Preface

The first time I started to think about vertical restraints beyond their legal doctrine was during my LLM studies in competition law and policy at the University of Glasgow ten years ago. At that time, I had already found the topic of vertical restraints fascinating, primarily because it was difficult to find the right answer as to whether they should or should not be part of competition/antitrust law, why, in what form and to what extent. Despite the fact that vertical restraints form part of the competition/antitrust regimes of many countries, the topic of vertical restraints has always been at the edge of research interest, unlike research in and knowledge of cartels, monopolies and mergers.

However, at the same time, the topic of vertical restraints, in particular resale price maintenance (RPM) and also vertical territorial restraints (VTR), causes significant controversy. Some claim that RPM and VTR restrict competition and are potentially two of the most anticompetitive vertical restraints, while others argue that they are procompetitive and beneficial to consumers. The approach to RPM and VTR in the competition/antitrust law regimes studied in this book, the European Union (EU) and the United States of America (US), also differs. Nevertheless, recent commentators agree that there is a lack of comprehensive studies, and that these studies are desirable in order to understand this issue better and make a qualified judgment regarding the competitiveness or anticompetitiveness of RPM and VTR.

These differences and the calling for more research were the reasons for writing this book. I conceptualized my first ideas at the beginning of my PhD candidature in 2007. That year was a significant milestone for the approach to RPM in the US given that the US Supreme Court delivered its decision in the case of *Leegin [Leegin Creative Leather Products, Inc. v. PSKS, Inc, DBA Kay's Kloset ... Kays' Shoes]*, 551 U.S. 877 (2007), overruling the previous approach and introducing the rule of reason to all forms of RPM. The rule of reason also applies to VTR in the US, and this rule has led to the de facto legalization of these practices.

Leegin provoked a noticeable debate on the nature and approach to RPM in both US and EU jurisdictions, however, no final conclusion has been made in that regard and the way the rule of reason should apply in

practice has not been absolutely clarified and settled in the US. Since *Leegin*, no cases on RPM have reached the US Supreme Court which could assist with specifying the application of the rule of reason to RPM.

The situation in the EU is different. The EU categorizes vertical price fixing, vertical minimum price fixing and some forms of vertical territorial restraints, such as some forms of absolute vertical territorial restrictions, as hard-core restrictions of EU competition law, meaning that it is unlikely that such a practice could be justified under Article 101(3) of the Treaty on the Functioning of the EU, although it would not be impossible.

The differences in the EU and US regimes provide a well-rooted scope for comparison which, together with the reasons behind these differences and the historical development of these approaches, can then assist with providing a detailed understanding of RPM and VTR and their EU and US legal approaches and applications. The essential part of this understanding is not only the law itself but, significantly, the economic theories and economic and marketing knowledge of this area of competition which I discuss in this book. However, I go even further, as I propose other, less conventional, views on this area of competition/antitrust law. In particular, I address a number of questions arising from the legal differences and differences in arguments on these issues arising, primarily, from law, economics and marketing.

The principal objectives of this book are to provide you, the reader, with a detailed understanding of this topic, to inform you whether and to what extent RPM and VTR restrict competition and to outline different angles of understanding for determining the anticompetitiveness and pro-competitiveness of RPM and VTR than the currently used economical account. I identify these different views based on determining the drawbacks of the current economical and legal approaches to RPM and VTR in the US and EU. In order to fulfil these objectives, I divided this book into five substantive chapters. Each chapter plays a specific role, and, at the same time, they form part of the one puzzle, where each assists with determining the principal objectives of this book, serving the overall objective of finding the optimal approach to RPM and VTR.

This brief preface is followed by a general, introductory, chapter, on the operation of RPM and VTR in distribution. That chapter outlines a number of the essential elements of vertical interactions by using knowledge from economics, marketing and other disciplines. In Chapter 2, I commence my argument that it is not only horizontal and interbrand competition which should be considered when evaluating vertical restrictions, but that the nature of vertical restraints requires intrabrand competition and the driving force of vertical restrictions – bargaining power –

to be taken into consideration. Chapters 3, 4 and 5 provide specific examples supporting this argument and, finally, Chapter 6 shows that by using a deontological account all forms of competition need to be considered.

Although this book is based on comprehensive, holistic research, I provide a number of suggestions rather than one answer to this issue and specific legislative suggestions simply because, unlike hard-core cartels, there is no black and white answer to RPM and VTR. The comprehensive research on which this book stands should not imply that this book answers all questions on RPM and VTR, nor that it provides the absolute single correct answer. On the contrary, it confirms that the answer can differ depending on the angle of view. Indeed, the book outlines more than one angle, explains the different opinions on this topic and, by providing a detailed understanding, it should provoke critical thinking in readers and unleash both conservative and new ways for understanding and analyzing RPM and VTR.

I would not have been able to write this book and finish it in August 2015 without the support, assistance and advice from many people I have met since researching this area of competition/antitrust law. I would like to mention at least some of them. First, I am grateful to the publisher Edward Elgar for giving me the opportunity to publish my first monograph and its staff members for being professional and supportive.

The basis of this book rests on my PhD thesis. I would like to acknowledge the support, advice and encouragement I have received since then from my former principal supervisor Prof Mark Furse from the University of Glasgow and also examiners, Prof Alison Jones from King's College in London and Prof Rosa Greaves from the University of Glasgow, for our inspiring discussions and their useful comments during my PhD viva. I have absorbed a lot of knowledge from and was highly inspired by Prof Herbert Hovenkamp during my academic visit to the Faculty of Law at the University of Iowa in 2009 for which I am deeply grateful.

I met a number of practitioners and academics during my academic visits to the US in 2009 and 2014 who challenged and influenced my ideas, understanding and concepts of this topic and related issues. In particular, my recent visit had a significant impact on this book. I had the opportunity to discuss vertical restraints with economists from the Antitrust Division of the US Department of Justice and the US Federal Trade Commission, and for that my special gratitude belongs to Norman Familant, Chief, Economic Litigation Section from the Antitrust Division of the US Department of Justice, and Ken Heyer, Deputy Director, Bureau of Economics at the US Federal Trade Commission. I discussed a

number of issues arising from this topic with Prof John E Kwoka from Northeastern University and I had inspiring conversations with solicitor Theodore Voorhees, the former President of the American Antitrust Institute, Albert A Foer and Richard Brunell.

My deep gratitude goes to Prof Keith N Hilton and Boston University for providing me with an office and research materials during my short academic visit in 2014 and likewise to Prof Josef Bejček from Masaryk University. Last year, I was also given an excellent opportunity to undertake part of my research at the Court of Justice of the European Union in Luxembourg. This short visit proved to be extremely inspiring, especially a number of discussions I had with judges from the Court of Justice and the General Court; the one with Prof Koen Lenaerts, Vice-President of the Court of Justice, was the most influential. I would like to thank them for their time and also thank the Library and Documentation and their staff members for providing me with essential materials and for their warm hospitality.

I am grateful to my colleagues from the University of Queensland and the TC Beirne School of Law for their support. In particular, the School for funding my research trips, the UQ librarians for their research assistance and Claire Morris, Xavier Goffinet and Laura Marshall for their editing assistance. I also received partial funding from the Ian Potter Foundation (Travel Grant number 20150242) for my 2014 US and EU research trip, for which I am sincerely grateful. On a personal note, I am extremely fortunate for and would like to thank my family and friends and, in particular, my excellent partner, Matthew Barnes, for his loving support.

The law in this book is up-to-date as at 1 June 2015.

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