INTERACTIONS WITH CUSTOMERS AND SUPPLIERS:
MARKETING AND DISTRIBUTION ISSUES IN ANTITRUST LAW

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I. INTRODUCTION

The antitrust laws afford companies a great deal of discretion in how they distribute their products, recognizing that many restrictions in agreements between producers and their downstream distributors can be beneficial to consumers by helping to align the incentives of upstream brand-owners with the selling efforts of downstream firms.

There are two main kinds of vertical restraints: those that restrain the downstream firm's freedom with regard to the resale of the product or service at issue; and those that restrict a downstream or upstream firm's freedom to deal with competitors of the firm imposing the restraint.

The first group of vertical restraints reflects sellers' preferences regarding how their own products are distributed. They concern price and non-price issues, such as limitations on a downstream firm's freedom with regard to territories and customers.

The second group of restraints affect a firm's competitors directly, potentially foreclosing them from access to either inputs (in the case of upstream restrictions) or distribution outlets (in the case of downstream restrictions). The major categories of such restraints are tying, exclusive dealing, and reciprocal dealing.

Vertical restraints are rarely outright illegal under the antitrust laws (although some types of restraints can be). Most cases require a detailed assessment of the parties’ market power and the impact of the restraint on competition in relevant markets.

II. VERTICAL RESTRAINTS UNDER U.S. ANTITRUST LAW

A. U.S. Laws Applying to Vertical Restraints

The basic U.S. antitrust laws that apply to marketing and distribution practices are:

- *Sherman Act §1*. Section 1 prohibits “contracts, combinations . . . and conspiracies in restraint of trade.” Vertical restraints can be viewed as anticompetitive agreements where they unduly limit competition. U.S. courts analyze agreements either as “per se” illegal – in which case no proof of anticompetitive effect is required for a violation – or under a “rule of reason” approach – balancing the anticompetitive effects of an agreement against its procompetitive benefits.

- *Sherman Act §2*. Section 2 prohibits monopolization, attempted monopolization, and conspiracies to monopolize trade or commerce. Section 2 actions are usually aimed at single-firm conduct, where a distribution practice is directed at entrenching or enhancing market power. For example, distribution agreements foreclosing competitors from access to a distribution network have been attacked under Section 2.
- *Clayton Act §2* (Robinson Patman Act). The Robinson Patman Act prohibits a seller from discriminating in price between different buyers when the discrimination adversely affects competition. The Robinson Patman Act applies only to the sale of “commodities” – i.e., tangible goods and not the provision of services – of like grade and quality made to similarly situated buyers in the same market. It also prohibits a seller from offering promotions or allowances in a discriminatory manner.

- *Clayton Act §3*. This provision makes it unlawful to sell goods on the condition that the purchaser refrain from buying a competitor’s goods if the effect may be to substantially lessen competition.

- *Federal Trade Commission Act §5*. Section 5 prohibits “unfair methods of competition.” This catch-all provision permits the Federal Trade Commission (FTC) to challenge conduct that would violate the Sherman Act and Clayton Act, and may be somewhat broader.

- *State antitrust statutes*. Most states have antitrust statutes that are in similar terms to the federal antitrust laws. These are addressed in this outline only where they diverge significantly from the federal antitrust laws, notably in the area of resale price maintenance.

**B. Customer and Territorial Restrictions**

These agreements limit a distributor’s freedom by prohibiting the distributor from selling outside an assigned territory or to particular categories of customers, while preserving the distributor’s freedom on product and service pricing.

Modern U.S. law on territorial restraints began with the Supreme Court’s 1977 decision in *GTE Sylvania*. Central to the *Sylvania* court’s decision was its recognition that “the market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.” The essential point is that vertical restrictions promote competition between the products of different manufacturers by allowing a manufacturer to achieve certain efficiencies in the distribution of its products.

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1 *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977). In this case, a manufacturer of television sets limited the number of retail franchises granted for any given area and required each franchisee to sell Sylvania’s products only from the location or locations at which it was franchised. The plaintiff, Continental, was one of Sylvania’s franchised retailers and wanted to open an additional franchise location. Continental claimed that Sylvania had violated Section 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania’s products other than from specified locations. On the basis of an instruction that an agreement restricting locations from which a distributor may sell is *per se* illegal, the jury held that Sylvania violated Section 1 and levied treble damages. The Court of Appeal reversed, holding that the restriction had limited potential for competitive harm and should be judged under the rule of reason. The Supreme Court agreed with the Court of Appeal’s ruling.

2 *Continental T.V. v. GTE Sylvania*, cit. at 51-52.
Post-*Sylvania*, courts held that effects on intrabrand competition alone are insufficient to establish a violation of Section 1.3 Courts applying the rule of reason focus on whether particular restraints lessen competition in the relevant market as a whole, considering such factors as the purpose for territorial and customer restrictions, how they operate in practice, and the net impact on competition after weighing the anticompetitive effects against procompetitive benefits.

Anti-steering provisions have become a focus in this area in the wake of the Supreme Court's 2018 decision in *Ohio v. American Express*.4 The Court held that anti-steering provisions are vertical restraints subject to the rule of reason, that plaintiffs can demonstrate anticompetitive effects through direct evidence such as reduced output and higher prices or through indirect evidence such as market power and harm to competition, and that both sides of a platform must be assessed when network effects are strong.

C. Exclusive Distributorships and Supply Arrangements

An exclusive distributorship typically provides a distributor with the right to be the sole outlet for a manufacturer's products or services in a given geographic area. It is a vertical restriction on the manufacturer, prohibiting the manufacturer from establishing its own sales outlet in the area or selling to other distributors located in the area. It restricts which downstream entity or entities may resell the supplier's brand.5

Even before *Sylvania*, the Supreme Court's treatment of exclusive distributorships was relatively lenient, despite the similarity to territorial restrictions.6 Many lower courts have applied the rule of reason to exclusive distributorships, considering such factors as the strength of interbrand competition, the duration of the exclusive distributorship, and the geographic scope of the distributorship.7 Even though exclusive distributorships are usually upheld, they can be found to

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3 See, e.g., *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006) (observing that antitrust law focuses on interbrand competition); *Murphy v. Business Cards Tomorrow*, 854 F.2d 1202, 1205 (9th Cir. 1988) (effect on intrabrand competition is not relevant if there is intense interbrand competition).

4 *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). In this case, the DOJ and 17 state attorneys general sued American Express, Visa Inc., and MasterCard International Inc., claiming that “anti-steering” restrictions imposed by the credit card networks on merchants violated Section 1 of the Sherman Act. American Express included provisions in its contracts with merchants that prohibited merchants from avoiding fees by discouraging customers’ American Express card use at the point of sale.

5 The term "exclusive distributorship" (which is often used interchangeably with "exclusive franchise") differs from "exclusive dealing" (an agreement by a distributor to refrain from dealing in a competing supplier's goods) and "exclusive territory" (an agreement by the distributor to refrain from selling outside a certain territory, also known as a "territorial restraint").

6 See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) ("if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.")

7 See, e.g., *City of Rockford v. Mallinckrodt ARD, Inc.*, 360 F. Supp. 3d 730, 754 (N.D. Ill. 2019) (complaint plausibly alleged antitrust violation where an exclusive dealing arrangement, paired with acquiring a competing product, allowed manufacturer to “keep prices high, restrict output, and prevent competition from entering the market....reduced the number of wholesale distributors of Acthar from three to one and employed Express Scripts' market power not to push for lower-cost alternatives.)
be anticompetitive when the downstream firm is a dominant firm, or if the agreement is broad in geographic scope or duration.  

Treatment under the rule of reason can be jeopardized where the vertical restraint is imposed in the context of an agreement between horizontal competitors. In cases where multiple distributors agree to enter into contracts with a manufacturer on the same terms, the agreement may instead be characterized as an illegal “hub and spokes” agreement, with the supplier as the “hub” through which an anticompetitive horizontal agreement between the distributors is effected. A similar approach can be seen where a downstream firm that sells the brands of multiple suppliers is the driving force behind the exclusivity. In *Toys "R" Us*, the FTC successfully challenged a group of agreements between Toys “R” Us and several of its suppliers. According to the FTC, when faced with increasing competition from warehouse club stores that offered greater discounts, Toys “R” Us negotiated a series of agreements with leading toy manufacturers under which the manufacturers would offer the club-stores products in packages configured differently from the packages sold to Toys “R” Us and traditional toy stores. The FTC found that seven manufacturers accepted the limitations on sales to club stores “on the condition that their competitors would do the same.” The Seventh Circuit concluded that Toys “R” Us had engineered a horizontal agreement to boycott a competitor, which could be condemned without an extensive inquiry into the issues of market power and procompetitive and anticompetitive effects.

D. Resale Price Maintenance (RPM) and Minimum Advertised Price Programs (MAP)

Resale price maintenance (RPM) (sometimes called “vertical price fixing”) refers to agreements between participants at different levels of the market structure that establish the resale price of products or services. Resale price maintenance can take the form of setting a specific price; often it involves setting either a price floor or a price ceiling.

- Maximum RPM agreements provide that resale prices remain at or below a certain level
- Minimum RPM: agreements under which resale prices remain at or above a certain level.
  This may require a reseller to sell at a particular price, or to ensure that any discounting does not exceed a certain amount below the supplier’s resale price list

1. Maximum RPM

In the U.S., maximum RPM agreements are evaluated under the rule of reason, as they may be more likely to benefit, rather than harm, consumers. Prior to the Supreme Court's decision in *State Oil Co. v. Khan*, 522 U.S. 3, (1997), vertical agreements to fix maximum resale prices were per se

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8 For example, in *Fed. Trade Comm’n v. Cardinal Health, Inc.*, (S.D.N.Y. April 20, 2015) (complaint & final order), the FTC alleged that Cardinal Health, the largest operator of radiopharmacies, obtained *de facto* exclusive rights to distribute General Electric’s and Bristol-Myer Squibb’s heart perfusion agents (HPAs) through a variety of contractual mechanisms and threats. Because GE and BMS were the only suppliers of HPAs, Cardinal’s conduct effectively excluded competitor radiopharmacies from local markets due to their inability to obtain HPAs. Cardinal agreed to pay $26.8 million to settle the charges.

unlawful. In 1968, in *Albrecht v. Herald Co.* 390 U.S. 145 (1968) the Supreme Court ruled that the per se ban on resale price maintenance encompassed vertical agreements that establish maximum resale prices. The Court held that “agreements to fix maximum prices ‘no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment’.”

Albrecht was criticized extensively by antitrust scholars. In *State Oil Co. v. Khan* the Court revisited the per se ban on maximum resale price fixing and overruled Albrecht. The Court ruled that "there is insufficient economic justification for per se invalidation of vertical maximum price fixing." The Court noted that maximum price fixing may lead to low prices and that low prices, however set, benefit consumers as long as they are above predatory levels and observed that the per se rule "could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers," thereby harming both consumers and manufacturers.10

2. Minimum RPM

The treatment of minimum RPM agreements is more complex. Before the Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007) vertical agreements setting minimum resale prices were per se illegal. In *Leegin*, the Supreme Court overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S 373 (1911) and extended rule of reason analysis to minimum resale price maintenance claims under federal law.11 But, even with the more extensive hurdles to prove an antitrust violation post-*Leegin*, several successful attacks on minimum RPM agreements or policies have been found to be illegal under federal antitrust law.

Under *Leegin*, courts focus on the net procompetitive or anticompetitive effect of resale price maintenance, and the Court noted that "certain factors are relevant to the inquiry." These include (1) the number of manufacturers engaged in the practice in the market, (2) whether the restraint comes at the behest of retailers or the manufacturer, and (3) whether the manufacturer or retailer(s) driving the practice possess market power.

In *Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc.*, 2015 WL 9987969 (2015), the court found the complaint’s claim that an agreement between Johnson & Johnson and retailer Costco

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10 In *Nat’l Franchisee Ass’n v. Burger King Corp.*, 715 F. Supp. 1232 (S.D. Fla. 2010); NFA argued that because Burger King entered into maximum price contracts with franchisees prior to 1997, the terms of those agreements could not grant Burger King the right to fix prices, where the agreements were drafted prior to Khan’s holding in 1997. The court reaffirmed the holding in *State Oil Co. v. Khan*, finding that maximum price fixing, although at one time per se illegal, did not apply to franchise contracts, allowing Burger King to impose maximum prices on its franchisees who signed franchise agreements prior to 1997.

11 *Leegin* sold belts under the brand name “Brighton” and marketed them as a luxury brand. PSKS operated Kay’s Kloset, a retail store chain. Leegin instituted a pricing plan where Leegin refused to sell to retailers who discounted Brighton goods below suggested retail prices. Leegin gave retailers a certain margin in the price. Leegin discovered Kay’s was marking down its products, and requested that Kay’s cease discounting. PSKS sued Leegin. The Supreme Court overruled *Dr. Miles* and the per se rule prohibiting resale minimum price maintenance. The court reasoned that RPM had procompetitive effects such as promoting interbrand competition, enhancing efficiency, reducing intrabrand competition which encourage retailers to invest in service or promotional events, and reducing free-riding by other retailers.
satisfied the concerted action requirement of Section 1 of Sherman, and allowed the case to proceed. In 2016, Costco dropped its lawsuit after Johnson & Johnson announced it would discontinue its pricing policy.12

Some states have introduced “Leegin repealer” statutes such as Maryland and New York, making minimum RPM agreements per se illegal.13

One modern doctrinal trend in the resale price maintenance area is the tendency for private plaintiffs to argue that resale price maintenance is part of a “hub-and-spoke” conspiracy, in which one party (the hub) enters into a series of vertical agreements with parties at different levels of the distribution chain, and the hub facilitates horizontal agreements among these firms (the spokes). In two recent cases involving major technology companies, the difference between successfully pleading such an arrangement was whether horizontal agreements between the spokes were alleged in addition to only vertical agreements.14

3. Minimum Advertised Price (MAP) Restrictions

Minimum advertised price (MAP) agreements require resellers to advertise or display resale prices at or above a fixed minimum price – i.e., MAP agreements do not permit resellers to advertise discounts, although they may actually give purchasers a discount when actually selling the product. MAP restrictions often appear in agreements to give cooperative advertising funds.

MAP policies are usually not challenged either by the government or through private litigation. MAP policies are evaluated under the rule of reason. They can be challenged if there is a basis for claiming that they impede or eliminate competition – such as where a majority of the distributors

12 Johnson & Johnson (J&J) announced a pricing policy where if a retailer priced any covered product below the minimum price, J&J and its distributors would cease supplying the retailer with all of J&J’s covered products regardless of the retailer’s contractual rights. J&J tweaked its pricing policy to add that a bundled offer cannot include “free” products or services. Costco alleged that J&J engaged in a vertical resale price maintenance agreement, which facilitated collusion to raise prices, increased the market power of less efficient retailers, restrained intrabrand competition by retailers, and had other unreasonably anticompetitive effects. J&J agreed to discontinue the pricing policy.

13 See, e.g., N.Y. Gen. Bus. Law § 369–a (“Section 369–a” which )“prohibits the enforcement of agreements to fix minimum resale prices.”

14 For example, in Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016), plaintiffs claimed that Kalanick and Uber were operating a horizontal price fixing scheme using the pricing algorithm to set prices charged to Uber drivers, restricting competition on prices by drivers to the detriment of Uber riders. Kalanick argued that each individual decision to enter into contractual arrangements with Uber are independent actions, vertically oriented because Uber matches drivers with riders and processes payments. The court ruled against Kalanick, analogizing to other hub-and-spoke agreements which have both horizontal and vertical elements. The court held that the plaintiff alleged that drivers agree with Uber to charge certain fares, understanding that other drivers agree to charge the same fares, facilitated by Uber, which was sufficient to plead a horizontal agreement. In contrast, in Frame-Wilson v. Amazon.com, Inc., No. 2:20-cv-00424, 2022 WL 741878 (2022), plaintiffs sued Amazon for its “pricing parity” provision in its contracts with third party sellers. These agreements required sellers to maintain price parity between the products listed on Amazon and those on external platforms. Plaintiffs argued that Amazon formed vertical agreements between third-party sellers and their host platform, which is how Amazon restricted third-party sellers in setting prices. The court found that in U.S. v. Apple and in Meyers v. Kalanick, specific facts were alleged that supported a horizontal agreement, but plaintiffs here failed to allege a horizontal agreement between Amazon and third-party sellers as competitors, thus rejecting any per se rule.
in an industry adopt the same policy, having the effect of stabilizing retail prices and, consequently, also wholesale prices. In other words, challenges tend to involve alleged horizontal conspiracies to implement MAP policies.  

E. Dual Distribution

Dual-distribution relationships occur when a producer sells its goods both to distributors and directly to the end consumer. As a result, the manufacturer maintains vertical relationships with its distributors (because it acts as a supplier of the product), but is also a horizontal competitor to those distributors (because it sells directly to consumers and operates at the same level in the supply chain as its independent distributors).

The hybrid nature of these relationships – both vertical when the manufacturer is selling to distributors and horizontal when the manufacturer competes directly with its distributors – may impact competition between the manufacturer and distributor at the same time as conducting legitimate vertical activities. Restrictions in dual-distribution agreements may relate to price or other terms, such as allocating customers.

The Supreme Court has not clearly addressed the issue of whether these restrictions should be classified as vertical or horizontal. Although some lower courts before considered territorial and customer restrictions in dual distribution environments per se unlawful horizontal restraints, every decision since 

Sylvania has analyzed restraints imposed by a manufacturer that competes with its distributors under the rule of reason.  

In 

Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (11th Cir. 2010), Tempur-Pedic (TPX) sold mattresses both through its authorized distributors and directly to customers through its own

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15 See In re Musical Instruments and Equipment Antitrust Litig., 798 F.3d 1186 (9th Cir. 2015). Plaintiffs alleged that Guitar Center and five major manufacturers of guitars conspired to implement and enforce MAP policies that fixed the minimum price at which any retailer could advertise the manufacturers' guitars and amplifiers. Plaintiffs asserted that a hub-and-spoke agreement was formed where Guitar Center served as the hub and pressured each manufacturer (the spokes) to adopt MAP policies. The Ninth Circuit affirmed the district court's dismissal of the case for failure to state a claim, because plaintiffs failed to provide evidence of horizontal agreements among the manufacturers; see also In re Nat'l Ass'n of Music Merchs., No. 001-0203 (F.T.C. 2009). The FTC conducted an investigation into MAPs in the music products industry. It was alleged that the National Association of Music Merchants (NAMM) discussed and exchanged information about MAP programs at trade shows. NAMM agreed to cease urging, encouraging, coordinating, or participating in the exchange of information between music product manufacturers and music product dealers relating to the retail price of music products, including MAPs.

16 See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., 615 F.3d 412, 420-21 (5th Cir. 2010) (rejecting plaintiffs' argument that defendant's dual distributor role created a horizontal restraint); AT&T Corp. v. JMC Telecom, 470 F.3d 525, 531 (3d Cir. 2006) (upholding dismissal of per se market division claim and characterizing restraint under dual distribution arrangement for phone cards as "primarily" vertical restraint subject to rule of reason analysis); Electronics Comm'n's Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 243 (2d Cir. 1997) (dual distribution of cellular phones addressed under rule of reason); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1230-31 (8th Cir. 1987) (agreement between supplier acting as distributor and other distributors is vertical where restraint was designed by and for the benefit of supplier); Davis-Watkins Co. v. Serv. Merch., 686 F.2d 1190, 1201-02 (6th Cir. 1982) (refusing to apply per se rule to territorial restrictions imposed by a dual distributor).
website. TPX set minimum retail prices for its distributors and adhered itself to the minimum prices in its website sales. Plaintiff alleged that this arrangement constituted a per se illegal horizontal price-fixing agreement as well as a vertical price-fixing agreement that was illegal under the rule of reason. The Court found that Tempur’s website acted as an enforcement mechanism to prevent distributors from raising prices, and that Tempur would not undercut the prices it imposed on distributors. As a result, it was economically advantageous for its web distributorship to equal the resale price, precluding the possibility of horizontal minimum price fixing.

Like with other vertical restraints, modern cases feature arguments over how an agreement should be characterized, whether horizontal or vertical. Modern courts usually continue to find dual distribution agreements are vertical in nature, subject to the rule of reason.17 Trivial arguments that an agreement that is not dual distribution is dual distribution and subject to the rule of reason will be rejected.18

F. Most Favored Nation (MFN) Clauses

MFN clauses are vertical agreements stipulating that the parties will give each other the “best price” or “best terms.” MFN provisions also can expressly prohibit granting better prices or terms to rivals of the seller (also known as “MFN Plus” provisions).

While most courts have found MFNs to be competitively benign in most circumstances, recent actions by enforcement agencies have raised the possibility that MFNs may be found to be anticompetitive in several specific situations.

The procompetitive effect of MFNs are that they eliminate the purchaser’s risk of negotiating a bad deal under unstable pricing conditions, and they lower the transaction costs of a purchasing negotiating agreements after discovery lower prices.19 On the other hand, MFNs may lead to anticompetitive effects by facilitating collusion among competitors. Agencies have developed theories of competitive harm caused by MFNs resulting in 1) collusion, 2) price stickiness, and

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17 See 2238 Victory Corp. v. Fjallraven USA Retail, LLC, 2021 WL 76334 (S.D.N.Y. Jan. 8, 2021): Plaintiffs, a business that purchased goods at wholesale prices and resold them to consumers at lower prices, alleged a per se violation of Section 1 of the Sherman Act by Fjallraven, a Swedish company. Fjallraven allegedly entered into an agreement with Netrush where Netrush became Fjallraven’s exclusive authorized Amazon seller. The complaint claimed that Fjallraven and Netrush entered into a horizontal agreement to eliminate Victory as a competitor on Amazon, and thus engaged in conduct that is per se unlawful under section 1 of the Sherman Act. The court held that the complaint expressly alleged a dual distribution agreement where Fjallraven was both a manufacturer and a direct seller of its product, which should be scrutinized using the rule of reason.

18 See United States v. Brewbaker, 2021 WL 1011046 (E.D.N.C. Mar. 16, 2021). In this criminal case, the court rejected the argument that a bid-rigging scheme was a vertical agreement in the form of a dual distribution arrangement, subjecting the arrangement to the per se rule rather than the rule of reason. The defendants attempted to rely on the Fifth Circuit’s decision on remand from Leegin, 551 U.S. 877.

19 In Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F3d 1406 (7th Cir 1995), cert denied, 516 US 1184 (1996), the Seventh Circuit rejected a challenge to an MFN clause, explaining that MFNs are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorable as their other customers and that is the sort of conduct that the antitrust laws seek to encourage.
3) anticompetitive exclusion. Antitrust enforcement agencies are more likely to allege collusion if a large percentage of the relevant competitors adopt similar MFNs.

In *United States v. Apple*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), the DOJ sued Apple and five book publishing companies for a conspiracy to raise and fix the price for e-books in violation of Section 1 of the Sherman Act. The DOJ’s case against Apple alleged that Apple was a participant in the publishers’ conspiracy and facilitated the publishers’ price-fixing by entering into separate agency agreements with each publisher. The trial court and the Second Circuit (in a split decision) held that Apple’s agreements were per se unlawful because the vertical agreements were used to facilitate horizontal cartel activity. (In the dissent’s view, the vertical agreements fell squarely within Leegin and should have been analyzed under the rule of reason even if the vertical agreements facilitated horizontal agreements.) The court treated the MFN provision as a way for Apple to protect itself against retail price competition and eliminate price competition, and as a means of inducing publishers to adopt an agency model.20

In *Colvin et al. v. Valve Corp.*, 2:21-cv-00801 C.D. Cal. (2021) the complaint alleges that the MFN prevents rival platforms from competing with the Steam platform price, reducing competition and injuring consumers. Defendant Valve owns Steam, a platform for the distribution of PC games. Valve enjoys a 75% market share for the sale of PC games. In order for game developers to sell on the Steam platform, Valve requires game developers to pay Valve a commission on all earnings on the Steam platform. Valve also requires game developers to enter into MFN agreements that requires the game developers to offer their PC games on the Stream platform at the lowest price that the PC game is offered for sale on any other platform.

G. Price Discrimination

The Robinson Patman Act prohibits a seller from discriminating in price between different buyers when the discrimination adversely affects competition. The Act applies only to the sale of “commodities” – i.e., tangible goods and not the provision of services – of like grade and quality made to similarly situated buyers in the same market. The Act also prohibits a seller from offering promotions or allowances in a discriminatory manner. A buyer may be liable under the Act if the buyer induces a seller to discriminate among competing buyers, knowingly obtains a discriminatory price from a seller.

20 The publishers – Hachette Book Group, Inc., HarperCollins Publishers, Macmillan Publishers, Penguin Group, Inc., and Simon & Schuster, Inc. – settled with the DOJ. Only Apple proceeded to trial. At the time of the alleged conspiracy, Amazon controlled over 90% of the e-books market. The publishers had long been unhappy with Amazon’s $9.99 price-point for e-books and discussed among themselves (in numerous phone calls and multilateral meetings in New York restaurants) ways to increase their e-book prices. Against the backdrop of the upcoming release of the iPad, Apple communicated with the publishers regarding selling ebooks on its iBookstore platform. Apple had bilateral discussions with each publisher discussing selling ebooks at higher prices than Amazon, and offering to enter into agency agreements (under which the e-book prices would be set directly by publishers). The publishers then each entered into separate agency agreements with Apple..
1. \textit{A difference in price in reasonably contemporaneous sales}

In \textit{FTC v. Anheuser-Busch, Inc.} 363 U.S. 536 (1960), the Supreme Court held that price discrimination within the meaning of the Act is the actual price difference.\footnote{Dahl Auto. Onalaska Inc. v. Ford Motor Co., – F. Supp. 3d – 2022 602904 W.D. Wis. (2022) (“Price discrimination under § 13(a) simply means a price difference.”)} Actual net prices—after all discounts, rebates, and other factors affecting price—are compared to determine whether there is a price difference. The Act does not prohibit all forms of discrimination among customers but only those that relate to price or that serve as disguised price discrimination. In \textit{Card v. Ralph Lauren Corp.}, the court held that the plaintiff failed to provide evidence of contemporaneous sales by the same seller. The court also found that the plaintiff failed to show any injury to competition.\footnote{In \textit{Card v. Ralph Lauren Corp.}, 2021 WL 4427433 (N.D. Cal. Sept. 27, 2021) the court found that plaintiff failed to show any injury to competition because one company was an off-price account “which could liquidate large quantities of discontinued and/or excess products” and another, as a full-price account, was not “permitted to sell RLH furniture products at more than 30% below MSRP on a regular basis. In other words, these two companies competed in two different segments. Plaintiff sued Ralph Lauren and E.J. Victor for terminating their business relationship in 2015. Plaintiff owned a high-end furniture store that focused primarily on Ralph Lauren products. Full-price accounts, such as Plaintiff’s, were only allowed to sell at discounts greater than 30 percent off the Manufacturer's Suggested Retail Price (MSRP) with prior authorization from Defendants and such requests were considered on a case-by-case basis. Plaintiff received notice that her online sale of Ralph Lauren products was not authorized, and her account was terminated.}

2. \textit{Two or more purchasers of tangible products}

The Act applies only to goods sold to two or more purchasers at different prices by a single seller. Generally, at least two completed sales are required. Courts generally have held that a sale and an offer to sell and a sale and a refusal to sell will not come under the Act.\footnote{See Crossroads Cogeneration Corp. v. Orange & Rockland UTILS., 159 F.3d 129, 149 (3d Cir. 1998) (“Merely offering lower prices to a customer does not state a price discrimination claim.”); Vaughn Med. Equip. Repair Servs. v. Jordan Rees Supply Co., 2010 U.S. Dist. LEXIS 88958, at *32 (“Merely offering different pricing to different customers does not state a claim for price discrimination.”); Data Capture Solutions-Repairs & Remarketing, Inc. v. Symbol Techs., 520 F. Supp. 2d 343, 349 (D. Conn. 2007) (“mere offers to sell at different prices do not suffice to state a claim under the Robinson-Patman Act.”)}

3. \textit{Like Grade and Quality}

Price discrimination is prohibited only if the products sold by the seller to the favored and the disfavored buyers are of like grade and quality. There is no universal test for like grade and quality, and the principal question is whether any differences between the products affect the competitive environment.

In \textit{FTC v. Borden Co.} 383 U.S. 637 (1996) the Supreme Court held that brand names and labels are not determinants of grade and quality, thus exposing to potential challenge price variations for the same goods promoted under different labels. The Court commented that grade and quality are to be determined by the characteristics of the product itself and bona fide physical differences...
affecting consumer use or marketability have been sufficient to cause products not to be of like grade and quality.\textsuperscript{24}

4. \textit{Competitive injury}

The Act does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition.\textsuperscript{25} The Act requires only a "reasonable possibility" or "probability" that price discrimination may harm competition.

There are at least three categories of competitive injury that may support a claim under the Act: (1) injury to competition at the level of the discriminating seller and its direct competitors; (2) price discrimination that injures competition among the discriminating seller's customers; and (3) injury to competition at the level of the purchaser's customers.

Injury to competition at the level of the discriminating seller and its direct competitors

Plaintiff must prove that the defendant engaged in predatory pricing, which requires two elements: seller priced below an appropriate measure of cost, usually marginal cost or average variable cost; and seller had a reasonable prospect of recouping its losses from below-cost pricing by eliminating competition and then raising prices. Evidence of recoupment is difficult to prove when the defendant does not have a dominant market share, usually in excess of 60%.\textsuperscript{26} In the years since Brooke Group, primary line injury claims frequently have been defeated on motions to dismiss or for summary judgment. In many cases, the plaintiff's claim has been rejected for failure to allege or prove that the defendant's sales were below cost. Primary line injury claims also have been defeated for failure to allege or prove a reasonable prospect of recoupment, often because entry barriers were low or the defendant lacked a dominant share of the market.

5. \textit{Injury to competition among the discriminating seller's customers}

Proving injury to competition at the buyer's level--secondary line injury--usually entails proof of competition between favored and disfavored purchasers. To establish that price discrimination

\textsuperscript{24} See \textit{Utah Foam Prods. Co. v. Upjohn Co.}, 154 F.3d 1212, 1217-18 (10th Cir. 1998) (the chemical products at issue were not of "like grade and quality": although they were "very similar in structure and may be used interchangeably," the products differed in certain properties (such as "viscosity and reactivity") and customers had a clear preference for one product over the other).


\textsuperscript{26} In \textit{Brooke Group v. Brown \& Williamson Tobacco Corp.}, 509 U.S. 209 (1993), the Supreme Court established an objective predatory pricing standard: [W]hether the claim alleges predatory pricing under section 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. . . . The second prerequisite . . . is a demonstration that the competitor had a reasonable prospect, or, under section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. There are differences between the Robinson-Patman Act (which requires a "reasonable possibility" of substantial injury to competition) and Section 2 of the Sherman Act (which requires a "dangerous probability" of actual monopolization).
may tend substantially to lessen competition, a plaintiff must show both (1) a competitive nexus between the plaintiff and a favored competitor, and (2) that the price discrimination is likely to injure such competition. The relevant competition may be indirect, such as between the disfavored purchasers and customers of the favored purchasers. Demonstrating competition between two entities and establishing injury to competition can be the most difficult elements to satisfy.

A plaintiff must define a relevant product and geographic market, and there cannot be competitive injury if the favored and disfavored purchasers (and their customers) are not in the same geographic market. In Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006), the Supreme Court held that absent a showing of actual competition with a favored Volvo dealer, the plaintiff could not establish competitive injury. The Court found the plaintiff’s evidence lacking because it did not show any actual instances in which it received a worse price than the alleged favored retailers when competing for the same customer.

In U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, 2021 WL 3418584 C.D. Cal. (2021) the court denied injunctive relief to a wholesaler that sold 5-hour Energy where it purchased 5-hour Energy at a higher price than Costco. Under Section 2(a) and 2(d), the plaintiffs needed to prove that there was actual competition between the alleged favored purchaser (Costco) and disfavored purchaser (U.S. Wholesale). The court held that plaintiff’s did not prove this element because the plaintiff and Costco occupy different places in the channels of distribution because Costco operated as a retailer, whereas U.S. Wholesale was a wholesaler who sold to retailers, not the ultimate consumer.

Once the necessary competition between favored and disfavored buyers is shown, there are two general routes for a plaintiff to attempt to establish secondary line competitive injury: showing substantial discounts to a competitor over a significant period of time, known as the Morton Salt inference, or proof of sales lost to favored purchasers.

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27 See DeLong Equip. v. Washington Mills Electro Minerals, 990 F.2d 1186, 1202 (11th Cir. 1993) (upholding jury verdict for plaintiff where evidence demonstrated that the two purchasers paying different prices competed for the same customers in Pratt, Georgia, even though their warehouses were in different areas).

28 See, e.g., In re Inclusive Access Course Materials Antitrust Litig., 2021 WL 2419528 (S.D.N.Y. June 14, 2021) (finding the plaintiff’s allegation that defendant textbook publishers sold to defendant retailers at discriminatorily cheaper prices compared to plaintiffs on two occasions did not amount to a significant period of time necessary to plead a substantial effect on competition in a secondary-line price discrimination case). The more common approach is to prove the requisite competitive injury by inference. In FTC v. Morton Salt Co. 334 U.S. 37 (1948) the Supreme Court held that the existence of a significant price difference over a substantial period of time involving a product for resale, where competition among resellers is keen, creates an inference of injury to competition. Cases inferring competitive injury from price discrimination frequently involve entrenched discriminatory pricing between highly competitive customers with low profit margins. No inference of injury to competition is permitted when the discrimination is not substantial. The Morton Salt inference, when applicable, may be rebutted. Courts have articulated numerous means of rebutting the inference. The Second Circuit, Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 212 (2d Cir. 2015), for example, recently held that "the inference may be rebutted by evidence that favored purchasers were diverting only a de minimis number of customers."
a. Injury to competition at the level of the purchaser’s customers

Injury at the level of customers of the favored and disfavored purchasers also may support a cause of action. In tertiary-line cases, the customers of the favored and disfavored purchasers can show their injury through diverted sales; but, however, the favored and disfavored purchasers do not have to be direct competitors. 29

The Supreme Court in Perkins v. Standard Oil Co. 395 U.S. 642 (1969) found that injury even further downstream-- characterized as "fourth level"--could be actionable where the disfavored direct-buying purchaser competed with customers two levels below the favored purchaser. The Court explained that there is no "artificial limitation" as to the level in the chain of distribution where the injury must occur. But the plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." 30

The FTC has demonstrated an interest in reviving the use of the Robinson-Patman Act. In June of 2022, the FTC announced that it will ramp up enforcement against bribes and rebates paid to exclude competitors offering lower-cost drug alternatives. The announcement expressed that such schemes may constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, which prohibits paying an intermediary to act against the interests of the party it represents in the transaction.

H. Exclusive Dealing, Tying and Bundling

1. Exclusive Dealing

Exclusive dealing describes a set of practices that have the effect of inducing a buyer to purchase most or all products or services for a period of time from one supplier. 31

The arrangement may take the form of an agreement forbidding the buyer from purchasing from the supplier's competitors, a requirements contract committing the buyer to purchase all (or a substantial portion) of its total requirements of specific goods or services only from the supplier, a pricing policy that creates a substantial disincentive to purchase from competitors, or an agreement to purchase all of a supplier's output.

Exclusive dealing arrangements may raise competitive concerns if they have the potential to foreclose competitors of the supplier from marketing their products to that buyer for the period of time involved.

31 Exclusive dealing also occurs when a technology license prevents the licensee from licensing, selling, distributing, or using competing technologies. Exclusive dealing should be distinguished from exclusive distributorships. In an exclusive distributorship, the restraint operates only on the seller, but in an exclusive dealing arrangement, the restraint is on the buyer.
Section 3 of the Clayton Act, Section 1 and 2 of the Sherman Act, and Section 5 of the FTC Act apply to exclusive dealing.32

Unless an exclusive dealing claim is brought under Section 2 of the Sherman Act, courts apply the rule of reason, balancing the procompetitive effects of the arrangement with the anticompetitive effects. For exclusive dealing arrangements to be unlawful under Section 1 of the Sherman Act or Section 3 of the Clayton Act they must result in substantial foreclosure of competition in the relevant market. Courts generally have found that if the arrangement forecloses 20% or less of the relevant market, it presumptively does not adversely affect competition and is legal. The Supreme Court has never treated exclusive dealing arrangements as per se unlawful.

If an exclusive dealing arrangement is challenged under Section 2, the amount of foreclosure that would otherwise be legal under Section 1 might be illegal under Section 2.

In Standard Oil Co. v. United States 337 U.S. 293 (1949), the Supreme Court adopted the "quantitative substantiality" test. This test measured whether the foreclosure of competition was substantial by focusing almost entirely on the percentage of the relevant market foreclosed to competing suppliers by virtue of the exclusive dealing arrangement. The Court found in two cases that relatively small percentages of foreclosure in the relevant market were substantial or more detailed analysis of the market was required.33 Tampa Electric Co. v. Nashville Coal Co.,365 U.S. 320 (1961) applied a qualitative substantiality test and found that although the arrangement foreclosed just 0.77 percent of the relevant market, a more detailed analysis of the market weighing the competitive effects was needed.

In Beltone Electronics Corp., 100 FTC 68 (1982), the FTC stated that "a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant market, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity."34 After Beltone, the analysis under Section 5 FTC Act, Section 1 Sherman Act and Section 3 Clayton Act merged into the Tampa Electric rule of reason standard.35

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32 Section 3 CA is limited to sale involving goods, wares, merchandise, machinery, supplies, or other commodities, it does not apply to services or intangibles.

33 Standard Oil Co. v. United States 337 U.S. 293 (1949), finding that the foreclosure of 6.7 percent of the relevant market was substantial where the foreclosure occurred in an industry where other major oil companies employed exclusive dealing contracts similar to those before the Court.

34 Beltone Electronics Corp., at 204.

35 McWane v. Inc., F.T.C., 783 F.3d 814 (11th Cir. 2015), the FTC challenged under Section 5 of the FTC Act a program under which McWane, which had a 90-95% market share of domestic ductile iron pipe fittings, informed its customers that if they did not purchase entirely from McWane, and distributors might lose their rebates or be cut off from purchasing McWane domestic fittings for up to three months. The Eleventh Circuit commented that although exclusive dealing arrangements are not per se unlawful, they can run afoul of antitrust laws when used by a dominant firm to maintain its monopoly. The distributors were essential to the domestic fittings market, the program lacked procompetitive benefits, and foreclosed Star from a substantial share of the market because two of the largest distributors constituting 50-60% of the market prohibited their branches from purchasing from Star.
Since *Tampa Electric*, courts have steadily moved away from a strict focus on foreclosure percentage to a more nuanced analysis of whether the arrangement threatens to create or enhance market power and therefore lead to an anticompetitive outcome. Courts tend to focus on the ability of competitors to reach the market in the face of the exclusive deal. Courts consider the market position of the seller imposing the agreement, the duration and ability to terminate, whether entry into the supplier market has occurred, and the prevalence of exclusive dealing arrangements in an industry. Thus, partial requirements contracts, minimum purchase requirements, loyalty discounts have been found permissible when they do not preclude competing sellers from selling to the buyers on whom the arrangements have been imposed. On the other hand, if competitors cannot circumvent the exclusive arrangement to reach the market, the arrangement may be found harmful to competition.\(^{36}\)

Traditional contracts that provide for exclusive dealing arrangements are subject to Section 1, but Section 1 also covers *de facto* exclusive dealing arrangements and partial exclusive dealing arrangements achieved through loyalty discounts or rebates that are conditioned upon a customer exclusively dealing with a supplier.\(^{37}\)

For example, in *Eisai v. Sanofi Aventis* (2016), after applying the rule of reason, the Third Circuit held that there was no evidence that Sanofi’s actions caused broad harm to the competitive nature of the anticoagulant market. The court reasoned that identification of a few dozen hospitals out of almost 6,000 in the U.S. was not enough to demonstrate “substantial foreclosure.” The court also reasoned that unlike in other cases where exclusive dealing claims based on bundled discounts prevailed, this case did not make compliance mandatory, where failure to meet purchasing targets would jeopardize the customers’ relationships with the dominant manufacturer. Here, Lovenox customers did not risk penalties or supply shortages for violating the Lovenox Program.

\(^{36}\) Courts continue, however, to assess the percentage of and have established a virtual safe harbor for market foreclosure of 20 percent or less.

\(^{37}\) *See In re Remicade Antitrust Litig.*, 345 F. Supp. 3d 566 (E.D. Pa. 2018). Direct and indirect purchasers of defendant Johnson & Johnson’s (J&J) alleged that J&J adopted an anticompetitive scheme consisting of exclusive agreements and coercive bundled rebates to foreclose competition posed by biosimilar versions of its drug Remicade. Plaintiffs alleged that defendant’s exclusive contracts with insurers blocked biosimilar drugs by requiring insurers to deny coverage for biosimilars completely or adopt “fail first” provisions, under which providers cannot choose a biosimilar unless a patient has first failed to respond to treatment with Remicade. Second, plaintiffs alleged that J&J allegedly used bundled rebates as leverage over insurers by threatening a rebate penalty if insurers did not enter contracts that foreclose them from reimbursing competitor biosimilars. J&J allegedly engaged in multi-product bundling, linking rebates for Remicade to other J&J drugs that its competitors did not offer. The court held that the purchasers successfully stated claims for exclusive agreements and bundled rebates. *See also Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394 (3d Cir. 2016): Eisai complained that Sanofi harmed competition in the market for anticoagulant drugs by preventing hospitals from replacing Sanofi’s Lovenox drug with competing drugs. Eisai claimed that Sanofi offered market share and volume discounts, where hospitals received price discounts based on the volume of Lovenox they purchased as a percentage of the total amount of anticoagulant drugs they purchased. Second, Eisai asserted that Sanofi used restrictive formulary access clauses that limited a hospital’s ability to give certain drugs priority status on its formulary.
Recently, in *In re EpiPen Marketing, Sales Practices and Antitrust Litig.*, the court applied a rule of reason analysis and granted summary judgment against the plaintiff’s exclusive dealing claims. The court determined that there was no substantial foreclosure of competition by following *Tampa Electric*, balancing the probable effects of the contract on competition. The court determined that there was no coercive conduct, the contract duration was short and terminable by payors without cause, that exclusive dealing arrangements were common in the pharmaceutical industry, and that there was no substantial market foreclosure because competing products remained available from major PBMs.

2. **Tying**

A tying arrangement is an agreement to sell a product (the tying product) only on the condition that the buyer also purchases a different product (the tied product). Tying can involve services as well as products.

Tying claims are most often brought under Section 1 of the Sherman Act, but claims can also be brought under Section 3 of the Clayton Act, and Section 2 of the Sherman Act, though Section 2 claims require proof of market power.

Earlier Supreme Court decisions held tie-ins to be per se unlawful under both Section 1 and Section 3. The strength of the per se rule for tying arrangements has waned over recent decades, but tying remains the only vertical restraint to which the per se rule nominally applies.

In general, tying arrangements have been treated as per se unlawful under Section 1 and Section 3 without proof of an unreasonable anticompetitive effect, if (1) the tying and the tied good are two separate products or services, (2) the sale or agreement to sell one product or service is conditioned on the purchase of another, (3) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (4) a not insubstantial amount of interstate commerce in the tied product is affected. If these elements are not met, the tying arrangement is assessed under the rule of reason.

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38 545 F. Supp. 3d 922 (D. Kan. 2021). Mylan Pharmaceuticals acquired Dey Pharma, which had the exclusive right and license to market, distribute, and sell EpiPen Auto-Injectors in the U.S. under a Supply Agreement with Meridian Medical Technologies, which manufactured EpiPen products. When a competitor secured a license to sell a competing product, Mylan allegedly responded by conditioning rebates paid to pharmacy benefit managers on their agreement to block the competing products from formulary placement, essentially by entering unlawful exclusive dealing arrangements in the form of Mylan’s rebate agreements with PBMs.

39 See *North Pac. Ry.*, 356 U.S. at 3; see also *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) ("[I]t is unreasonable, per se, to foreclose competitors from any substantial market.")
The critical feature of an illegal tying arrangement is coercion: the seller exploiting its economic power over one product to force a buyer to purchase a second product they would not otherwise purchase together with the first.\(^{40}\)

The Supreme Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) held that “certain arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable per se, whereas other tying arrangements are illegal only if they impose an unreasonable restraint on competition in the relevant market.”\(^{41}\) Per se condemnation of a tying arrangement is appropriate only if it is probable that the seller has either the degree or the kind of market power that enables him to force customers to purchase a tied product.\(^{42}\)

In the Supreme Court's most recent tying opinion, *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006), the Court ruled that market power cannot be presumed automatically where a company conditions the sale of a patented product on the purchase of a tied product. In other words, the mere fact that a tying product is patented does not necessarily mean that a firm has market power. The Court also indicated that tying arrangements are not always or almost always anticompetitive, which may suggest that the Court is open to further reexamination of the application of the per se rule to tying arrangements.\(^{43}\)

Today, consistent with previous decisions, courts follow the modified per se approach to tying arrangements that can resemble the rule of reason. Modern courts are especially likely to pay attention to whether the products are actually tied and exerting a forcing effect, as opposed to merely being offered together.\(^{44}\)

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\(^{40}\) See *It's My Party, Inc., Live Nation, Inc.*, 811 F.3d 676, 684 (4th Cir. 2016): Plaintiff, It’s My Party, contended that Live Nation violated the Sherman Act by engaging in an illegal tying in the music concert industry. It’s My Party alleged that there was tying of promotional services with the use of a certain venue. The Fourth Circuit found no coercion because there was no evidence that Live Nation’s promotion services coerced artists (the consumers) into performing in a particular arena, simply because the products were offered together. Because the two products were often sold separately, there was no tying.

\(^{41}\) See *Jefferson Parish* at 17-18. In *Jefferson Parish*, a hospital entered an exclusive contract with a firm of anesthesiologists that required every patient undergoing surgery at the hospital to use that anesthesiology firm. A board certified anesthesiologist was denied admission to that hospital’s staff because the anesthesiologist was not a member of the anesthesiology firm under contract. The Supreme Court ruled unanimously that the agreement was legal, but split 5-4 as to which rule the court should follow. The majority adopted the modified per se rule above, concluding that even though surgical services and anesthesia are separate products, Jefferson Hospital did not have market power over surgical services because 70% of patients in the geographic market went to other hospitals.

\(^{42}\) In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), Kodak would only sell repair parts for its copiers and scanners if the customers also purchased repair services from Kodak. The Supreme Court struck down the arrangement even though Kodak only had a 23% market share because Kodak had market power in the aftermarket for its own equipment parts. Kodak formed agreements with its parts manufacturers to only sell its Kodak parts to Kodak, giving Kodak an effective monopoly over its parts.

\(^{43}\) See *Illinois Tool Works* at 36-38.

\(^{44}\) See *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020). Viamedia claimed that Comcast conditioned the sale of Interconnect services (the tying product) on the purchase of ad rep services (the tied product), in violation of Section 2 of the Sherman Act. The Seventh Circuit cited *Jefferson Parish* and *Eastman Kodak* as supplying its rule regarding tying,
3. Bundling

In bundling a seller offers a bundle of goods at a lower price than its individual components sell for separately, effectively giving a discount on the second product. Bundling can occur without tying if the customer still has the option of purchasing the two products separately.

Bundling is frequently considered pro-competitive because they lower consumer prices and stimulate price competition, but bundling can be anti-competitive if competitors cannot offer the same selection of products or match the discount, causing foreclosure of the rival.

Although there is agreement across the circuits that for Section 2 predatory bundling claims market power by the firm engaging in the bundling is required, there is a Circuit split between the Third and Ninth Circuits on when bundling should be considered anti-competitive and illegal.

The Third Circuit applies a more general anticompetitive effects test. In *LePage’s v. 3M*, 324 F.3d 141 (3d Cir. 2003), the Third Circuit held that even though 3M did not price below its costs, the rebate bundling program was anticompetitive because 3M intended to force LePage out of the market and transition consumers to the more expensive branded Scotch tape.

The Eight, Ninth, and Fifth circuits follow a different approach, known as the discount attribution test. Ninth Circuit rejected the approach adopted in *LePage*, following instead the Supreme Court’s predatory pricing jurisprudence, and the risk of enjoining procompetitive pricing behavior. The court held that when assessing the legality of a rebate, the full amount of

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[45] See *Inline Packaging, LLC v. Graphic Packaging Int’l*, 962 F.3d 1015, 1030 8th Cir. (2020) (finding that both the Third Circuit’s and the Ninth Circuit’s approaches require the plaintiff to establish that the defendant is a monopolist or holds sufficient market power in the leveraging market).

[46] In *LaPage*, LePage’s produced a private label transparent tape. In addition to selling private label tape, the defendant also sold the leading brand of transparent tape (Scotch tape) and enjoyed a 90% market share. LaPage’s claimed that 3M used its monopoly power over Scotch tape to create a multi-tiered “bundled rebate” by offering higher rebates when customers purchased other products in a number of 3M’s product lines that LePage’s did not manufacture. As a result, PePage claimed that such bundling required them to offer substantial discounts on its tape in order to compete.

[47] In *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) the defendant was a healthcare provider that offered bundled rebates or discounts to insurers on the condition that the insurers made PeaceHealth their exclusive preferred provider for primary, secondary, and tertiary care. Competing healthcare providers could not compete by providing all three services. PeaceHealth’s competitors argued that these bundled rebates to customers that purchased all three services was foreclosure and in violation of Section 2; see also *Cascade Health Sol.,* 515 F.3d at 903 (citing *Brooke Grp.*
the defendant’s rebate for all products must be apportioned to the products on which the monopolist faced competition, and if the resulting price is below the defendant’s incremental cost to produce those products, the bundled discount may be exclusionary under Section 2. Otherwise, the loyalty rebate is presumed to be legal price competition. The second element of predatory pricing, dangerous probability of recoupment of losses, is not required.

The Fifth Circuit followed the Ninth Circuit in *Clean Water Opportunities, Inc. v. Willamette Valley Co.* 48 The court held that the plaintiffs failed to sufficiently plead a bundling claim because they did not allege facts that the entire bundled discount, when applied to the product at issue, resulted in below cost pricing. This result suggests that the predatory pricing framework that uses below-cost pricing as the standard for anticompetitiveness is gaining popularity among courts outside the Third Circuit. 49

4. Reciprocal dealing

Reciprocal dealing can be considered a form of tying where Firm A uses its economic power to compel Firm B to purchase a product from A in return for A’s agreement to buy a product from B.

The Supreme Court has only spoken on the issue of reciprocal dealing once in a merger matter, where the Court held that the merger violated the Clayton Act Section 7 because it would lead to reciprocal buying insulating from competition on price, quality, and service. 50

Thereafter, lower courts have sometimes taken inconsistent approaches to whether reciprocal dealings claims should be evaluated under the per se rule or the rule of reason, but generally

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48 *Clean Water Opportunities, Inc. v. Willamette Valley Co.*, 2019 WL 113681 (5th Cir. Jan. 4, 2019). Clean Water Opportunities, doing business as Engineered Polyurethane Patching Systems (EPPS), manufactured path, a polyurethane material used to fill holes in plywood. EPPS entered a contract with MARTCO, a plywood manufacturing company, to supply patch at a price below Willamette’s prices. Willamette then offered a substantial discount on all the non-patch products it sold to MARTCO contingent upon MARTCO purchasing all of its patch from Willamette. EPPS could not offer a matching discount, and MARTCO terminated its relationship with EPPS. EPPS alleged that, although Willamette did not price patch itself below average variable cost, it effectively did so when it substantially discounted non-patch products to induce customers to purchase its patch. The court held the complaint failed to establish below-cost pricing because the competitive price was $10 and EPPS’s price was $12.90, providing Willamette with more than $2.90 of a pricing advantage, and no other facts alleged that prices fell below average variable cost.

49 *See Unigestion Holdings, S.A. v. UPM Tech., Inc.*, 412 F. Supp. 3d 1273, 1288 (D. Or. 2019) (finding that the plaintiff failed to allege predatory bundling because they made no allegation that the defendant sold transportation service below the cost of delivering that service).

50 In *FTC v. Consolidated Foods*, in which Consolidated Foods, which owned food processing plants and a network of wholesale and retail food stores, acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic. After the merger, Consolidated Foods attempted to induce reciprocal buying of Gentry’s products by Consolidated Foods’s suppliers.

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find that when coercion is present, the per se rule applies.\textsuperscript{51} Lower courts have, however, found that the absence of market can condemn a reciprocal dealing claim regardless of which rule is applied.\textsuperscript{52}

III. VERTICAL RESTRAINTS UNDER EU LAW

A. EU Laws Applying to Vertical Restraints

In the European Union (EU), vertical restraints are reviewed under Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101 TFEU prohibits agreements and other collusive behavior between undertakings that restrict competition and affect trade between Member States in the EU. For there to be an agreement within the meaning of Article 101 TFEU, it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way (concurrence of wills). The form in which that intention is expressed is irrelevant, as long as it constitutes a faithful expression of the parties’ intention. Unilateral conduct may fall within the scope of Article 102 TFEU, which prohibits the abuse of a dominant position.

The De Minimis Notice (DMN), the Vertical Agreements Block Exemption Regulation (VBER), and the Vertical Guidelines are the three main texts used to determine the applicability of Article 101 TFEU to vertical agreements.\textsuperscript{53}

\textsuperscript{51} Compare Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979) (noting that certain types of reciprocal dealing are subject to the per se illegal rule); see also Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425 (5th Cir. 1978) (finding that the proper standard for reciprocal dealing arrangements should be no higher than for tying arrangements, and applying the per se rule); with Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 511-12 (3d Cir. 1998) (declining to resolve the issue of whether reciprocal dealing arrangements should be found per se illegal or be judged under the rule of reason, but citing Ninth Circuit precedent stating that the Sherman Act is concerned with coercive reciprocal dealing) Brierwood Shoe Corp. v. Sears, Roebuck, & Co., 501 F. Supp. 144, 147-48 (S.D.N.Y. 1980) (finding that because plaintiff’s claims depend on the theory that goods are being traded to the plaintiff on disadvantageous terms, there is no coercion claimed and the reciprocal dealing arrangement should not be subject to the per se rule).

\textsuperscript{52} See Great Escape, Inc. v. Union City Body Co., Inc., 791 F.2d 532, 537 (7th Cir. 1986) (finding that plaintiff must establish that the defendant buyer has substantial market power tending to require the seller to make the reciprocal purchase to establish a coercive reciprocal buying arrangement). The court found that an automotive body company did not possess sufficient market power in the purchase of services from a truck delivery company to coerce the truck delivery company to switch travel agencies. The truck delivery company at most sold seven percent of its sales to the defendant, which would not create enough market power in the defendant to coerce the truck delivery company. See also Brokerage Concepts, Inc., 140 F.3d at 516-17 (finding that the plaintiff failed to establish that U.S. Healthcare had sufficient market power to impose per se liability because defendant’s market share was no higher than 25% and plaintiff offered no evidence that the successful tying of approval of additional pharmacies to participation in the U.S. Healthcare network were not motivated by plausible business reasons).

\textsuperscript{53} On 10 May 2022, the European Commission (Commission) adopted the new VBER, accompanied by the new Vertical Guidelines. While the overall assessment framework remains the same, the Commission introduced important changes, with the aim of clarifying how the established framework governing vertical agreements will be applied and interpreted in light of the growth of e-commerce and the evolution of the platform economy. The new VBER will enter into force on 1 June 2022 and will expire on 31 May 2034. Agreements already in force on 31 May 2022 are subject to a transitional period of one year; they must be compliant with the new rules by 31 May 2023.
1. **De Minimis Notice**

An agreement that falls within the scope of the DMN is outside the scope of Article 101 TFEU. The DMN requires that the market shares of the parties to the vertical agreement does not exceed 15%; in case of parallel networks of agreements between suppliers and distributors having cumulative foreclosure effect, the individual market share of each party should not exceed 5%.

The DMN does not apply when an agreement includes any of the restrictions that are listed as hardcore restrictions in any current block exemption regulation. However, even where the conditions of the DMN are not met, the European Commission will generally not take enforcement action in respect of vertical agreements entered into between micro, small, and medium-sized enterprises in the absence of dominance.

The DMN is only likely to be of particular value in respect of agreements which contain the so-called excluded restrictions as defined by Article 5 VBER, i.e., non-compete obligations imposed on the buyer that exceed the limits set under VBER.

2. **Vertical Block Exemption Regulation**

To qualify as a vertical agreement under the VBER, an agreement must relate to the conditions under which the parties may purchase, sell or resell certain goods or services. Agreements entered into by providers of online intermediation services, such as e-commerce marketplaces, app stores, price comparison tools and social media services, fall within the scope of the VBER.

The VBER grants an exemption from Article 101 TFEU to vertical agreements subject to a 30% market share ceiling, determined on the basis of market shares of the supplier and the buyer and provided that the restraints do not qualify as hardcore restrictions within the meaning of Article 4 of the VBER.

The 30% market share threshold reflects the view that, absent hardcore restrictions, only vertical restraints engaged in by firms with some degree of market power at either the level of the supplier or the buyer, or both, pose a significant threat to competition. There is nonetheless no presumption that agreements between parties holding market shares above 30% fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3) of the Treaty; these must be assessed on their individual merits.

Hardcore restrictions are presumed to result in a net harm to competition. Therefore, vertical agreements that contain such hardcore restrictions do not benefit from the exemptions provided by the VBER.

The hardcore restrictions set out in Article 4 of the VBER are as follows:

- resale price maintenance;
- territorial and customer allocation;
- territorial and customer restrictions in online sales and advertising;
- restrictions on component suppliers to sell to end users, repairers, and independent service providers.

Article 5 of the VBER excludes certain obligations contained in vertical agreements, such as non-compete obligations exceeding a duration of 5 years, post term non-compete obligations imposed on a buyer, non-compete obligations imposed on a member of a selective distribution system and parity obligations (MFNs), from the benefit of the block exemption, irrespective of whether the market share thresholds set out in VBER are exceeded or not.\(^{54}\)

There is no presumption that the obligations listed in Article 5 of the VBER fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3), thus an individual assessment of the clause is required. Moreover, the exclusion of an obligation from the block exemption pursuant to Article 5 is limited to the specific obligation, provided that the obligation in question can be severed from the rest of the vertical agreement. In that case, the remainder of the vertical agreement continues to benefit from the block exemption.

3. **Vertical Guidelines**

The Vertical Guidelines set out principles for the assessment of vertical agreements and concerted practices under Article 101 TFEU and the VBER.

B. **Customer and Territorial Restrictions**

Agreements that directly or indirectly have the object of restricting the territory into which or the customers to whom a buyer or its customers may sell the contract goods or services are designated hardcore restrictions.

The new VBER maintains the distinction between active sales – actively targeting customers – and passive sales – sales made in response to unsolicited requests from individual customers.\(^{55}\)

Active sales restrictions are permitted to protect exclusive or authorized distributors. Passive

\(^{54}\) Under Article 5 of VBER noncompete obligations exceeding a duration of five years are not exempted. Post-term non-compete obligations imposed on the buyer are excluded from the benefit of VBER, unless all of the following conditions are fulfilled: the obligation is indispensable to protect know-how transferred by the supplier to the buyer; it is limited to the point of sale from which the buyer has operated during the contract period; it is limited to a maximum period of 1 year.

\(^{55}\) Active sale restrictions are exempted under the VBER when suppliers establish an exclusive distribution system. Suppliers may restrict a buyer’s active sales, including targeted online advertising, into territories or to customer groups that are allocated exclusively to other buyers or reserved to the supplier. The protection of such exclusively allocated territories or customer groups is not absolute, as the supplier may not restrict passive sales into such territories or customer groups. When operating a selective distribution system, suppliers can restrict active and/or passive sales to unauthorized distributors located in the same territory where the selective distribution operates Restrictions on sales by wholesalers (including exclusive and authorized wholesalers) to end-users are also exempted.
sales restrictions are hardcore restrictions, but the supplier may restrict passive sales of any distributor and their customers when the supplier operates a selective distribution system. Restrictions on passive sales of wholesalers to end-users are also permitted.

The Commission and the European Courts have consistently applied Article 101 TFEU to prohibit suppliers granting their resellers absolute territorial protection within their contract territory.  

In Grundig-Consten, the Commission examined only the effects on intra-brand competition and refused to analyze its effects on inter-brand competition. The ECJ upheld the Commission’s view and commented that “although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict competition should escape the prohibition of Article [101(1)] merely because it might increase the former.”

This approach implies that many forms of territorial restriction were considered per se violations of Article 101(1), without any analysis of their broader economic effects on competition with other brands. The promotion of intra-brand competition across national boundaries was considered an indirect means of encouraging the harmonization of market conditions, particularly pricing, across the European Union, and the Commission rejected arguments relating to differences in the characteristics of, and competitive conditions on, different national markets within the Union, even when such differences were significant.

More recent decisions, however, confirm that territorial restrictions in vertical agreements are no longer regarded as per se suspicious. Since at least Metro SB-Großmärkte GmbH & Co. KG v Commission the ECJ and the Commission recognized that a restriction of intra-brand competition is problematic only in the event of a reduction in effective inter-brand competition.

In its most recent decision, Visma, the ECJ reaffirmed that vertical restraints should not be a priority under Article 101, that the concept of by-object restriction must be applied narrowly

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56 See, e.g., the Commission’s landmark decision in Grundig-Consten, Case 00004-03344, OJ 1964 161/2545; on appeal: Case 56/64, Consten and Grundig v. Commission. The Commission found that the agreement between Grundig and Consten granted absolute territorial protection in France to Consten, its exclusive distributor, and infringed Article 101(1). Absolute territorial protection implies that the supplier structures its distribution system in such a way that each reseller is protected from competing sales within its contract territory by resellers established in other territories, commonly by prohibiting each reseller from making any sale outside its territory. The ECJ upheld the Commission’s decision with respect to the territorial restrictions at issue, which included the assignment by Grundig to Consten of French trade mark rights. For a more recent assessment of absolute territorial protection in respect of satellite broadcasting services achieved through a prohibition on the export of decoding devices, see Case C-403/08, Football Association Premier League and Others, paras 134-146.


58 See Case C-501/06P, GlaxoSmithKline Services and Others v. Commission and Others.

and that anticompetitive effects are only likely where interbrand competition is weak and there are barriers to entry at either producer or distributor level.\textsuperscript{60}

The new Vertical Guidelines distinguish between exclusive supply, exclusive distribution and selective distribution. VBER exemptions apply when neither the supplier's nor the buyer's market share exceeds 30\% and the agreements do not include hard core restrictions of competition.

C. Exclusive Supply

The main competition risk of exclusive supply is anticompetitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular where the exclusive distributor becomes the exclusive buyer for a whole market. When a buyer is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anticompetitive effects. The higher the tied supply share, and the longer the duration of the exclusive supply obligation, the more significant the foreclosure effect is likely to be.

Foreclosure of competing buyers is not likely where these competitors have similar buying power to that of the buyer party to the agreement and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies where a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative foreclosure effect may lead to withdrawal of VBER protection.

D. Exclusive Distribution

VBER exempts exclusive distribution systems in which the supplier allocates a territory or a group of customers exclusively to one or a limited number of buyers, while restricting all its other buyers within the Union from actively selling into the exclusive territory or to the exclusive customer group.

In an exclusive distribution system, any restrictions on passive sales remain a hardcore restriction and make the entire agreement void under Article 101 TFEU. Moreover, the exemption is limited to a maximum of five distributors per exclusive territory or customer group, in order to preserve the incentive of the distributors to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to organize its distribution system.\textsuperscript{61}

\textsuperscript{60} See Case C-306/20 - \textit{Visma Enterprise}, p. 78.

\textsuperscript{61} Above that number, there is an increased risk that the exclusive distributors may free-ride on each other's investments, thereby eliminating the efficiency that exclusive distribution is intended to achieve.
Moreover, under the new VBER a supplier may require buyers to pass on restrictions of active sales to their direct customers, giving enhanced protection in respect of exclusively allocated customer groups or territories. Such pass-on is not block-exempted further down the distribution chain.

Outside VBER protection, the Vertical Guidelines explain the market position of the supplier and its competitors is of major importance, as a loss of intra-brand competition will only be problematic if inter-brand competition is limited at the supplier or distributor level. The stronger the position of the supplier, notably above the 30% threshold, the higher the likelihood that inter-brand competition is weak and the greater the risk for competition resulting from any reduction in intra-brand competition. In any case, even if infringing Article 101(1) TFEU an exclusive distribution may nevertheless create efficiencies relevant under Article 101(3) TFEU.

E. Selective Distribution

In a selective distribution system, the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria. Those distributors undertake not to sell such goods or services to unauthorized distributors within the territory reserved by the supplier to operate the system.

Selective distribution systems are comparable to exclusive distribution systems in that they restrict the number of authorized distributors and the possibilities of resale. The main difference between the two types of distribution system lies in the nature of the protection granted to the distributor. In an exclusive distribution system, the distributor is protected against active selling from outside its exclusive territory, whereas in a selective distribution system, the distributor is protected against active and passive sales by unauthorized distributors.

The criteria used by the supplier to select distributors may be qualitative or quantitative, or both. In Metro v Commission, Case 26/76, the ECJ stated that purely qualitative selective distribution may fall outside the scope of Article 101(1)TFEU provided that the three conditions are met:

1) The nature of the goods or services in question must necessitate a selective distribution system (such a system must constitute a legitimate requirement to preserve its quality and ensure its proper use); in C-230/16 - Coty Germany, the ECJ commented that quality of such goods may result not only from their material characteristics, but also from the aura of luxury surrounding them. Therefore, establishing a selective distribution system

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62 See Visma Enterprise cit., paragraph 78.
63 For example, exclusivity may be necessary to incentivize distributors to invest in developing the supplier’s brand or in providing demand-enhancing services.
64 However, restrictions of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade are hardcore restrictions.
that seeks to ensure that the goods are displayed in a manner that contributes to sustaining that aura of luxury may be necessary to preserve their quality.\(^5\)

2) Resellers must be chosen on the basis of objective qualitative criteria, which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner;

3) The criteria laid down must not go beyond what is necessary. In *Guess*, Case AT.40428 (2018), the Commission fined the branded clothing company for limiting cross-border sales through restrictions contained in its selective distribution network. The restrictions included (i) bidding on Guess brand names and trademarks as keywords for online search advertising; (ii) selling online absent a prior authorization from Guess; (iii) selling to consumers located outside allocated territories; (iv) cross-selling among authorized wholesalers and retailers; and (v) setting independent retail prices for Guess products. These restrictions resulted in increased online sales through Guess’ website at the expense of its wholesalers/retailers.

Outside the VBER, the Vertical Guidelines require an analysis of the market structure. As for exclusive distribution, the market position of the supplier and its competitors is of central importance in assessing possible anticompetitive effects. The possible competition risks of selective distribution systems include a reduction in intra-brand competition and, especially in the case of a cumulative effect, the foreclosure of certain types of distributors, as well as the softening of competition and the facilitation of collusion between suppliers or between buyers, due to the limitation of the number of buyers.\(^6\)

F. Dual Distribution

Dual distribution refers to situations in which a supplier not only sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors.

All aspects of the vertical agreement are exempted. The new VBER take into consideration horizontal concerns caused by information exchange in dual distribution systems. The exchange of information is exempted only if it is both (i) directly related to the implementation of the

\(^5\) Ruling confirming that luxury brands may restrict distributors in a selective distribution network from selling their goods through third-party online platforms such as Amazon and eBay, provided that this is necessary to preserve the luxury image of their goods.

\(^6\) The Commission may withdraw VBER where selective distribution systems create cumulative anticompetitive effects. Such cumulative anti-competitive effects are unlikely where the total share of the market covered by selective distribution does not exceed 50%. Competition concerns are also unlikely to arise where the market coverage exceeds 50%, but the aggregate market share of the five largest suppliers does not exceed 50%.
vertical agreement and (ii) necessary to improve the production or distribution of the contract goods or services.  

Dual distribution is not exempted in case of actual or potential competition at both levels of the distribution chain between the parties, that is to say that only non-reciprocal agreements are exempted - the buyer of the contract goods or services does not also supply competing goods or services to the supplier. Moreover, the exemption for dual distribution does not apply to the provision of online intermediation services where the provider of the online intermediation services is also a competing undertaking on the relevant market for the sale of the goods or services.  

Lastly, the new VBER expands the scope of the exemption for dual distribution to cover not only manufacturers but also importers and wholesalers.

G. Vertical Agreements in the Platform Economy and Online Sale Restrictions

1. Online Intermediation Services

Under the new VBER agreements relating to the provision of online intermediation services are vertical agreements and benefit from the block exemption, subject to the conditions set out in VBER.  

In order to qualify as a provider of online intermediation services, a company must facilitate the initiating of direct transactions between two other parties. As explained in *Airbnb Ireland*, Case C-390/18, the fact that company collects payments for transactions that it intermediates, or offers ancillary services in addition to its intermediation services, for example, advertising services, rating services, insurance or a guarantee against damage, does not preclude it from being categorized as a provider of online intermediation services. Examples of online intermediation services mentioned in the Vertical Guidelines are online marketplaces and price comparison services.  

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67 The new Vertical Guidelines also provide examples of precautionary measures that parties can take to minimize the risk that the information exchange will raise competition concerns. For example, they may exchange information only in aggregated form or ensure an appropriate delay between the generation of the information and the exchange. They may also use technical or administrative measures, such as firewalls, to ensure that information communicated by the buyer is accessible only to the personnel responsible for the supplier’s upstream activities and not to the personnel responsible for the supplier’s downstream direct.

68 Providers of online intermediation services that have such a hybrid function may have the ability and the incentive to influence the outcome of competition on the relevant market for the sale of the intermediated goods or services.

69 VBER defines online intermediation services as services which allow undertakings to offer goods or services to other undertakings or to final consumers, with a view to facilitating the initiation of direct transactions between undertakings or between undertakings and final consumers.

70 For the purpose of the Vertical Guidelines, price comparison services refer to services that do not provide a direct purchasing functionality. Services enabling users to conclude purchase transactions by providing sale and purchase functionality are classified as online marketplaces.
Restrictions imposed by the undertaking that provides the online intermediation services on buyers of those services relating to the price at which, the territories to which, or the customers to whom the intermediated goods or services may be sold, including restrictions relating to online advertising and online selling, are hardcore restrictions.

When the supplier wishes to restrict the use by a buyer of online intermediation services, the Vertical Guidelines establish that such restrictions can benefit from the exemption, provided that the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers.

The new VBER added a new category of hardcore restrictions with regard to online sales restrictions: the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods. Other restrictions of online sales or restrictions of online advertising that do not prevent the use of an entire online advertising channel are exempted. The new Vertical Guidelines incorporate the guiding principles for the assessment of online restrictions drawn from the case law, in particular Pierre Fabre and Coty.

In Case C-439/09 - Pierre Fabre Dermo-Cosmétique, the ECJ held that a vertical agreement containing one or more restrictions of online sales or online advertising which de facto prohibit the buyer from using the internet to sell the contract goods or services has at the very least the object of restricting passive sales to end users wishing to purchase online and located outside the buyer’s physical trading area.\(^{71}\)

2. **Marketplace restrictions**

In C-230/16, Coty Germany, the ECJ confirmed that a restriction or ban of sales on online marketplaces concerns the manner in which the buyer may sell online and does not restrict sales to a particular territory or customer group. Moreover, while such a restriction or ban restricts the use of a specific online sales channel, other online sales channels remain available to the buyer, thus such restrictions are not considered hardcore restrictions.

3. **Price Comparison Services**

Suppliers may wish to restrict the use of price comparison services. Price comparison tools merely redirect customers to certain online shops rather than offering a sale and purchase function and are considered as an online advertising channel. Restrictions on the use of price comparison services may increase consumer search costs and thereby soften retail price

\(^{71}\) Similarly, this is the case for vertical agreements that have the object of preventing the use of one or more entire online advertising channels by the buyer, such as search engines or price comparison services, or of preventing the buyer from establishing or using its own online store. See also AT.40182 - *Guess*, cit. recitals 118 to 126.
competition. They may also restrict the buyer’s ability to reach potential customers, inform them about its offering and direct them to its online store.

A ban on the use of price comparison services prevents the buyer from using an entire online advertising channel and is a hardcore restriction under the new VBER. Conversely, when the vertical agreement prevents the use of price comparison services that target customers in a territory or customer group that is allocated exclusively to other buyers or reserved exclusively to the supplier, or when the vertical agreement does not directly or indirectly prevent the use of all price comparison services, for instance when requiring that the price comparison service meets certain quality standards, VBER exemptions apply.

**H. Resale Minimum and Maximum Price Maintenance (RPM) and Minimum Advertised Price (MAP) Programs**

Under the new VBER, agreements that, directly or indirectly, have the object of restricting the buyer’s ability to determine its sale price, including those which establish a fixed or minimum sale price to be observed by the buyer are hardcore restrictions of competition and prohibited.72

The Vertical Guidelines explain that RPM can be applied through direct means and indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price.73 The recommendation of a maximum resale price is not a hardcore restriction. However, if the supplier combines such recommendations with incentives to apply a certain price level or disincentives to lower the sale price, this can amount to RPM.

The ECJ has held on several occasions that RPM is a restriction of competition by object within the meaning of Article 101(1)TFEU.74

Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, they disincentive the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts. A key parameter for price competition between retailers is thereby removed. Under the new VBER MAPs will therefore be treated as an indirect means of applying RPM.

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72 RPM can restrict intra-brand and/or inter-brand competition in various ways: facilitate collusion between suppliers and/or buyers; reduce the pressure on the supplier’s margin; may prevent or hinder the entry and expansion of new or more efficient distribution; foreclose smaller rivals.

73 For example: fixing the resale margin; fixing the maximum level of discount that the distributor can grant from a prescribed price level; making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level; imposing minimum advertised prices (‘MAPs’), which prohibit the distributor from advertising prices below a level set by the supplier; linking the prescribed resale price to the resale prices of competitors; threats, intimidations, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to the observance of a given price level.

74 See *Binon v AMP*, C-243/83, paragraph 44; *V/R v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, C-311/85, paragraph 17; *Erauw-Jaquy v La Hesbignonne*, C-27/87, paragraph 15.
As regards e-commerce, under the Vertical Guidelines the application of price monitoring systems (for example, software) or obligations to report imposed on retailers are not, on their own, RPM.

The Commission in 2018 fined Asus, case AT. 40465, Denon & Marantz, AT. 40469, Philips, AT. 40181, and Pioneer, for engaging in RPM by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. The four manufacturers' RPM strategy centered on online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases.

The qualification of a restriction as a hardcore restriction or as a by object restriction does not mean that it is a per se an infringement of Article 101(TFEU). Where undertakings consider RPM to be efficiency-enhancing in an individual case, they may rely on efficiency justifications under Article 101(3) TFEU. Also the Vertical Guidelines recognize that RPM may lead to efficiencies, in particular where it is supplier driven.

An efficiency defense for RPM could be the introduction of a new product; coordinated short-term low price campaign; a minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier that damage the brand image; lastly, in some situations, the extra margin provided by RPM may allow retailers to provide additional pre-sales services, in particular in the case of complex products.

I. MFN Clauses

While all MFNs were exempted under the old VBER, this is no longer the case. Restrictions imposed by suppliers of online intermediation services, which cause buyers of such services not to offer, sell or resell goods or services to end users under more favorable conditions via competing online intermediation services (known as wide MFNs), are no longer exempted and require individual assessment under Article 101 of TFEU.

Other MFNs requiring suppliers and retailers to publish on a price comparison tool or online marketplace the same or better price and conditions as those published on its own website, (known as narrow MFNs) are still exempted under the VBER if other conditions of the VBER are also met. However, the Commission has noted that any narrow MFN exemption could be individually withdrawn where the relevant market for the supply of platform services is highly concentrated and competition between the providers of such services is restricted by the
cumulative effect of parallel networks of similar agreements restricting platform users from the offering, selling, or reselling of goods or services to end-users under more favorable conditions on their direct sales channels.

In May 2017, the Commission announced that it had accepted commitments from Amazon to resolve its investigation into “parity clauses” in Amazon’s distribution agreements with e-book publishers in Europe, Case AT.40153.

The provisions required publishers to offer Amazon similar or better terms and conditions as those offered to its competitors and/or to inform Amazon about more favorable or alternative terms given to Amazon’s competitors. The clauses covered prices as well as other terms that a competitor may use to differentiate itself from Amazon, such as an alternative distribution model, an innovative e-book or a promotion. The Commission believed that such clauses could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers’ and competitors’ ability and incentives to develop new and innovative e-books and alternative distribution services. Under the commitments, Amazon agreed to cease enforcing the MFN provisions in its agreements with publishers.

MFN clauses in the online booking sector have been at the center of different antitrust investigations conducted in a number of EU member states under the coordination of the Commission. The antitrust investigations related to “parity clauses,” under which the prices, availability and conditions offered on the contracting OTA site had to be at least as favorable as those offered by hotels to competing online booking platforms as well as via other booking channels, such as the hotel’s own website. Various EU national competition authorities (NCAs) alleged that these provisions raised competition concerns because they led to hotels having to fix a common price for their rooms on all available booking channels, including via their own reservation centers. This limited intra-brand competition between platforms. In some jurisdictions, such as France and Germany, the NCAs banned MFN provisions. In other jurisdictions, NCAs forced OTAs to adopt “narrow” MFN clauses, provisions that allow hotels to offer lower rates to other OTAs and offline travel agents, but prohibit hotels from undercutting the OTA on their own websites.

Lastly, under the new VBER, dual pricing (i.e. charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) and the equivalence principle (i.e. imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in brick-and-mortar shops) are no longer considered as hardcore restrictions.

The new Vertical Guidelines make clear that suppliers may set different wholesale prices for online and offline sales by the same distributor, as this may incentivize or reward an appropriate level of investments.

J. Exclusive Dealing and Tying
1. **Single Branding**

In the EU single branding refers to exclusive dealing agreements under which the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That requirement can be found amongst others in non-compete and quantity forcing clauses agreed with the buyer:

- A non-compete arrangement is based on an obligation or incentive scheme which causes the buyer to purchase more than 80% of its requirements on a particular market from only one supplier. The buyer must de facto not buy, sell or incorporate competing goods or services;

- Quantity forcing may take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit).

Single-branding agreements can benefit from the exemption provided by VBER where neither the supplier’s nor the buyer’s market share exceeds 30% and the non-compete obligation does not exceed five years.

The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in the case of cumulative use and, where the buyer is a retailer, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant suppliers.

The Commission may withdraw block exemption protection in the case of negative cumulative effect, that is where a number of major suppliers enter into single branding agreements with a significant number of buyers on the relevant market. A tied market share of less than 5% is generally not considered to contribute significantly to such a cumulative effect. Also, when the market share of the largest supplier is below 30% and the combined market share of the five largest suppliers is below 50%, there is unlikely to be a single or a cumulative anti-competitive effect.

2. **Tying**

Tying may constitute a vertical restraint within the meaning of Article 101 TFEU where it results in a single branding type of obligation for the tied product.

Whether products in a tying arrangement will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of
customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier.75

Tying can benefit from VBER exemption when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30%.

Outside VBER, tying may lead to anti-competitive foreclosure effects on the tied market. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. The Commission applies the analysis of single branding agreements in case of tying. The market position of the supplier on the market of the tying product is of central importance.

Where appreciable anti-competitive effects are established, it is necessary to assess whether the conditions of Article 101(3)TFEU. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. It must, however, be shown that at least part of those cost reductions are passed on to the consumer. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardization. However, it needs to be demonstrated that the positive effects cannot be realized equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase them from the supplier or someone designated by the latter.

IV. VERTICAL RESTRAINTS IN OTHER JURISDICTIONS

A. Brazil

Brazil’s competition authority, the Administrative Council for Economic Defense (CADE), defines vertical restraints as “restrictions imposed by producers/suppliers of goods . . . on vertically related markets – upstream or downstream [in the supply chain]” and provides that such restrictions are assessed according to the rule of reason.

CADE specifies that “vertical restrictive practices require, in general, the existence of market power in the market of origin.” Brazil’s current antitrust law states that market power is presumed when a party controls 20% or more of a given market.

In relation to RPM, for companies whose market share exceeds 20%, CADE’s current enforcement regime is somewhat uncertain. In its 2013 investigation of auto parts manufacturer SKF, CADE found SKF’s minimum resale price policy to be per se illegal and fined them 1% of their gross turnover from the previous year. CADE’s ruling was considered particularly severe in light of the fact that SKF’s RPM policy was in place for only seven months and not all distributors even obeyed it. Following this case, in a 2018 review of Continental’s “minimum announced price policy” with its tire retailers, CADE found that the policy was legal on the basis

75 See Microsoft v Commission, T-201/04.
that Continental did not have a dominant position in the affected markets, the retailers did not influence the policy, and the policy was applied in a non-discriminatory manner.

Exclusive dealing in the presence of market power is also strongly discouraged. In 2009, CADE brought suit against brewer Ambev, which operated a loyalty program rewarding retailers with discounts and prizes for ordering in volume. Because Ambev was one of the most prominent breweries in Brazil, CADE ruled that the loyalty program effectively created exclusivity in the market, since retailers were incentivized to purchase only Ambev products. CADE originally imposed a fine of BRL352 million (approximately $65 million) and settled with Ambev for BRL 229 million (approximately $46 million) after Ambev contested the fine in federal court. More recently, in 2018, CADE reviewed long-term exclusivity agreements imposed by Unilever and Nestle on ice cream retailers that required the retailers to sell only the two brands and restricted them from storing competitor ice cream in freezers supplied by Unilever or Nestle. CADE dismissed the claims against Nestle on the basis that Nestle had less than 20% of the ice cream market. Unilever, however, was found to have 60-70% of the market and was fined BRL 29 million and ordered to amend its commercial agreements to exclude the exclusivity provisions.

B. Canada

The Competition Act (CA) applies to vertical agreements in Canada. The Commissioner of Competition is the head of the Canadian Competition Bureau, and is responsible for the administration and enforcement of the Competition Act.

Part VIII of the CA covers refusals to deal, resale price maintenance, exclusive dealing, tying arrangements, vertical territorial allocation of markets, abuse of dominance, and delivered pricing. Part VIII of the CA provides that the effect of the conduct on competition in relevant markets will be judged under the rule of reason. There are no categories of vertical restraints that are per se unlawful.

The Bureau may also challenge a vertical agreement as an abuse of dominance. The Bureau’s Abuse of Dominance Guidelines provide that the conduct of firms with market shares of 50% or greater will be scrutinized. If a firm has a market share less than 50%, the Bureau will only scrutinize conduct if other evidence suggests that the firm has substantial market power or can obtain market power through its anticompetitive conduct.

RPM is governed by Section 76 of the CA, which sets out several types of conduct that may be subject to a Competition Tribunal remedial order. The Bureau also has published Price

76 Abuse of Dominance Enforcement Guidelines, March 7, 2019, https://www.competitionbureau.gc.ca/eic/site/cb-be.nsf/eng/04420.html. Note that the Bureau is in the process of updating these guidelines following the passage of the 2022 amendments to the Competition Act.
Maintenance Enforcement Guidelines. These Guidelines contain a safe harbor for firms with market share of less than 35%. The types of conduct that may violate Section 76 include:

- Where a producer or supplier, by agreement, threat, promise or any like means, influences upward or discourages the reduction of the price at which customer, or any other person to whom product comes resale, supplies, offers to supply or advertises a product in Canada (Section 76(1)(a)(i));
- A refusal to supply goods or services to a person, or otherwise discriminate against them, based on their low pricing policy (Section 76(1)(a)(ii));
- To induce a supplier by agreement, threat, promise or any like means, as a condition to dealing with the supplier, to refuse to supply a product to another person because of that other person's low pricing policy (Section 76(8));

Section 76 also applies to minimum advertised price agreements.

The Guidelines acknowledge that “price maintenance practices are common in many markets, and can be pro-competitive in many circumstances.” To find that price maintenance violates Section 76, the Bureau must prove that the price maintenance has or is likely to have an adverse effect on competition in a relevant market, such as if the RPM resulted in the exclusion of rivals or new entrant competitors to the supplier; the exclusion of discount or more efficient retail competitors’ or if price maintenance conduct was being used to inhibit competition among suppliers or retailers. “Adverse effect” on competition is understood to be a lower threshold than substantial lessening or prevention of competition. Before the Competition Act was amended in 2009, resale price maintenance was a per se criminal offense.

Exclusive dealing agreements are governed by Section 77 of the CA, and may also be challenged as an abuse of dominance under Section 79. As explained in the Abuse of Dominance Guidelines, exclusive dealing occurs when a firm supplies its product or products to a customer on the condition that the customer or supplier buy and/or sell only those versions of the product(s); when a firm requires that customers (or suppliers) do not buy (and/or sell) products of competitors; or can also take the form of a firm requiring or inducing its own suppliers to deal only with the firm itself and not with that firm's competitors. Exclusivity may be mandated explicitly, or induced through other methods, such as technological incompatibilities, requirements contracts, meet-or-release clauses, most-favored-nation (MFN) clauses, or other contractual practices. The Guidelines note that exclusive dealing is not necessarily anticompetitive and may be engaged in for procompetitive purposes.

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C. China

China’s legal system is a civil law system that does not adhere to the principle of stare decisis. In 2010, in an effort to streamline court proceedings, the Supreme People’s Court of China issued the Provisions of the Supreme People’s Court on Case Guidance and created the Guiding Case System. Under this system all courts in China are to refer to guiding cases when they decide cases with similar facts, even though the Guiding Cases are not binding.

Restrictive agreements and practices are mainly regulated under the Anti-Monopoly Law (AML) which came into effect on 1 August 2008. China recently passed an amendment to its Anti-Monopoly Law, came into effect on August 1, 2022. Most notably, the amendment introduces a provision providing that resale minimum price maintenance (RPM) “shall not be prohibited if the undertaking can prove that it does not have the effect of eliminating or restricting competition.”

This amendment codifies the Supreme Court of China’s landmark 2018 decision in *Hainan Provincial Price Bureau v. Hainan Yutai Scientific Feed Company*. As held in *Yutai*, now when a plaintiff alleges a violation of the Anti-Monopoly Law based on RPM, the defendant can prove that the RPM agreement does not restrict competition, and it is not unlawful. Before, no justifications could be offered, and it was per se illegal.

The amendment that introduces a “safe harbor” for what are referred to as “vertical monopoly agreements.” If companies have market shares below a threshold set by the State Administration for Market Regulation (“SAMR”) and meet other conditions, then the agreements will not be prohibited. SAMR has yet to determine the market share threshold.

The Consultation Draft of Implementing Rules proposed that the specific market share threshold is 15%, which is stricter than the Vertical Exemption Block Exemption applied in the EU. The amendment clarifies that the lack of anticompetitive effects can serve as a defense against public enforcement. However, it is unclear what level of evidence would be considered by SAMR as sufficient.

In a recent case in April 2021, SAMR fined Yangtze River Pharmaceutical Group approximately $118 million for engaging in RPM. In Yangtze River, SAMR found that the company’s end users, including medical institutions like hospitals, retail drug stores, and distributors, entered into agreements with Yangtze to restrict or fix resale prices. SAMR concluded that it was not required to show actual anticompetitive effects occurred due to the agreements and Yangtze failed to prove that its actions would not severely harm competition in the relevant market.

While the decision may be applicable only to the pharmaceutical industry, and distinguishable on different facts that make it easier to prove pro-consumer effects, the decision suggests that until new legislation is adopted, companies should adopt policies that prohibit direct and indirect RPM
In *TetraPak*, SAIC found that TetraPak abused its dominant position in the packaging materials market by indirectly imposing exclusive distributorship on a supplier of its raw materials and exclusive dealing (loyalty discounts) obligations on buyers.

TetraPak entered into agreements with the only bulk supplier of kraft back paper at the time that prohibited the input supplier from using TetraPak’s technical information to supply kraft back paper to third parties. Kraft back paper was a critical input for the production of packing materials. SAIC concluded that the use restrictions placed by TetraPak on this technical information restricted the input supplier’s ability to supply anyone other than TetraPak, causing foreclosure effects that restricted competition in the market for packaging materials.

TetraPak also shows the approach of SAIC to loyalty discounts. SAIC found that because the discounts operated retrospectively, they would induce buyers who were close to the threshold for the discount to purchase more from TetraPak in order to achieve a lower price, forcing the customer to purchase exclusively from TetraPak. In addition, the loyalty discounts forced competitors to offer bigger discounts to compensate for the loss of customers who now purchased from TetraPak, which could have caused a long-run squeeze of equally efficient competitors, reducing competition.

D. India

Vertical restraints are reportedly not a priority for the Competition Commission of India (CCI). The CCI is primarily interested in cases that involve cartelization and abuses of dominance. The CCI has brought approximately 90 cases against vertical restraints, representing about 10% of the cases evaluated by the CCI.

In these cases, the CCI did not find a violation of competition law in 85% of cases. Less than 10% of cases in which the CCI imposed penalties involved vertical restraints.

Section 3(4) of the Indian Competition Act governs anticompetitive vertical agreements, including tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.

Section 19(3) provides the factors that the CCI must consider when assessing whether an agreement has an appreciable adverse effect on competition under Section 3: creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provision of services; or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Courts in India have specified that the CCI must identify the existence of an agreement and assess whether the agreement causes or is likely to cause an appreciable adverse effect on
competition in India. The CCI first defines the relevant market and determines the involved firm’s market share. Unlike with horizontal agreements, there is no presumption of illegality for vertical agreements. The Competition Act also provides for defenses for vertical agreements, which can be justified if they impose reasonable conditions to protect or restrain infringement of IP rights.

In *Shri Sonam Sharma*, the CCI provided the following elements for establishing an anticompetitive tying arrangement: there must be two separate products or services; the purchase of one is conditioned upon the purchase of another; the seller must have sufficient economic power in the tying product, to coerce a purchase of the tied product; and the tying arrangement must affect a substantial portion of the market.

Recently, the CCI held that the integration of WhatsApp and WhatsAppPay was not illegal tying because there was no coercion. Coercion must involve consumers being forced to use the tied product, having no discretion to use it or not, and users must be restricted from using products that compete with the tied product.

For exclusive distributorships, Indian law borrows from EU competition law. The CCI held that despite the efficiencies generated by an exclusive distributorship agreement, the anticompetitive factors weighed more heavily where the agreement enabled a dominant firm to eliminate competition in the market, allowing it to engage in exclusionary conduct and violate its special responsibility not to impair competition.

Currently, RPM is subject to the standard statutory framework listed above. The CCI has held that a firm must have significant market power to violate Section 3(4). In a recent case, the CCI

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80 *Shri Sonam Sharma v. Apple Inc. & Ors*, Judgment, No. 24/2011 (C.C.I. 2013). Apple, a handset manufacturer and a service provider called Airtel and Vodafone had worked together to offer a packaged product to a customer. Whenever a customer bought a phone from Apple, they only had the option to choose from either Vodafone or Airtel. The CCI held that there was no violation because the market shares made an appreciable adverse effect on competition. Consumers also had the choice to pay to unlock their phones.

81 *Harshita Chawla v. Whatsapp Inc.*, 15/2020 (CCI (finding no tying where What’sApp integrated What’sAppPay into its existing messaging application because there was no coercion where users could use other payment inferences because WhatsApp users did not have to mandatorily use WhatsAppPay, and because the integration did not restrict users from using other payment apps).

82 *Id.*; see also *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors.*, Judgment, No. 03/2011 (CCI 2014). In *Shri Shamsher Kataria*, car manufacturers entered into an exclusive distribution agreement with original equipment manufacturers (OEMs) and Original Equipment Suppliers (OESs). The agreement restricted the supply of spare parts by the OESs to the aftermarket, and the OEMs restricted the sale of spare parts and equipment to only authorized dealers. The firms justified the agreement as a quality control mechanism that would protect the goodwill of the brand. The CCI held that under Section 19(3), the anticompetitive factors outweighed the pro-competitive justifications, and because the purposes of the agreement could be achieved using alternative means that were more competitive. The CCI followed EU jurisprudence that finds that the dominant firm has a special responsibility not to impair competition, which required that the anticompetitive factors outweigh the procompetitive justification.

83 See *M/S Counfredivie v. Timex Grp. India Ltd.* (2018). (finding that even if a manufacturer is controlling the discounts given on the sale of its products, Timex Grp. did not violate Section 3(4) because it faced substantial competition, and any actions to control resale prices would not cause an appreciable adverse economic consequence).
attempted to argue that an RPM program with a punishment mechanism was anticompetitive and that it would presume the welfare effects of RPM as harming consumers. This approach was contrary to previous cases where the CCI did not find violations of Section 3(4) because attempts to control the price at which a retailer was selling because the conduct had no effect on the market.\textsuperscript{84} Even though this presumptive approach failed, it has not dissuaded the CCI from pursuing similar arguments in a case against Honda for a similar RPM arrangement.

The CCI has pursued seventeen cases involving RPM, but has only assessed a penalty against a party for RPM in one case. In 2017, in \textit{Fx Enterprise Solutions India Pvt. Ltd. \& Hyundai Motor India Ltd.},\textsuperscript{85} the CCI found that the seller had entered into an RPM that constituted an appreciable adverse effect on competition by specifying the maximum discount that car dealers could offer to consumers. The agreement produced higher prices; however, the Indian appellate court overruled the decision for insufficient analysis of the effects of the agreement.

The CCI conducted a market study published in 2019, discussing e-commerce in India, in which the CCI advanced a rule of reason framework for assessing exclusivity agreements.\textsuperscript{86} The study suggested that exclusivity agreements in digital markets could on the one hand be used to exclude competitors or create entry barriers, or generate efficiencies on the other. An investigation into agreements between platforms and third-party sellers relating to e-commerce platform Amazon and smartphone manufacturers was brought in 2020, suggesting a new focus for the CCI in the area of exclusive agreements.\textsuperscript{87}

\textsuperscript{84} Id.; see also Samir Agarwal v. ANI Technologies Pvt Ltd and Ors, Judgment, Case No. 37 of 2018, (finding that there was no RPM where no “resale” occurred because Ola and Uber were the final sellers to the riders, and could not be considered resellers).

\textsuperscript{85} \textit{Fx Enterprise Solutions India Pvt. Ltd. \& Hyundai Motor India Ltd.}, Judgment, No. 36, 82 (C.C.I. 2014). Car dealers for Hyundai alleged that Hyundai imposed exclusive supply agreements, resale minimum price maintenance, and a tie-in arrangement for CNG kits, lubricants, and car insurance policies. Hyundai’s dealership arrangements contained a discount control mechanism that required its dealers to not discount the cars they sold at a rate above the rate mentioned in the policy. Hyundai was said to enforce this policy by establishing secret shopping agencies to conduct covert visits to the dealers’ showrooms and collect penalties that would be distributed to all non-violators. The CCI did not provide any evidence of higher prices to substantiate its theory of harm that the dealership program harmed consumers through higher prices. The CCI stated generally that RPM raises prices.

\textsuperscript{86} CCI, Report, Market Study on E-Commerce in India: Key Findings and Observations 33 (Aug. 1, 2020); \url{https://www.cci.gov.in/economics-research/market-studies/details/18/6}.

\textsuperscript{87} \textit{See Delhi Vyapar Mahasangh v. Flipkart Internet Private Ltd. \& Amazon Seller Servs. Private Ltd.}, Order, No. 40/2019 (CCI). A union of small and medium-sized companies selling mobile phones and accompanying accessories brought a case against Amazon and Flipkart for entering vertical agreements with preferred sellers that foreclosed competition. The CCI initiated an investigation in which the plaintiffs alleged that Flipkart and Amazon afforded deep discounts to preferred sellers on its platform which placed the non-preferred sellers at a disadvantage, engaged in preferential listing by pushing the non-preferred sellers further down in the search results, created search bias by designating preferred products, and routed its private label brands through a few preferred sellers. The CCI held that an investigation should be made into the matter.
As for other forms of vertical restraints, MFN clauses must cause an appreciable adverse economic consequence to violate Section 3(4). The CCI did not have any detailed assessments of most-favored nations clauses until 2019.

In *Federation of Hotel & Restaurant Ass’ns of India*, the CCI concluded that a prima facie case for investigating alleged violations of Section 3(4) were warranted.\(^88\) The CCI concluded that MakeMyTripIndia was essentially a distribution platform for hotels in a vertical relationship with hotels, and given their significant presence in the market, any restrictive agreement that may lead to a refusal to deal or an exclusive arrangement with some firms “may potentially have an adverse effect on competition."

E. Japan

Japan’s competition law, the Act Concerning the Prohibition of Private Monopolization and Maintenance of Fair Trade (AMA), prohibits three types of conduct: (1) private monopolization; (2) cartels and bid rigging; (3) unfair business practices; and (4) mergers.

In *Asahi Shinbunsha et al. v. JFTC*,\(^89\) the court held that vertical agreements are generally classified under unfair trade practices as referred to in Articles 19 and 2(9) of the AMA and described in the Japan Fair Trade Commission (JFTC) Designation of Unfair Trade Practices. In terms of standard of legality, while the “substantial restraint of competition” is required for private monopolization, a business practice is an unfair trade practice if it constitutes an “impediment of fair competition.”

The JFTC is the sole competition regulator in Japan and has the authority to designate certain business practices as unfair trade practices. The JFTC has the burden of demonstrating the anticompetitive effects of a practice.

Unfair trade practices include, without limitation: predatory pricing, tying, refusal to deal, discriminatory treatment, resale price maintenance, dealing on exclusive or restrictive terms and abuse of superior bargaining position (ASBP).

There is no definition of “agreement” for the purpose of vertical restraints and there is no need for a formal agreement. An agreement can be found provided that a party compels the other party to comply with a certain obligation. A formal agreement is not necessary: for example, for resale price maintenance it is sufficient to show that the supplier has successfully coerced its distributor into following its pricing instructions.

\(^{88}\) *Fed’n of Hotel & Restaurant Assn’s of India v. MakeMyTrip India Pvt. Ltd.*, Order, No. 14/2019 (C.C.I.). MakeMyTripIndia was an online travel agency providing travel and tourism services; Oravel Stays Private Ltd. (OYO) was engaged in the business of providing travel services through online booking. It was alleged that MakeMyTripIndia imposed a contractual term in its agreements with hotels prohibiting hotels from selling their rooms on any other platform at a price below the price being offered on MyMyTripIndia’s platforms.

\(^{89}\) Tokyo High Court, 6 Kosai Minshū 435, March 9, 1953.
The JFTC’s Guidelines Concerning Distribution Systems and Business Practices of 11 July 1991 (DSBP) define a safety zone for certain vertical non-price restraints, such as exclusive dealing or distributorships and passive territorial restraints, that may otherwise be illegal as unfair trade practices if such restraints were imposed by an “influential enterprise in a market.” A market share above 20% is used to determine whether a manufacturer meets the “influential manufacturer.” However, an analysis of the effects is still required. Within the 20% market share safe harbor, enterprises do not usually tend to distort fair and effective competition.

Resale minimum price maintenance is considered to be virtually per se illegal and justifications are almost never accepted. Article 23 of AMA provides that resale price maintenance is permitted with respect to (i) goods “the uniform quality of which can be easily perceived” which are designated by the JFTC and (ii) certain copyrighted works (resale price maintenance of certain copyrighted literary and musical works between competitors is exempt (Article 23-4, AMA). Since Article 23 exempts certain resale price maintenance agreements from the normal regulation of the Act, such agreements must be strictly reviewed by the JFTC in order to avoid any detriment to consumer interests.

MFNs are not prohibited by the AMA, but they may pose competition issues in a particular case. As a result, they are assessed by weighing the effects of any anticompetitive effect with the procompetitive effects. The JFTC has recently investigated many arrangements involving online marketplaces where parties have entered into most-favored nation clauses. The JFTC settled the cases with these parties, who agreed to change their terms following the JFTC’s investigation.

The JFTC has probed major companies in digital markets, including Amazon and Rakuten, one of the biggest online mall operators in Japan, on suspicion of infringing the regulations of unfair trade practices. In addition, a new law in 2021 regulates platform businesses in the digital economy. Under the new law, major overseas/domestic digital platform operators designated by the authority are required to disclose the terms and conditions of their contracts with users; take other measures, including the establishment of procedures and administrative organs to ensure the fairness of transactions and dispute settlement procedures; and submit annual reports and self-assessments to the authority on the status of their implementation of the above measures. When the authority finds any conduct that is deemed likely to violate the AMA, it will request that the JFTC take actions under the AMA.

F. Mexico

Mexican antitrust law is contained in three sources: Article 28 of the Constitution, which prohibits monopolies and monopolistic practices; Articles 54 to 56 of the Federal Law on Economic Competition (FLEC); and the various regulations of the FLEC.

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90 Meiji Shoji v JFTC, 22 Shinketsushu 201 (Sup Ct, 11 July 1975); Hamanaka v JFTC, 58-2, Shinketsushu 1 (Tokyo High Ct, 22 April 2011).
Restrictive agreements and practices that are vertical restraints are known as Relative Monopolistic Practices (RMP), which are different from Absolute Monopolistic Practices, which are always per se illegal. RMP are always subject to a rule of reason analysis, where conduct will be illegal only if the anticompetitive effects outweigh the beneficial effects.

According to Article 54 of the FLEC, for conduct to be considered an RMP it must satisfy the following conditions: it must be listed in Article 56, it must be carried out by one or more businesses having substantial market power in the relevant market, and either have the purpose or effect of unlawfully displacing other business, substantially impeding their access to the market; or establish an exclusive advantage in favor of a business.

If these conditions are satisfied, the conduct is an RMP and it will be subject to a rule of reason analysis. The RMP will only be illegal if the alleged offender cannot prove both that the conduct 1) has produced efficiency gains or 2) has impacted positively the process of economic competition and free market access, overcoming the possible anticompetitive effects and consequently resulting in improving consumer welfare.

The following conduct may be considered RMPs under Article 56: vertical market division by reason of geography or time; vertical price restrictions; exclusive dealing; refusals to deal; exclusionary group boycotts; loyalty discounts; cross-subsidization; discrimination in price, sales or purchasing conditions; predatory and exclusionary pricing. These conducts are not per se illegal, and are reviewed under a standard similar to the Rule of Reason applied in the US.

G. United Kingdom

The key legal source on the regulation of vertical restraints in the United Kingdom is the Competition Act 1998 (CA). Although the UK withdrew from the EU in 2020, the relevant elements of the CA still follow the structure of article 101 TFEU, which prohibits horizontal and vertical anti-competitive agreements. Where a party occupies a dominant position in a market to which the vertical agreement relates, section 18 of the CA, which regulates the conduct of dominant companies, will also be relevant to the antitrust assessment of a given agreement.

When the transition period for the withdrawal of the UK from the EU came to an end on 31 December 2020, such that EU laws generally ceased to apply in the UK, VBER was retained in UK law (as the retained Vertical Agreements Block Exemption Regulation (retained VABER)). This meant that agreements in the UK could still benefit from the block exemption (both pre-existing and new agreements), provided that they met the relevant conditions. On May 31, 2022, the UK adopted its own version of the VBER (known as the Vertical Agreements Block Exemption Order, or VABEO), exempting from the CA prohibition vertical agreements that satisfy the terms of
VABEO. On July 12, 2022, the UK Competition and Markets Authority (CMA) published final guidance on VABEO.

The CA prohibition will only apply to a vertical restraint that has an appreciable effect on competition within the UK. In determining the appreciable effect of a restraint, the CMA will have regard to the Commission’s De Minimis Notice, which provides that, in the absence of certain hardcore restrictions, and in the absence of parallel networks of similar agreements, the Commission will not consider that vertical agreements have an appreciable effect on competition provided market shares of the parties’ corporate groups do not exceed 15 per cent for the products in question.

Article 8(2)(a)-(f) of VABEO contains a list of hardcore restrictions, namely: the fixing of minimum resale prices; certain types of restriction on the customers to whom, or the territory into which, a buyer can sell the contract goods; restrictions on members of a selective distribution system supplying each other or end users; restrictions on component suppliers selling components as spare parts to the buyer’s finished product; and the setting of wide retail parity obligations.

To benefit from the safe harbor created by VABEO, neither the buyer nor supplier who is a party to a vertical agreement may have a market share exceeding 30 per cent.

Where the vertical agreement does have an appreciable effect on competition within the United Kingdom and does not fall within the terms of the De Minimis Notice or VABEO (or any other applicable safe harbor), it is necessary to conduct an individual assessment of the agreement to determine whether the conditions for an exemption under section 9 of the CA are satisfied.

Territorial and customer restraints restricting the territory into which a buyer may resell contract products or limitations on a buyer’s sales to particular classes of customer are hardcore restrictions. There is one important exception to territorial restraints. Where a supplier sets up a network of exclusive distributorships and prevents each buyer from selling actively into a territory granted exclusively to another buyer (or reserved to the supplier itself).

These arrangements will fall within the safe harbor provided the other conditions of VABEO are met (including supplier and buyer market share less than 30 per cent), provided the restrictions relate only to active sales (i.e., they do not cover passive or unsolicited sales) and provided the restrictions cover only active sales into territories granted on an exclusive basis to another buyer (or to the supplier itself).

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91 The Competition Act 1998 (Vertical Agreements Block Exemption), Order 2022 (SI 2022 No. 516).
92 https://www.gov.uk/government/publications/vabeo-guidance
93 The VABEO Guidance notes that “Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.9 Broadly, the agreement must contribute to clear efficiency benefits. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits. Fourth, it must not give companies the opportunity to eliminate competition from a substantial part of the relevant market.”
Exclusive supply covers the situation in which a supplier agrees to supply only one buyer for resale or a particular use. The main anticompetitive effect of these arrangements is the potential foreclosure of competing buyers, rather than competing suppliers. As such, the buyer’s market share is the most important element in the assessment of these restrictions. In particular, negative effects may arise where the market share of the buyer on the downstream market as well as the upstream purchase market exceeds 30 per cent. However, where the buyer and supplier market shares are less than 30 per cent, and the exclusive supply agreements are shorter than five years, these restrictions will benefit from the safe harbor created by the VABEO.