Antitrust issues in product distribution in the U.S. and Canada – the same but different
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Antitrust laws—also referred to as competition laws—in the United States and Canada afford companies a great deal of discretion in how they distribute their products. However, there are limits to what is and is not allowed, which differ by jurisdiction. Businesses distributing their products on both sides of the U.S.–Canada border should understand these limits so they can spot legal issues and adopt appropriate and compliant cross-border distribution strategies.

Origins and Approach

While U.S. and Canadian competition laws largely reflect the same underlying principles, both the development and the approaches to enforcement of these laws differ.

For the most part, U.S. antitrust law is derived from a number of broadly worded statutory prohibitions on activities such as “unfair methods of competition affecting commerce.” It has been left up to U.S. courts to determine the scope of these prohibitions through judicial decisions in fact-specific cases. Guidance, based in part on these decisions, has also been developed by the two U.S. government enforcement agencies, the Federal Trade Commission and the Department of Justice.

U.S. antitrust laws not only allow the FTC and the DOJ to initiate enforcement proceedings but also grant to private parties the right to sue. Significantly, private litigants can seek awards equal to three times the actual damages they have incurred as a result of anticompetitive distribution practices. This gives competitors an incentive to bring lawsuits challenging the business practices of more successful rivals. Private lawsuits can also be brought as class actions, which allow numerous plaintiffs with small claims to band together to sue. The result of this system has been an evolution in U.S. antitrust law as the government and private plaintiffs have tested the scope of the law on the basis of new and evolving theories of economic harm.

Canadian competition law, on the other hand, is derived from number of rather specific statutory provisions that circumscribe and differentiate prohibited from permitted distribution practices. Many of these provisions have received little or no judicial consideration.

It is also a unique feature of the Canadian system that the principal avenue of recourse in circumstances involving distribution-related complaints is to the Commissioner of Competition, who can bring an application to the Competition Tribunal for a prohibition order if the conduct in question crosses the line. While there is a limited right of private access to the Competition Tribunal for individual plaintiffs, applications can be brought only with the tribunal’s consent, and damage awards are not available.

Issues in Product Distribution

Horizontal Arrangements

In both the United States and Canada, “horizontal” distribution arrangements—between businesses at the same level in the distribution chain—can present challenging antitrust issues.

Most business people understand that arrangements between competitors regarding the prices they will charge for their products or the amount of product they will produce are strictly off-limits. However, other arrangements—such as an agreement between competing distributors to jointly purchase and operate a warehouse—might be pro-competitive and legal, assuming that appropriate safeguards were to be observed.
If a business wants to become involved in a distribution arrangement that involves horizontal interaction with a competitor, antitrust counsel should always be consulted before the arrangement is implemented.

**Vertical Arrangements**

Vertical distribution arrangements—between manufacturers and distributors or between distributors and retailers—while generally less problematic than horizontal arrangements, can also raise antitrust issues in both the United States and Canada. While the guiding principles are the same in both jurisdictions, there are some important practical differences between the laws of the two countries.

In the United States, vertical distribution arrangements—such tied-selling—are almost always evaluated using a “rule-of-reason” analysis. U.S. antitrust laws prohibit these “vertical restraints” only where the harm to competition that results from the arrangement outweighs its pro-competitive benefits. In general, a distribution arrangement of this type will be problematic only if the party imposing it has a large market share or some other ability to exercise power in the marketplace. It is not uncommon for a smaller competitor to sue a larger rival in the United States, alleging that the rival has engaged in a vertical practice that unreasonably restricts competition. It is through these private suits that the scope of vertical restraints is defined.

In Canada, most vertical restraints are “reviewable trade practices.” As in the United States, these arrangements are not prohibited outright—it is only where they substantially lessen competition that reviewable trade practices can be enjoined. In most cases, however, reviewable trade practices do not lessen competition, substantially or otherwise, and formal challenges in Canada are rare.

The vertical restraints and reviewable trade practices subject to a competitive effects analysis in both the United States and Canada include:

- **Exclusive dealing and distribution.** Exclusive dealing is a requirement by a supplier that its customers refrain from doing business with its competitors (“you will purchase only from me”). Exclusive distribution involves an agreement by a supplier to deal only with a single distributor with respect to either a particular product line or in a particular geographic area (“I will sell only to you”). In Canada, only exclusive dealing can raise an issue.

- **Marketing/market restriction.** A requirement by a supplier that its distributors resell its products only in a defined geographic area (and not in other areas) or only to specific customers (and not to any other customers). Tied selling—a requirement by a supplier that, in order to obtain one product, a customer must also purchase another, unrelated product.

- **Refusal to deal.** A decision by a supplier not to do business with a particular customer.

Prior to 2009, Canadian competition law also prohibited outright both price discrimination (discriminatory discounts or rebates granted by a supplier to particular customers) and predatory pricing (below-cost pricing)—practices that are reviewed in the United States under a more nuanced analysis. However, these prohibitions were repealed in March 2009. Currently, price discrimination and predatory pricing can only problematic in Canada if a supplier engaging in either practice has a “dominant position” in a market. The same is true for bundled price discounting, which occurs when a business offers a substantial discount across a “basket” of products. In the United States, predatory pricing is unlawful only if the pricing is below marginal costs; certain types of price discrimination are per se unlawful, while others require a rule of reason analysis; and bundled discounting is problematic only if one of the products in the bundle is considered to be a “must have” product and the discount granted is steep enough that other competitors cannot meet it with their own basket or individual products without selling below cost.

There is another distribution practice in respect of which U.S. and Canadian competition laws diverge—resale price maintenance (RPM). RPM occurs when a supplier requires a purchaser of its products to resell them at or above—or not below—a price specified. Prior to 2009, RPM was illegal in Canada and was prohibited outright. As a result of recent amendments, RPM is now a reviewable trade practice in Canada and is problematic only where it has an adverse effect on competition, which most often is not the case. In the United States, the story is a bit more complicated. U.S. federal law changed in 2007 as a result of a landmark Supreme Court decision, which placed the analysis of RPM arrangements on a footing similar to that in Canada. However, several states—including New York,
California and Maryland—take the position that under their state antitrust laws, RPM continues to be “per se” illegal, regardless of market position or effect.

**Now is the Time to Review Distribution Your Policies**

If you sell products in both the United States and Canada, now is probably a good time to review your distribution policies. Changes in recent years to the competition laws in both countries mean that older policies may be out of date. This could result in businesses either engaging in practices that could be subject to challenge or deciding not to adopt practices that no longer pose serious antitrust risks.

In the United States, the law has evolved over the past 20 years to provide businesses with substantially more flexibility in structuring distribution arrangements. Many courts, including the U.S. Supreme Court, have adopted rules that allow companies to defend distribution practices as pro-competitive, rather than condemning such practices outright.

While Canadian competition laws affecting product distribution have also evolved, the changes have resulted from legislative amendments. In some areas, like price discrimination and predatory pricing, prohibitions have been completely repealed. The result is far more latitude in product distribution arrangements for all but the largest competitors.

Businesses can compete more successfully when they implement the most effective distribution practices. Understanding the scope and limits of the competition law limits that affect them can help businesses make the best choices while minimizing legal risks.

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