and the defendant must have some power over the buyer to force purchasing the tying and tied products jointly rather than separately.

2.5 What is the analytical framework for assessing vertical agreements?

Vertical agreements are typically analysed under the rule of reason. The rule-of-reason analysis focuses on whether the party seeking to impose the restriction has market power. If there is market power, the court will then evaluate whether competition has been harmed. The court may examine the nature and extent of possible foreclosure, the duration of the agreement, the importance of the input, the impact on entry, evidence of actual effects, the extent of other similar agreements, and any other relevant evidence of harm. This evidence is then balanced against any procompetitive benefits, efficiencies, or other mitigating factors. In the case of vertical agreements, the procompetitive benefits and efficiencies are typically found to be quite substantial. Certain states may analyse certain types of vertical agreements as *per se* violations.

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

The relevant product and geographic markets for vertical agreements are defined in the same manner as for other agreements or conduct. They are fact-specific inquiries that depend on substitutability of other products or geographies. Since parties to vertical agreements, as the name implies, operate at different levels within commerce, there will be different product markets for each firm.

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

Generally speaking, the modern trend is for courts to view agreements between distributors and manufacturers operating as distributors in competition with their distributors as vertical agreements, subject to rule-of-reason analysis.

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

As with other Sherman Act claims, market share is a proxy for inferring market power, and thus harm to competition from exclusionary conduct. In addition, market shares can provide an indication of the potential for foreclosure resulting from a vertical agreement.

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

Economic analysis is central to any analysis of a vertical agreement. Through economic analysis, the court, the enforcer, and the firms must determine whether the agreement has or likely will create or increase market power of the firms involved, whether this will cause anticompetitive harm, and whether the agreement is reasonably necessary to achieve procompetitive results. Each step along the way in this process, and the final balancing of potential anticompetitive harm against potential procompetitive results, requires economic analysis of a variety of factors.

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

The Supreme Court has recognised that certain non-price restrictions may "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" (*GTE Sylvania*, 433 U.S. 36, 54 (1977)) and the "market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition" (*Id.* at 51–52 (1977)). Thus, the Supreme Court and lower courts have considered and upheld various vertical restraints, including territorial restrictions, exclusive distributorships, location requirements, and other non-price restrictions.

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

Intellectual property licensing arrangements often have a vertical component and, as such, will be analysed accordingly. Although no special rules apply in such situations, the DOJ and FTC have jointly issued Antitrust Guidelines for the Licensing of Intellectual Property. The most recent update, in January 2017, reaffirmed the enforcers' general position that "intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive". The update reflects changes and developments in the antitrust laws that have occurred in the two decades since the Guidelines were originally published. The Guidelines are available at: https://www.justice.gov/atr/IPguidelines/download.

2.12 Does the enforcer have to demonstrate anticompetitive effects?

Yes, the enforcer must demonstrate anticompetitive effects.

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

Yes; courts employing the rule of reason will balance the anticompetitive effect of a restraint against the procompetitive benefits and efficiencies of the same restraint and consider the net impact on competition in the relevant market. A restraint or agreement will only be held to violate the antitrust laws if its harm to competition outweighs the benefits and efficiencies.

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

Firms have successfully defended vertical agreements on the basis of business justifications, including: promoting efficiencies; responding to customer dissatisfaction; preventing confusion, fraud, and deception; ensuring that the product provided to the consumer meets consumer expectations; eliminating free-riding; and ensuring quality. In addition, legal defences, such as a lack of proof of a relevant market or market power, can be used. Courts, however, can reject justifications where there is a less restrictive way of ensuring quality.

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

On June 30, 2020, the FTC and DOJ released joint Guidelines for Non-Horizontal Mergers. (This was the first update of those Guidelines since 1984.) The Guidelines focused on several theories of harm, including: foreclosure that may increase the incentive and ability to raise rivals' costs; the exchange of competitively sensitive information; and coordinated effects. The Guidelines also accepted the procompetitive effect of the "elimination of double marginalisation", which can result in a vertical transaction. In September 2021, however, the FTC under Chair Khan voted to withdraw its approval of the 2020 Non-Horizontal Merger Guidelines specifically citing issues with the treatment of efficiencies under the 2020 Guidelines. Subsequently, in January 2022, the FTC and the DOJ jointly initiated a public inquiry process to inform potential revisions to the Horizontal Merger Guidelines as well as the Non-Horizontal Merger Guidelines.

Outside of the merger context, the DOJ published Vertical Restraints Guidelines in 1985; however, those Guidelines were withdrawn in 1993, and the DOJ has not proposed to publish new Vertical Restraints Guidelines under any subsequent administration. In 2008, the DOJ published a report on monopolisation and single-firm conduct under Section 2 of the Sherman Act; however, that report was withdrawn in 2009, nullifying it as part of DOJ policy. The DOJ has not proposed publishing a new policy report or guidelines relating to monopolisation and single-firm conduct under subsequent administrations.

2.16 How is resale price maintenance treated under the law?

Since the Supreme Court's decision in *Leegin*, resale price maintenance (RPM) has been evaluated under the rule of reason under the federal antitrust laws, rather than being considered *per se* illegal. Rule-of-reason analysis for RPM cases focuses on the possible relationship between minimum prices and the provision of ancillary services that assist customers, improve quality, or achieve any of the benefits listed above. However, some states have passed "*Leegin* repealer" laws to ensure *per se* liability for RPM agreements under the state's antitrust laws.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealing arrangements are generally analysed under the rule of reason, balancing any harm to competition with the agreement's procompetitive benefits. This analysis often comes out in favour of the agreement, as exclusive dealing is often a vehicle for substantial efficiencies, including economies of scale and support services for the manufacturer's brand. However, exclusive dealing contracts can be anticompetitive when used by a firm with market power to foreclose competition from smaller firms.

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

Tying claims are also generally evaluated under the rule of reason's balancing test. Regulators and courts will assess whether the firm offering the "tied" product has market power in the "tying" product. If so, the arrangement may violate the antitrust laws if anticompetitive effects can be established. On the procompetitive side, tying can reduce costs and increase convenience for consumers.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims are typically reviewed under Robinson-Patman, although the statute condemns charging different prices to similarly situated buyers as opposed to what economists would label true "price discrimination". Robinson-Patman is an older statute that has specific requirements and several exemptions. For example, Robinson-Patman applies to commodities of like grade and quality. Price discrimination conduct may be excused for several reasons, including where the difference in price can be accounted for by different costs in manufacturing, sales, or distribution, and where a price concession was given in good faith to match that of a competitor. Robinson-Patman has been disfavoured by enforcers across administrations for decades, as enforcement can be counter to efficiency and harm consumers; recently, however, new agency leadership has spoken favourably about the statute and the potential to challenge certain conduct under it.

2.20 How do enforcers and courts examine loyalty discount claims?

Enforcers and courts analyse loyalty discount claims under a rule-of-reason-type analysis. Loyalty discounts resemble volume discounts, offer similar benefits, and can lead to lower prices for consumers. Theoretically, they can also pose similar threats to competition akin to exclusive dealing or predatory pricing; e.g., that a firm with market power will use the discounts to price below cost and drive out smaller competitors.

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

As with each of the previous forms of unilateral conduct, bundled discounts are evaluated under the rule of reason. There are often procompetitive benefits for these provisions, as with loyalty discounts. A key factual inquiry is whether the discounted price of the bundle of goods or services exceeds the aggregate cost of the goods or services in the bundle. If not, there is a greater risk that it could be viewed as a pretext for driving rival firms from the market.

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

Vertical restraints can take any number of forms, including permutations and combinations of those discussed above. Regardless of the form, the restraints will typically be assessed under the rule of reason, weighing anticompetitive harm against any procompetitive benefits and efficiencies.

2.23 How are MFNs treated under the law?

While most-favoured-nation clauses (MFNs) can have procompetitive benefits, they have come under greater scrutiny in recent years. The price-fixing allegations successfully brought against Apple by the DOJ and several states centred around the alleged use of MFNs to ensure uniform pricing for e-books among five different publishers.

The debate over MFNs is ongoing, and legal risk depends on the specific facts and circumstances.

3 Dominant Firms

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

Courts and regulators have found that many forms of allegedly harmful unilateral conduct are justified by their economic efficiencies and other benefits. However, there are instances of unilateral conduct enforcement, and practitioners are constantly evaluating whether such enforcement is increasing. These are very fact-specific inquiries.

3.2 What are the laws governing dominant firms?

Dominant firm behaviour is governed by Section 2 of the Sherman Act, discussed above, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" any market, as well as Section 5 of the FTC Act, which prohibits "unfair methods of competition".

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

The analysis is substantively similar to the rule-of-reason analysis, such as that outlined in response to question 2.16.

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

There is no precise threshold as to whether a firm is dominant or a monopolist. Rather, the question of whether a firm is dominant in a given market is an intensively fact-specific inquiry. That said, while there is no bright line, it is generally understood that as a firm's market share approaches 70%, the firm is increasingly likely to be considered to have monopoly power.

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

Under the U.S. antitrust laws, it is not illegal to be a monopolist, only to acquire or maintain a monopoly through exclusionary means. Whether a company has monopoly power or has engaged in exclusionary conduct is a fact-specific inquiry.

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

Economic analysis is indispensable to assessing the competitive effects of a course of conduct and in determining whether a firm possesses market power. It can inform every stage of antitrust investigations and litigation, from the decision to prosecute to the calculation of damages.

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

Market share is the most common means of drawing an inference of monopoly power. As discussed above, typically anything over 70% may be considered monopolistic.

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

Apart from contesting the facts, firms facing allegations of abuse of market dominance can argue several points, including that they do not hold market power, that there has been no antitrust injury, that any competitive harm from their conduct is outweighed by procompetitive benefits and/or efficiencies, or that the conduct is excused by some other legal principle (e.g., no duty to deal with competitors).

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

Efficiencies are a fundamental part of the balancing test under the rule of reason and essential to almost every defence put forth by antitrust defendants. In the U.S., monopoly power obtained through luck, skill, or foresight (as opposed to through exclusionary or predatory conduct) are not illegal. Consequently, if a monopolist obtains its position through superior efficiency, it has not violated Section 2. Efficiency defences can take a variety of forms – for example, that consumers will benefit from lower prices, higher quality, or greater selection, or that improved innovation or other synergies have led to greater competition in an industry.

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

No; collective dominance is not covered by the U.S. antitrust laws.

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

Monopsony cases, although less common than monopoly ones, are evaluated under a framework analogous to that of other dominant firm cases.

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

Generally speaking, an abuse of dominance or anticompetitive conduct is harmful conduct other than competition on the merits. Courts applying the U.S. antitrust laws seek to protect "competition, not competitors", meaning they are more concerned with harm to the competitive process than the success or failure of individual firms. Anticompetitive conduct leads to one or more of: higher prices; lower quality; reduced innovation; and fewer choices for consumers.

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

Courts and competition authorities view intellectual property as a key incentive to innovate and compete, driving much of the development in most markets. Even though patents are often labelled government-granted monopolies, the federal courts do not presume that a patent conveys monopoly power under Section 2. Nonetheless, patents can raise competition concerns depending on the specific facts.

Recent litigation over "reverse payment" pharmaceutical patent litigation settlements highlight the issue; possession of a lawful monopoly in the form of a patent does not permit patent-holders to foreclose competition to their patented product (e.g., by paying a potential competitor not to challenge the patent-holder's patent).

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

Yes; courts and enforcers will consider direct effects evidence of market power. These can include: internal business plans describing exclusionary behaviour, past or contemplated; evidence of supracompetitive prices; and complaints from customers.

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

The question of "platform dominance" is an emerging and unsettled issue in U.S. antitrust law. The question of how to balance the efficiencies and benefits created by platforms with the power held by their creators over competitors within the platform is a developing issue in antitrust jurisprudence.

3.16 Are the competition agencies in your jurisdiction doing anything special to try to regulate big tech platforms?

Big tech platforms (e.g., Google, Facebook, Amazon) and their vertical acquisitions have been subject to increasing antitrust scrutiny in the U.S., in part due to concerns about alleged market concentration and monopolisation.

In particular, U.S. authorities have filed three separate lawsuits against Google. First, on October 20, 2020, the DOJ, joined by 11 State Attorneys General, filed a lawsuit against Google alleging that by cutting deals to be the default search engine on mobile phone devices, Google broke antitrust laws. This case is scheduled for trial in September 2023. Second, on December 16, 2020, a group of 10 states led by Texas Attorney General Ken Paxton filed a lawsuit alleging that Google engaged in deceptive acts while operating its buy-and-sell auction system for digital ads. Finally, third, on December 17, 2020, a bipartisan coalition of 38 states and territories filed a lawsuit alleging that Google holds a monopoly in general search, and that Google favours its own services over those of rivals when displaying search query results. Additionally, on December 9, 2020, the FTC and 46 State Attorneys General filed a lawsuit against Facebook alleging that Facebook has illegally acted to maintain its personal social networking monopoly including by acquiring Instagram and WhatsApp, and seeking to require Facebook to divest certain assets including Instagram and WhatsApp.

The House Judiciary Committee is leading a public-facing bipartisan investigation and has requested documents from key executives at Google, Facebook, and Amazon. In October 2020, the antitrust subcommittee released its findings in a 449-page report accusing the big tech platforms of abusing monopoly power and called for large-scale changes, including restructurings, in order to rein in big tech. Both the House and Senate Judiciary Committees have also voted to advance certain antitrust bills focused on big tech and competition online. Such bills are not uncommon and have generally stalled; however, bipartisan support of certain recent bills could suggest legislative action regarding competition online. Democrat control of Congress, the Senate, and the White House also signals the possibility of substantive legislative reforms with regard to antitrust.

3.17 Under what circumstances are refusals to deal considered anticompetitive?

Unilateral refusals to deal can violate the Sherman Act but are considered at the "outer boundary" of Section 2. Three cases have helped outline the claim: *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985); and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In *Otter Tail* and *Aspen Skiing*, the court held that the defendant had violated the Sherman Act by refusing to deal with a competitor, while in *Trinko* it held that the bar had not been met. Comparing the holdings of the three cases identifies some elements that were satisfied in *Otter Tail* and *Aspen Skiing*, but not *Trinko*: (1) the parties ended a prior course of dealing which implied that doing business together had been profitable for the monopolist; (2) the monopolist demonstrated a willingness to forego short-term profit in the hope of obtaining long-term gain; and (3) the monopolist refused to sell something it was already in the business of selling. This kind of difficult-to-establish standard means that refusal to deal cases, while possible, are very rare and extremely challenging.

4 Miscellaneous

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

This is not applicable.

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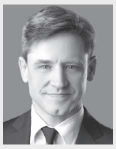

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