

MAYER | BROWN

Antitrust & Competition Law for Supply Chain and Distribution Arrangements

Key US and EU Considerations

February 9, 2021

Nathalie Jalabert Doury

Partner

+33 1 53 53 43 43

njalabertdoury@mayerbrown.com

Reginald Goeke

Partner

+1 202 263 3241

argoeko@mayerbrown.com

Adam L. Hudes

Partner

+1 202 263 3298

ahudes@mayerbrown.com

Supply Chain & Distribution Lawyers Help Clients To:

1. Strengthen supplier and distributor relationships.
 2. Manage risk of financially challenged suppliers and distributors.
 3. Address potential and actual disputes.
 4. Prepare for business continuity and disaster recovery.
 5. Anticipate and address customs, tariffs, and other trade regulations.
 6. Address compliance risks and advance CSR/ESG goals.
 7. Optimize tax efficiency.
 8. Protect IP rights.
 9. Comply with antitrust and competition laws.
 10. Leverage AI, platforms and other technology to innovate and adapt.
- Global Practice across 26 domestic and international offices
 - Integrated solutions to key risks in Supply Chain & Distribution networks
 - Geographic Risk
 - Liquidity Risk
 - Contract Risk
 - Security Risk
 - Compliance Risk

Our Presenters



Nathalie Jalabert Doury

Partner – Paris

[Bio](#)



Reginald R. Goeke

Partner – Washington DC

[Bio](#)



Adam L. Hudes

Partner – Washington DC

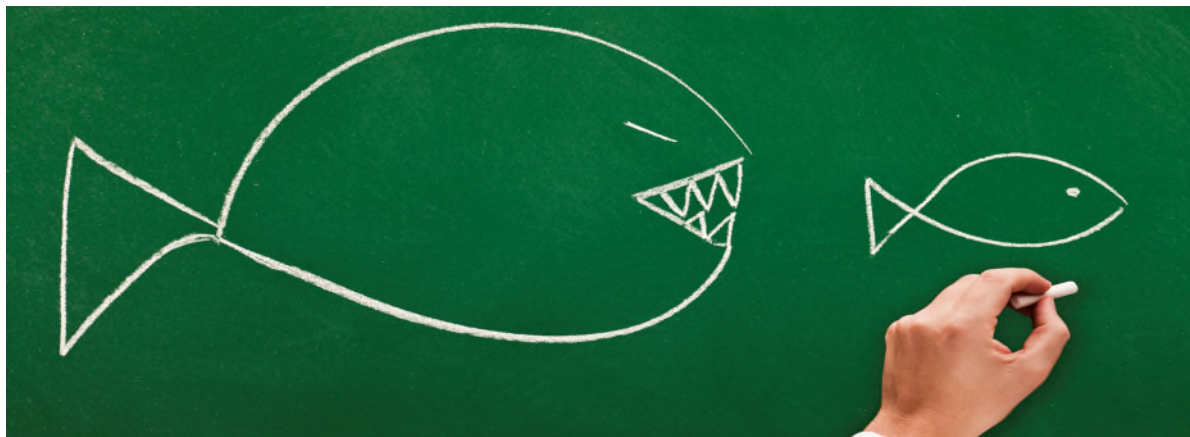
[Bio](#)

Recent US Trends

The background features a dark blue gradient with a faint, dotted world map. Overlaid on the map are various data visualization elements: vertical lines of varying heights, some with circular markers at the top or bottom, and scattered individual circles in shades of red, white, and blue. The overall aesthetic is modern and data-driven.

Enforcement Of US Antitrust Laws

- Sherman Act
- Clayton Act
- Federal Trade Commission Act
- Robinson-Patman Act
- State Antitrust Laws
- Private Litigation



A Dynamic Landscape For Antitrust

- Enforcers on a mission (DOJ, FTC, states)
- Engaged Congress
- Competitors' strategic use of law
- Resourceful plaintiffs bar
- Active state Attorney Generals



A Dynamic Landscape For Antitrust

A New Administration



The COVID-19 Pandemic



Supply Chain And Distribution: Areas Of Antitrust Risk

- Competitor collaborations
- Vertical price restraints
- Restraints on dealers
 - On selling
 - On buying
- Other forms of unfair competition (gray market goods)

DOJ And FTC Antitrust Guidance For COVID-19 Business Collaborations

- Expedited process for obtaining review and approval of business collaborations intended to address the public health crisis
- Reaffirms that there are often **pro-competitive** reasons for competitors to share information and that collaboration on research and development is “typically procompetitive”
- The Agencies further identified situations in which competitors may need to communicate while responding to the pandemic
 - Health care facility coordination in providing resources and services to communities without access to PPE, medical supplies, or health care
 - Manufacturers temporarily combining production, distribution, or service networks to facilitate production/distribution of COVID-19-related supplies.

However, Cartel Behavior Remains Subject To Vigorous Government Enforcement And Private Litigation

- “Tyson agrees to \$221.5 million settlement in antitrust case” (Jan. 20, 2021)
- “Commercial Flooring Contractor Agrees To Plead Guilty To Bid Rigging” (DOJ Press Release Aug. 27, 2020)
- “StarKist Ordered to Pay \$100 Million Criminal Fine for Antitrust Violation” (DOJ Press Release Sep. 11, 2019)
- “Settlements Top \$288 Million in Unprecedented, Ongoing Auto Parts Antitrust Litigation” (April 15, 2016)

"Vertical" Price Restraints

- **Agreements** with dealers or other customers setting minimum resale prices typically OK under the federal standard, but potentially problematic under certain state laws
- *Per se* illegal in California, Maryland (Utah)
- What about unilateral policies forbidding resale prices below minimum prices?
- Maximum resale prices (price gouging)



Contact Lens Antitrust Litigation



- Over 100 antitrust lawsuits pending in Florida since 2015 alleging that Johnson & Johnson and other contact lens manufacturers created industry-wide resale pricing floor agreements in violation of federal and state antitrust laws
 - Manufacturers turned to unilateral pricing policies because they were concerned about deep discounts offered by Wal-Mart, Costco, and others
 - Costco initially refused to comply, but was threatened that it would be cut off by J&J (Costco filed its own suit against J&J)
 - Allegations of “requests, demands, negotiations, *and formal and informal understandings* between manufacturers, retailers, and others to adopt, implement, and enforce minimum retail prices”
- Also Maryland and California subclasses

When Is A Customer Also A Competitor?

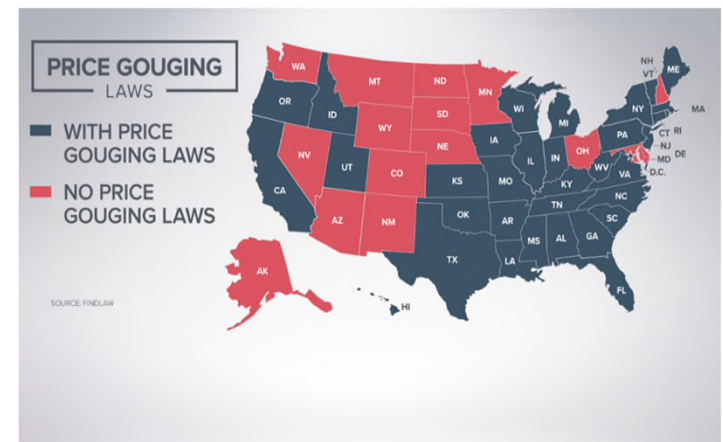
- 2016 FTC enforcement action
- Fortiline is a distributor of ductile iron pipe, fittings, and accessories for “Manufacturer A” in North Carolina and Virginia, and also competes against Manufacturer A for sales in eight other states
- Fortiline therefore has a **dual distribution** relationship with Manufacturer A
 - Vertically related to Manufacturer A through its distribution arrangements
 - Horizontally related to Manufacturer A as a competing seller

When Is A Customer Also A Competitor?

- Fortiline sent emails to Manufacturer A suggesting that it raise prices across the board—not just in states where it distributes for Manufacturer A, but also in states where Fortiline and Manufacturer A are competitors
- FTC alleged that these emails constituted an “invitation to collude”
- Consent decree reached with Fortiline prohibiting Fortiline
- Key Takeaways
 - Business arrangement with competitors are accepted and often procompetitive
 - BUT, stick to the legitimate bounds of the business arrangement to avoid converting a legal vertical partnership into an illegal agreement among competitors

State Price Gouging Laws Being Actively Enforced

- The majority of states have price gouging laws that are triggered once a city, county executive, or governor declares a public health emergency
- The price gouging laws in the states vary widely, from the products covered to the level of price increased proscribed—**KNOW THE LAW**
- Numerous lawsuits and investigations:
 - Whole Foods, Walmart, Trader Joe's, Costco, and other grocery providers were hit with a suit accusing them of illegally marking up the price of eggs
 - eBay was accused of encouraging sellers to jack up the prices of masks, hand sanitizers, and other high-demand products
 - 3M initiated multiple lawsuits to limit price-gouging of its protective gear



Non-Price Vertical Restraints

- Exclusive Dealing Arrangements
 - Agreements which prohibit a customer from buying the same product from a competitor
 - Requirements contracts
- Territory and Customer Restriction
 - Limit sales to a geographic region
 - Limit sales to a certain category of customer
- Tying Arrangements
 - Supplier conditions sale of certain product (or discount on that product) on the customer's agreement to buy another (often less desirable) product from the supplier. Assumes that Supplier has market power with respect to the tying product

Rule of Reason Analysis

- Non-price vertical restraints typically subject to a “**Rule of Reason**” analysis
- Requires a showing of market power in a properly defined market
 - Necessary market share depends on the market
 - But almost never a concern when less than 30% market share
- Defendant must be able to identify procompetitive impact of the restraint (*e.g.*, restraint will increase competition)
- Plaintiff must show a substantial anticompetitive effect in order to complete the violation

Most Favored Nations Clauses

- Provide assurance that a buyer or seller is getting as good a deal as any other buyer or seller
- MFN clauses have been targeted by enforcers and litigants for years, with mixed results
- Historical concern has been where (1) party benefitting from MFN has substantial market share, or (2) MFN require a seller to provide one buyer better terms than all other buyers (MFN plus clauses)
- Recent focus on MFNs being utilized to coordinate prices among multiple customers



MFNs Facilitating A Hub And Spoke Conspiracy: *United States v. Apple*

- Apple entered into e-book agency sales agreements with five of “Big Six” publishers
 - Prior to Apple’s entry, e-book industry operated under wholesale model
 - Amazon controlled 90% of e-book market, pricing bestsellers at \$9.99 price point
- Apple’s agency agreements enabled publishers to control retail pricing and contained MFNs guaranteeing that Apple’s iBookstore would have lowest e-book retail price
 - MFNs facilitated horizontal or “hub and spoke” conspiracy among publishers
 - Created price floor and enabled publishers to increase retail prices
- Second Circuit recognized MFNs are “surely proper in many contexts” but in this case “forc[ed] collective action by the publishers”



The Robinson-Patman Act

- Prohibits:
 - Discrimination in price
 - Between competing customers
 - For goods of like grade and quality
 - Where the effect is to substantially lessen competition
- Unless:
 - The price is offered in good faith to “meet but not beat” a competitive situation; or
 - The lower price is available to all competing customers regardless of whether all avail themselves of it
- Rule also applies to volume discounts, promotional allowances, trade support, co-op advertising programs, and any similar funds used to promote the resale of a products



Robinson-Patman Act: Civil Litigation

- While DOJ/FTC have taken no steps to enforce the RPA in decades, private litigation continues at a steady pace
 - Numerous automobile companies (Ford, GM, Fiat Chrysler, Hyundai) have faced price discrimination lawsuits in recent years related to dealer incentive programs
 - Following a two-week trial, a California federal jury cleared the maker of 5-Hour Energy shots of claims it illegally price-discriminated against family-owned wholesalers when it offered Costco the energy shots at a lower cost
 - In 2016, the Seventh Circuit Court of Appeals reversed a trial court and dismissed claims that Clorox's refusal to sell it bulk-size products is price discrimination, ruling retailers don't have a right under federal antitrust law to purchase all of a manufacturer's items
- Despite no clear wins for plaintiffs, expect RPA lawsuits to continue to be filed at a steady pace against a difficult economic environment

Unfair Competition Impacting The Supply Chain: Gray Market Goods

- Gray Market Goods (or “parallel imports”) are manufactured with the consent of the brand owner but are sold outside of the brand owner's approved distribution channels
 - Costs U.S. suppliers billions of dollars annually covering a variety of industries: food and beverage, electronics, automotive parts, cosmetics, etc.
 - Multiple paths for enforcement: International Trade Commission, U.S. Customs and civil litigation
 - Injunction and monetary damages can be awarded
- Requirement of “material differences” between the gray market and authorized goods
- Fluctuations in exchange rates and supply shortages have led to an uptick in gray market sales, which has led to increased lawsuits and government enforcement
- In February 2020, a North Carolina federal court awards Hyundai **\$5 million** and an injunction against a seller of gray market Hyundai parts



Recent EU Trends

The background features a dark blue gradient with a faint, dotted world map. Overlaid on the map are various data visualization elements: vertical lines of varying heights, some with circular markers at the top, and scattered individual circles in shades of red, white, and blue. The overall aesthetic is modern and data-driven.

Enforcement Of EU And Member States Rules

- Art. 101 TFEU – restrictive agreements and coordinated practices
- Article 102 TFEU – abuse of dominance
- Parallel application of Member States' specific regulations, where applicable
 - Abuse of economic dependence, *per se* RPM prohibition, discrimination rules, etc.



Public enforcement
Infringement cases by
European Competition
Authorities



Private enforcement
Contractual disputes and
damage claims heard by
National Courts

Developed Regulation And *per se* Rules

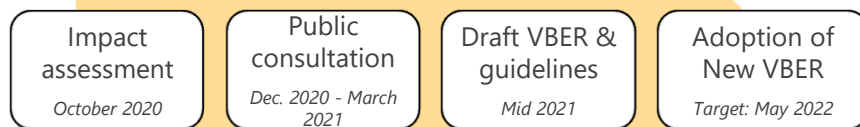
- Traditional continental law approach
 - Regulation rather than rule of reason in order to provide legal certainty
- Analytical framework for vertical restraints started to shape in 1966
 - ECJ, Consten and Grundig (Joined cases 56/64 and 58/64) : Art. 85 (now Art.101) also applicable to vertical restraints
 - Large demand for exemptions emerged on an individual basis
- Commission began issuing block exemption regulations in the 1980s
 - Safe harbor: where conditions are met the agreement cannot be challenged on the basis of EU antitrust rules
 - Used to be very formalistic : white, grey and black clauses
- The 2010 Vertical Block Exemption Regulation (VBER)
 - Safe harbor for exclusive and selective distribution, distribution agreements more generally

The VBER Revision Process

Vertical Block Exemption Regulation Safe Harbor

- 30% market share cap
- No hardcore restriction (RPM, absolute territorial protection, restriction to online sales, etc.)
- Some restrictions are not covered by the block exemption (e.g. non compete > 5 years)
- Self-assessment principle
- Individual exemption remains possible over 30% (and possibly as well for some hardcore/not exempted restrictions)

Ongoing Revision Process



- Main issues to be addressed from the outset:
 - Online sales: admissible restrictions imposed on distributors and platforms
 - Selective distribution progression and questioning of the justification of the use of selective agreements
 - Relaxation on RPM
 - Guidance and/or relaxation on dual pricing (online/offline)
 - Guidance on MFNs
- And possibly more:
 - Dual distribution (competition supplier/retailers)
 - Relaxation of the rules on active sales
 - Duration of non-compete

Parallel Trade Restrictions

- Creation of a single market is one of the main objectives of the EU competition policy
 - Significant price differences remain between Member States on some markets
 - Vertical agreements cannot be used to partition the market and preserve higher price zones: once a product is put on the market in the EEA, it can be traded freely across borders except for a few exceptions (prohibition of active sales towards exclusive territories)
 - Numerous enforcement actions over the years: pharma, car distribution etc.

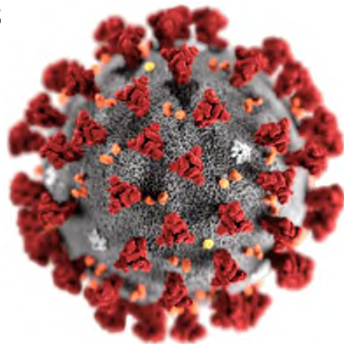
Recent precedents

AB InBev (2019): Abused its dominant position (art. 102) in Belgium by restricting cross-border sales of its beer to Belgium from the Netherlands in order to maintain a higher price level in the Belgian market.

Mondelēz (ongoing, 2021): The EU Commission has opened proceedings on potential restrictions of parallel trade of chocolate, biscuits and coffee between Member States through agreements (art. 101) and unilateral practices (art. 102).

Challenging times for distribution agreements

- Covid-19: More flexibility for competitor cooperation in order to ensure the supply and adequate distribution of essential scarce products and services
- In the meantime, those taking advantage of the crisis have been warned
- Retailers have experienced very different conditions to continue operating from one Member State to another – distressed players (specialized retail in particular)
- Acceleration of the move to reduce intermediaries in supply chains

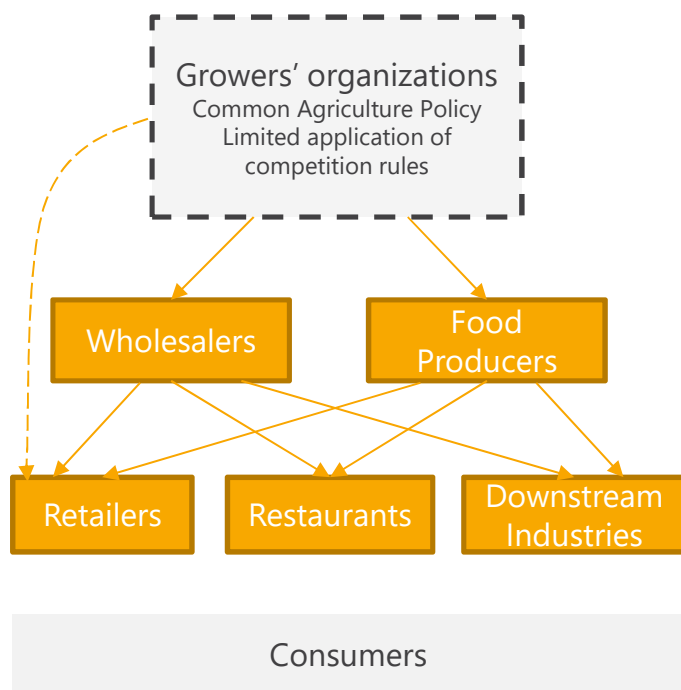


- EU-UK Trade and Cooperation Agreement (TCA) governing the post-Brexit relationship from 1 January 2021
- Potential for parallel investigations by the UK and EU with respect to alleged anti-competitive agreements
- VBER and other EU block exemption regulations adopted by the UK as retained EU law

Supply Chain And Distribution : Areas Of Antitrust Risk

- The food sector
- Online sales restrictions
- Parallel trade restrictions
- Horizontal coordination within a given supply chain/network
- RPM and hub & spoke coordination
- MFNs

The Food Sector: Still A High Risk Zone For Structural Reasons



- Strong activity of European Competition Authorities for a number of years now

- Distressed agriculture industry in many Member States
 - Growers and breeders pressure to obtain better sales prices
- Price fixing at the level of food producers
 - EU: mushrooms (2016); canned vegetables (2019)
 - Significant NCA enforcement activity: dairy, ham, poultry cartels (France), sugar, sausages (Germany), milk (Spain) etc.
- Purchasing alliances under scrutiny
 - FCA, Food alliance between Auchan, Casino, Metro and Schiever, 2020
 - FCA, Food alliance between Carrefour and Tesco, 2020
- Creation of a Food Task Force within the EU Commission
- EU investigation on supermarkets
 - First DGComp Task Force Food probe against food retailers
 - Started with potential coordination through purchasing alliances
 - Focus is now on potential downstream coordination in France



Online Sales Restrictions

- Online sales vs. selective distribution
 - Key European sectors rely on selective distribution to a significant extent (luxury, hi-fi, cosmetics, etc.)
 - Online sales increase price transparency and allow to suppress intermediaries – downward price trends as the use of internet increases
 - Use of selective distribution is increasing
- Retailers do have the right to resell online
 - Online sales considered to be a form of passive sales under the VBER; any unjustified restriction is a hardcore restriction
 - Suppliers prohibiting or restricting internet sales do not enjoy the safe harbor and risk enforcement actions

[ECJ, Case C-439/09, Pierre Fabre, 13 October 2011]

Selective Distribution

Only the retailers meeting criteria are allowed to purchase and retail products

- ✓ Qualitative criteria (online & offline)
- ✓ Quantitative criteria

Pure players can be excluded from selective distribution networks

[VBER Guidelines, pt. 54]

Third-party platform prohibition is not a hardcore restriction in selective distribution systems for luxury goods

[ECJ, Case C-230/16, Coty Germany GmbH, 6 December 2017]

Admitted in some Member States beyond luxury products : [Higher Regional Court of Hamburg, food supplements, 22 March 2018]

[French Competition Authority, gardening tools, 24 October 2018]

Online Sales – Will The VBER Revision Really Bring About A Significant Change?

- Calls to relax the RPM prohibition
 - RPM can provide an answer to free-riding to protect margins of brick and mortars facing higher costs
 - RPM in some instances produces efficiencies
 - Intra-brand competition not necessary where inter-brand competition is effective
- Dual pricing in debate
 - Different wholesale prices for online/offline resale or resellers
 - Alternative to RPM to maintain the ability of brick and mortars to compete (free-riding)
 - Hardcore restriction when dual pricing is applied to the same retailer
 - Assessment on an individual basis when applied to different retailers [VBER Guidelines, pt. 64]
 - Some National Competition Authorities are applying a broad and strict position
 - Omni-channel strategies change the picture

Marketplace vs. Brick & Mortar

- EEA wide if not global purchase conditions
- Brick & mortar frequently national or regional with lower volumes in each (more fragmented markets than pure players)
 - => *Lower purchase prices for market places in many circumstances*
- Especially in a selective environment, small qualitative outlets with sales staff generating multiple costs
- One multilingual site representing signification development costs but very low maintenance costs afterwards
 - => *Higher sales costs for brick & mortar in many circumstances*

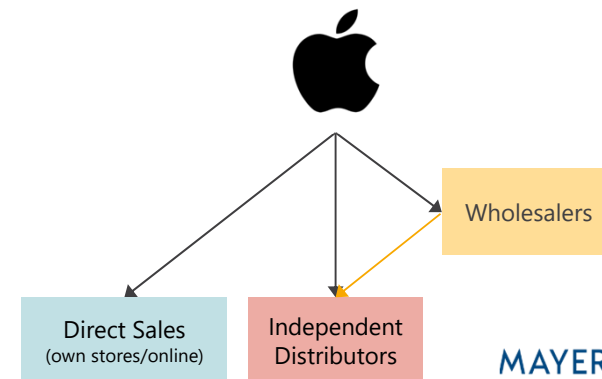
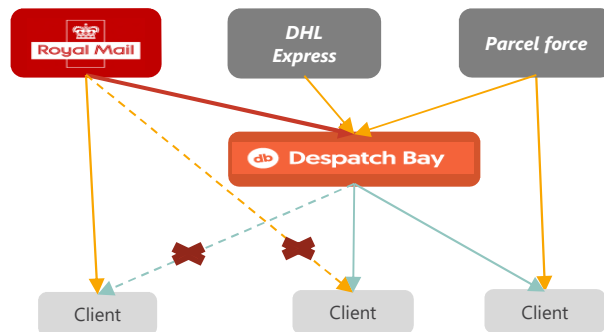
Relaxation does not appear granted – more guidance would already be an improvement

Horizontal Coordination Within A Given Supply Chain/Network

- Legitimate collaboration between complementary network operators may end up in anticompetitive practices
 - Integrators of services/direct supply of services
 - Network sharing arrangements between competing players active in different territories
 - ⇒ Shall not lead to non-aggression pacts, customer sharing
 - ⇒ Increased enforcement

[CNMC, Business Parcel Services, 2018] [FCA, Freight transport, 2019] [OFCOM, Royal Mail/Despatch Bay, 2019]
- Increasing competition between suppliers and distributors (dual distribution)
 - Suppliers selling both to distributors and to end-users so far enjoy the safe harbour of the VBER for their distribution agreements
 - France: €1.1 billion fine against Apple, *inter alia*, for restricting competition between its resellers and own distribution channels

[FCA, Apple, Tech Data and Ingram Micro, March 2020]



Resale Price Maintenance: A Long Standing Practice

- Manufacturers should not take any actions that interfere with the freedom of retailers to set their final prices to customers
- Recommending a resale price or requiring a retailer to respect a maximum resale price is exempted under the VBER
[VBER Guidelines, 2010]
- Fixed or minimum resale price considered a hardcore restriction



- Level of fines may be as important as for horizontal coordination
- Distributors may be fined as well where they participate in the RPM practice (agree in return of benefits, monitor price levels and report, etc.)
- Leniency applications for RPM are not possible under most EU regimes

Recent EU Precedents

EU (2017): EC imposed a total of €111 million in fines on four consumer electronics groups for restricting online retailers' ability to set their own retail prices for widely used electronics products (including notebook computers and headphones).

Germany (2019): The German Federal Cartel Office imposed €13.4 million fine on bicycle wholesaler ZEG for fixing prices with 47 retailers. The FCO had also imposed fines in similar matters in 2017 against a clothing manufacturer, in 2016 against LEGO, and in 2015 against three mattress manufacturers.

France (2020): French Competition Authority fined Apple €1.1 billion including €221 million for a series of practices (communication of suggested prices, price monitoring, risk of retaliation) affecting resellers ability to freely determine their commercial policy and preventing them from deviating from the retail prices set by Apple.

Hub & Spoke Defined

- Agreements between competitors in one market co-ordinated by vertically related intermediaries, mostly through information exchanges
- Higher risks in market structures with shared incentives to raise prices between the two market levels
- Recent theory of harm, presenting interactions with RPM
 - First cases in the UK
 - Enforcement develops at Member States' level
 - Online price monitoring tools and algorithm may facilitate the implementation of Hub & Spoke schemes
 - Criteria to apply Hub & Spoke/RPM/combination of vertical and horizontal agreements remain unclear

Key EU Precedents

UK (2003): Toy manufacturer acting as intermediary between two catalogue retailers in order to identify common products and to apply matching recommended retail prices.

UK (2011): Exchanges of information between supermarkets through dairy processors in order to raise their retail prices.

Belgium (2015): Coordination between retailers of drugstore, perfumery and hygiene (DPH) products through their suppliers, each of which acted as an intermediary for its respective products.

Netherlands (2020): Coordination between cigarette manufacturers on the basis of future pricing intentions provided by wholesalers and retailers.

Portugal (2020): Indirect price coordination between supermarkets through two drink suppliers.

Burden Of proof: RPM vs. Hub & Spoke

Resale Price Maintenance

Debated *per se* theory and demanding burden of proof

- Evidence of an agreement to apply prices determined by the supplier (rare)
or
- Three condition test
 - Prices communicated by the supplier (such as the diffusion of price lists)
 - Control of price application by the supplier (monitoring, rewards, retaliation)
 - Significant application by retailers (over 80% in precedents of the French Competition Authority)

[French competition authority, luxury perfume, 2006]

Hub & Spoke

Standard of proof based on exchanges among players much more than on actual price evolutions

- Three-pronged “A-B-C-Test” (A and C being retailers and B a supplier in this example): three objective and two underlying subjective conditions
 - A: Discloses future pricing intentions to the hub B with the intention that it will be passed on to a competitor
 - B: Passes the information on to C
 - C: Uses the information in determining its own pricing behaviour knowing under which circumstances B obtained the information from A

[UK Court of Appeal, Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading (2006)]

Most Favored Nations Clauses

- Parity clauses in vertical agreements are covered by the VBER
[EC Staff Working Document supporting its e-commerce Report, pt. 621]
- Prevents a supplier from offering another retailer a lower price than the one offered to the party imposing the restriction
- Many Member States have identified antitrust concerns in recent years
- Also enforced at EU level - Apple E-books (EU)
 - MFN clause introduced by Apple to ensure that its iBookstore would offer the cheapest prices online
 - EC took the view that MFN clauses created pricing rigidity discouraging publishers from discounting elsewhere
 - Settled by way of commitments not to enter into or enforce any retail price MFN clauses in agreements with e-book retailers or publishers for a period of five years

Recent EU Precedents

Insurance price comparison websites and digital comparison tools (UK, 2013): Prohibition of wide MFNs in relation to motor insurance

Amazon Marketplace (UK and Germany, 2013): Amazon announced in mid-2013 that it would no longer enforce MFN provisions across the EU

Online hotel bookings (France, Italia, Sweden, Germany, 2015): MFN clauses in agreements between online travel agents and hotels; settled by way of commitments except for Germany (prohibition decision)

ComparetheMarket (UK, 2020): consumer price comparison website fined over £17million for imposing wide and restrictive MFN clauses in its agreements with home insurance companies

Supply Chain & Distribution Practice

- We help clients on supply chain and distribution contracting, compliance and disputes across the globe
- We have 70+ partners with deep experience in supply chains across 15 domestic and international offices
- For more information, visit www.mayerbrown.com and search "Supply Chain"

Our Geographies

OFFICES IN THE AMERICAS, EUROPE, ASIA AND THE MIDDLE EAST

Our clients include many of the world's largest companies, including most of the Fortune 100, FTSE 100, Nikkei, DAX and Hang Seng Index companies and a majority of the largest banks. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.





[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

mayerbrown.com

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.