# 10 Antitrust Law

## 1 Facts

**Exercise 1** (page 346)
**1.** Because it deals with interstate commerce which is the power of the federal government.
**2.** Efficient allocation of resources, lower prices, high quality products, increased innovation.
**3.** Federal Trade Commission and the Antitrust Division of the US Department of Justice.
**4.** Civil jurisdiction allows for the recovery of monetary compensation and criminal jurisdiction allows the Federal government to punish the offenders.
**5.** It takes into account the relevant geographic market and the relevant product market. This is done to determine whether or not there is a monopoly.
**6.** Natural resources, geographic advantage, patent protection, excellent products, efficient business skills.
**7.** It drives competitors out of the market.
**8.** The "rule of reason"states that cases should be judged on what might be considered either reasonable or unacceptable in the precise circumstances, whereas with the "per se rule" an action can be considered illegal in itself, without taking into consideration whether, in a particular case, it can be justified.

**Exercise 2** (page 346)
**1.** Vertical. **2.** Vertical. **3.** Horizontal. 4. Vertical. **5.** Horizontal. **6.** Vertical. **7.** Horizontal. **8.** Vertical.

**Exercise 3** (page 346)
Students' own answers.

## 2 Further Resources

**Exercise** (page 349)
**1. & 2.** Students' own answers.
**3.** General Motors, General Electric; International Business Machines, American Telephone & Telegraph Company, Microwave Communications, Inc.
**4.- 6.** Students' own answers.

**Exercise** (page 351)
**1.** A monetary fine or possible imprisonment.
2. Temporary restraining order or prohibition. Seizure or condemnation of property.
**3.** Plaintiff can be awarded 3 times the amount of loss (for punitive damages), plus the costs of the lawsuit and reasonable attorney's fees.

## 3 Focus on Case Law

**Exercise** (page 359)
Students' own answers.

**Exercise** (page 363)
**1.** Students' own answers.
**2.** The reasons the precedent relied on do not justify a "per se rule".
**3.** Students' own answers.

## 4 Listening

**Tapescript**
Olson: Mr. Chief Justice, and may it please the Court: The per se illegality rule for resale price maintenance is widely recognized to be outdated, misguided and anticompetitive. It should be replaced with the same rule of reason standard that applies to other forms of vertically imposed marketing restrictions. The Sherman Act bars only unreasonable restraints of trade and the court presumptively applies a rule of reason analysis to determine whether a restraint is unreasonable. Per se rules should be rare and imposed only where the court is virtually certain based upon considerable economic experience that a practice is nearly invariably anticompetitive. Vertical minimum retail-resale price maintenance are plainly not invariably anticompetitive. In fact, a broad consensus of economists and decisions of this Court recognize that vertical restraints promote interbrand competition, which is the goal of the antitrust laws and are rarely, if ever, anticompetitive.
Woman: There was an argument made, Mr. Olson, that it is somewhat difficult to distinguish vertical from horizontal in this context, that in fact, the agreement that the manufacturer made with the dealers was more successful in getting a horizontal accord among the dealers than if the dealers had attempted it themselves, in which case some might have held back.
Olson: Well, the economists who have looked at the use of resale price maintenance have said that that would very rarely, if ever, be the case. It certainly could not be the case in this industry in connection with this participant in the marketplace. There are something like 5,000 dealers that the Brighton products are sold through. There are thousands and thousands of other competing dealers, hundreds of products. What the Court has said repeatedly is that programs such as this may promote interbrand competition, perhaps…
Stevens: Mr. Olson, suppose just the dealers in New York, the retail dealers agreed among themselves on the price. Would that be lawful?
Olson: No. I think that that would be covered by a horizontal prohibition, Justice Stevens.
Stevens: Would you say that it's per se unlawful?
Olson: I think it would be, as horizontal restraint among competing dealers, it could be a per se violation under horizontal rules if it was – if it was – involved the manufacturer in some way, it could be dealt with by the rule of reason.
Stevens: Why should that be any different from the arrangement where those dealers all got together in the convention and recommended to the manufacturer that he impose a vertical restraint of precisely the same dimensions? Why…
Olson: What this Court said in Sylvania, and said again in the State Oil versus Khan, is that the manufacturer has very, very little incentive to increase…
Stevens: No, but I'm asking what if he did, why should you draw a distinction?
Olson: Because the motivation for the arrangement, if it comes from a manufacturer – you're suggesting a hypothetical in which all of the dealers in a particular area would get together to impose this on a manufacturer. I think it's very unrealistic that that would happen.

Stevens: No. They just passed a resolution asking the manufacturer to impose this vertical restraint and ways to do it. Should that be different from one in which the manufacturer does it independently?
Olson: I think that if the manufacturer makes a decision, whether it's because dealers would like to see that happen or not, as this Court said in Business Electronic versus Sharp Electronics, there's of course relationships between the dealers and the manufacturers, that the dealers may have an interest in doing this, because they may find for the same reason that the manufacturer does that it promotes the sales of products. The record is clear in this case that this was an effective strategy for the Brighton company, the Brighton Leegin company that's manufacturing the Brighton products, to enter a very difficult and highly competitive marketplace, and it was successful.
Woman: Maybe, Mr. Olson, you could give us an example where the rule of reason would find a violation in this situation?
Olson: Well, it might be a situation, the economists have written about this, say that it would be very rare, and would require retailers with a strong powerful market power to impose a situation where the manufacturer would do that to help facilitate a horizontal cartel. That certainly was not involved in this case, and that would probably be found to violate the rule of reason. In addition, it would probably be unlawful under the horizontal rules established by this Court. That was not an issue in this case. The economists say that that would very seldom happen.
Woman: You say very. Which economists? I know the Chicago school tends to want rule of reason and so forth. Professor Sherer is an economist, isn't he? Worked at the FTC for a long time. A good expert in the field. He points out the drug industry after you got rid of – after you got rid of resale price maintenance, the margins fell 40 percent. The drug stores it went down 20 percent. He says with blue jeans, alone, it saved American consumers $200 million to get rid of it. And his conclusion is, as in the uniform enforcement of resale price maintenance, the restraints can impose massive anti-consumer benefits. Massive.
Olson: Well…
Woman: What that sounds like is that if at least he, who is an economist, thinks if you get rid of Dr. Miles, every American will pay far more for the goods that they buy at retail. Now that's one economist, of course. There are others who think differently. So how should we decide this?
Olson: Well…
Woman: Should we overturn Dr. Miles and run that risk?
Olson: In… in… The vast majority of the economists who have looked at this have come out to the opposite conclusion, Justice Breyer. Secondly…
Woman: We're supposed to count economists?
Olson: No. No. I think that…
Wman: Is that how we decide it?
Olson: But what this Court – what this Court has repeatedly said, that under circumstances such as this where there's a consensus among leading respected economists, that is one factor.

**Exercise 1** (pages 363-364)
See tapescript above.

**Exercise 2** (page 364)

**1.** A lawyer for *Leegin Creative Leather Products, Inc*
**2.** It's somewhat difficult to make the distinction in this context. She says that in creating this vertical agreement, the deal that the manufacturer made with the dealers was in fact more successful at creating a horizontal agreement than if the dealers had attempted it themselves.
**3.** Brighton. Because there are thousands of other dealers and hundreds of products.
**4.** To show the weakness in his argument.
**5.** "Per se" rules should be rare and imposed only where the court is virtually certain, based upon considerable economic experience, that a practice is nearly invariably anticompetitive. The "rule of reason" could be applied to those dealers where the agreement involved the manufacturer in some way.
**6.** He wants to insist on the fact that making the distinction is difficult because in both cases they are acting together.
**7.** The motivation is different. He cites Supreme Court cases (*Sylvania and State Oil vs. Khan*) which were decisions previously handed down by the Supreme Court.
Sherman Antitrust Act which is legislation decided by Congress.
**8.** It is a reference to the University of Chicago, a school of thought favoring free-market economics (ex: Milton Friedman). An expert in the field who worked for the FTC.
To show that different economists have different views and that one school of thought believes that restraints can impose massive anti-consumer benefits.
**9.** To overrule it.
**10.** He's against it
**11. & 12.** Students' own answers.

**Exercise 3** (page 364)
Organize a class discussion on price fixing. Use arguments found in the *Leegin* case as well as your own. Find examples in French business law or business practices for purposes of comparison.

## 5 Grammar Practice

**Exercise 1** (page 365)
**1.** agreed-upon **2.** post-closing **3.** Price-fixing **4.** antitrust **5.** slow-moving **6.** long-distance **7.** full-fledged **8**. tie-ins **9.** on-line

**Exercise 3** (pages 365-366)
*(possible answers)*
**1.** Tie-ins per se are unlawful **on condition that** the seller possesses sufficient market power in the tying product and coerces the buyer to take the tied product as a condition to obtaining the desired product.
**2.** The seller should only decide to cut off a customer **providing/provided that** he avoids any inference of concerted action with others./The seller can decide to cut off a customer **so long as** he avoids any inference of concerted action with others.
**3.** It is not illegal to have a monopoly position in a market **providing/provided that** one arrives at it through acceptable means, e.g. efficient business skills, luck, excellent products, historical growth, natural resources, geographic advantage, or patent protection.

**4.** This is the general language of the Sherman Act, but also the more particular provisions of Section 3 of the Clayton Act, which prohibits such tying arrangements **on condition that** the likely result is to lessen competition substantially.
**5.** A rule of per se illegality can be applied **provided that/providing** there is evidence of an agreement with the compliant customers as to the prices or price levels they charge.
**6.** Any agreement is unlawful (under the rule of reason) **so long as** its restrictive effect on competition is not reasonably necessary to achieving a legitimate procompetitive objective.

*Remarques*
• À noter que ces expressions sont parfois interchangeables, d'autres fois, non. Ainsi l'on peut bien entendu remplacer *so long as* par *as long as*.
• Certaines formulations exigent l'emploi d'un modal plutôt qu'un autre, cf. phrase n° 2.

**Exercise 3** (page 366)
**1/b, 2/b, 3/a, 4/c, 5/d, 6/d, 7/a.**

**Exercise 4** (page 365)
**1.** should/must **2.** may/can **3.** will **4.** shall **5.** might/would **6.** must **7.** can/may