

**Baker
McKenzie.**

Annual Corporate Compliance Conference 2020

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Distribution Agreements: Key Compliance Learnings from Recent Cases

Wednesday 16 September, 2.00 - 3.00 pm BST



Speakers



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Agenda

01 | The Legal 101: A Quick Refresher

02 | Compliance Learnings from Recent Cases in the EU and the UK

03 | Creating a Compliant Online Retail Environment

04 | Update on the Verticals Review

Looking for competition law training on distribution agreements?



Our webinar training on the "Do's and Don'ts" of Distribution Agreements is available!

Just search for "**Essential Knowledge**" on the Baker McKenzie website.

The screenshot shows the Baker McKenzie website interface. At the top, the logo is on the left, and navigation links for HOME, PRACTICES, INDUSTRIES, RESILIENCE, RECOVERY & RENEWAL, and LOCATIONS are on the right. A search bar is also present. The main content area features a large banner for a webinar titled "EU & UK: Competition Law - Essential Knowledge for In-House Lawyers Mastering the Basics for Your Business" dated 09 Jul 2020. Below the banner, there is an "In brief" section with a summary of the program and a list of topics. The "Contact Information" section lists three speakers: Keith R. Jones, James Robinson, and Francesca Richmond, each with their title and email address. The "In brief" section includes a table of topics with dates and links to view recordings.

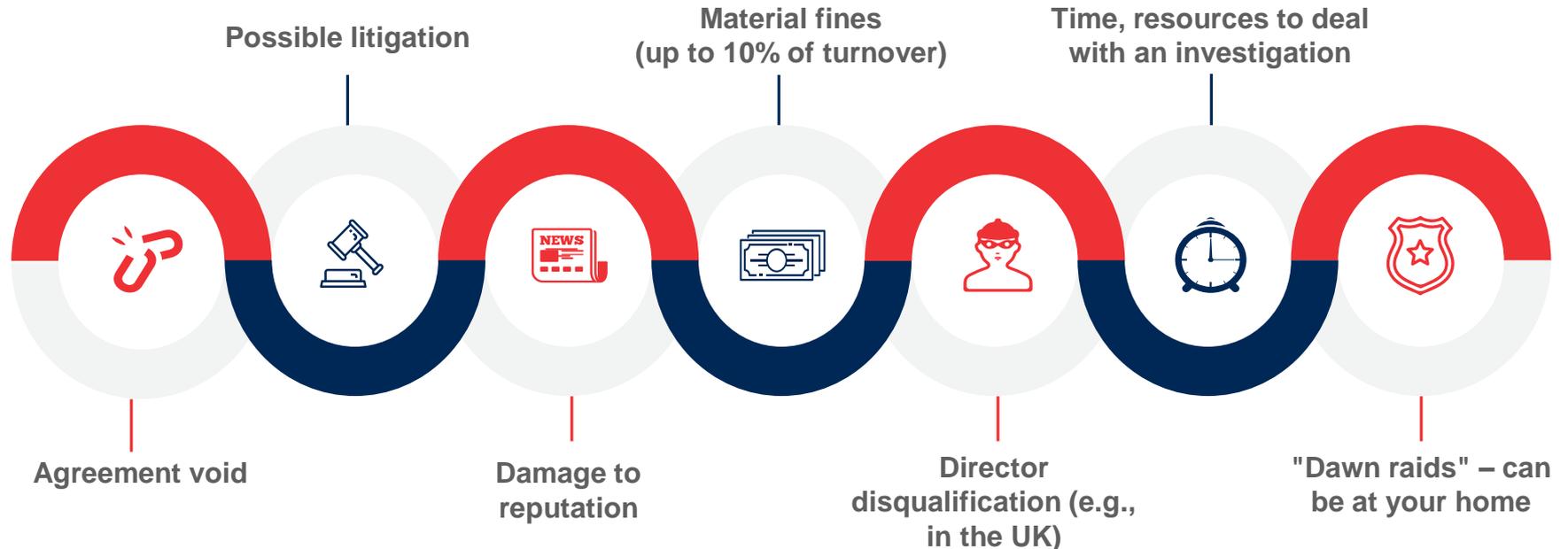
Date	Session	View webinar recording
28/4/2020	Introduction to competition law, market definition and economics Eva Crook-Santner, Gavin Hayes, Alex Stratakis	View webinar recording
5/5/2020	Dealing with competitors Irena Apostopoulos, Julian Godfrey, Eren Kilich	View webinar recording
12/5/2020	Distribution dos and don'ts Karoline Phillips, Sarwenaz Kiani	View webinar recording

01

**The legal 101:
A quick refresher**

Why be concerned about antitrust compliance in a distribution context?

Infringements in vertical agreements as damaging as in horizontal ones!



European competition rules on vertical restraints

➔ EU Vertical Block Exemption Regulation and guidelines provide a safe harbor presumption of lawfulness for multiple distribution systems that comply with these rules

- market share thresholds
- no hardcore restrictions

➔ Outside safe harbour – individual analysis required

➔ EU Member States have national competition rules that apply in parallel

➔ In the UK – Chapter 1 Competition Act 1998 – assessment follows EU rules, no change expected after Brexit

➔ The verticals regime expires on 31 May 2022 and is currently under review

What are the main red flags?



Resale price maintenance



Territorial and customer restrictions



Online sales restrictions



Restrictions on sales to other authorised resellers within a selective network (cross supplies within the closed system must be allowed)

02

**Compliance learnings
from recent cases in
the EU and the UK**

When are investigations initiated?



EU Commission: follow up from e-commerce sector inquiry (launch in 2015 and final report in May 2017)



EU and Member States: complaints by resellers



Voluntary disclosure? UK possible, elsewhere unlikely

Recent enforcement - European Commission



Conduct and evidence in recent EU cases

RPM, territorial, online and cross-supply restrictions

- Resale price maintenance (Consumer Electronics - in relation to online pricing mainly – emails and other ways of communication; Guess - agreement)
- Direct online sales restrictions (Nike; Guess; NBCUniversal - agreements)
- Indirect online sales restriction regarding use of trademarks for online advertisement and for online search engines such as for Google AdWords (Guess – internal documents)
- Direct territorial sales restrictions "out of territory" sales restrictions (Nike; Sanrio; NBCUniversal; Melia; AbInbev; Guess - agreements)
- Indirect territorial sales restrictions by limiting languages on products (Sanrio; NBCUniversal - agreements) / cross-supply restriction due to minimum purchase amount (Guess – agreement)

Body of evidence – compliance weakness

Express clauses in agreements

Guess – RPM

"For each sample range GUESS EUROPE shall fix a minimum price for sale to the public of its own products, by means of a «recommended pricelist» [...], for the purpose of making the product image uniform on the market."

Guess - Internet sales ban

*"(o) not to sell any Products through the Internet or any other electronic or computer-based system, **without GUESS's prior written consent** [...]"*

Body of evidence – compliance weakness

Explicit clauses in agreements – territorial restrictions

Nike

"The Licensee shall not, either directly or indirectly, sell or otherwise make available Products to any person, firm or corporation in any place or country outside the Territory"

Guess

"All Advertising [...] shall be limited to Advertising and marketing within the Territory and SUBDISTRIBUTOR [...] has no right to Advertise or otherwise market the Products or solicit Customers outside the Territory and is expressly prohibited from doing so."

Body of evidence – compliance weakness

Internal documents – Guess internet strategy

As explained in Guess' internal documents:

"[...] the online market has to be strictly controlled in order to avoid wholesale cannibalizing retail sales. Retail expansion potential is enormous, but if it's strongly limited and obstructed by online wholesale, the expansion would be very hard to achieve" and "the goal is to direct traffic to our B2C site"

"[The] policy is not to let our wholesale customers bid on Google adwords using the Guess Trademark. [...]" "[a]uthorizing third parties would generate an important increase in our Google costs and decrease in visibility and sales for www.guess.eu."

Even if there are no restrictions in agreements – actual practice and internal documents are sufficient to provide evidence regarding the infringement!

Body of evidence – compliance weakness

RPM – main source of evidence emails (internal and external)

Consumer electronics manufacturers: subject of email "*calendar week 39 final premium partner test week > punish*"

Employee informs several account managers about the state of play of the program.

In his e-mail, he is reporting that there are still a few candidates that "*would not understand*" and either have large deviations or are 1 or 10 cent below the RRP.

In case this continues he announces that all retailers which have more than 2-3 articles below the RRP shall be informed that their Q3 bonus will be cut.

Recent enforcement - UK CMA

EUR 3.7m

CASIO

August 2019

EUR 1.5m

KORG

29 June 2020

EUR 4m

Roland

22 July 2020

January 2020

Fender

EUR 4.5m

17 July 2020

GAK
YAMAHA

EUR 278,945 fine for GAK

Conduct and evidence in recent CMA cases

RPM in relation to online pricing

- Resale price maintenance in relation to resellers' online pricing, in some cases by requesting to adhere to "minimum advertised price"
- In some cases, policy was implemented with the help of price monitoring software
- Resellers also put pressure on suppliers to take action against those who did not follow RRP
- Internal communication among employees at supplier or reseller (email, WhatsApp, SMS, iMessage, and Google Hangout chats)
- High awareness of illegal behaviour as employees deleted evidence and intentionally avoided written communication with resellers – but CMA able to re-create data / find other sources of information

Building the case

Internal communications can be as bad as external

Internal communication between employees regarding asking resellers to increase pricing:

"If your mate is not in line by Monday, he is on stop."

Internal communication between employees at a reseller:

"As predicted just got the threatening phone call from [SUPPLIER]! Will move prices."

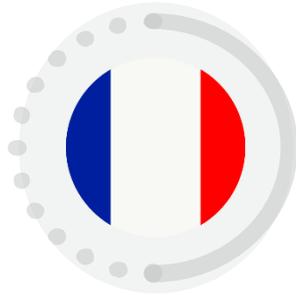
Internal documents:

In a presentation titled 'EMI UK Business Plans May 2016', on page 8, under the heading 'New Terms and Conditions' the first bullet point reads, **'Regain control of pricing'**

Liability of resellers in the spotlight



UK – first case where a reseller has been fined (GAK)



French authority fined Apple and two of its wholesalers earlier this year for vertical resale restrictions



Germany authority has fined resellers but there were particular circumstances (hub & spoke or reseller is instigator)



Other authorities, such as in Romania, regularly fine resellers in vertical restriction cases

A few words on process...

To cooperate or not to cooperate

- ▶ No immunity / leniency possible at EU level (and most EU Member States) only informal cooperation process for vertical restrictions; in UK, immunity and leniency is available for RPM
- ▶ In all recent cases parties decided to cooperate and received significant reductions – advisable approach in cases of unambiguous evidence, gives company control over the process and possibility to shape the scope of the case to certain extent
- ▶ Average lengths of investigations: 2-3 years (much shorter than cartel cases given conduct is more straightforward)

Compliance learnings

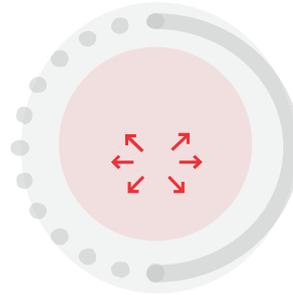
How to minimise risks of investigations



Review of agreements – global companies at risk when non-EEA templates are used



Training regarding internal communication – Tone from the top and company mentality are crucial;
Guidelines regarding use of price monitoring data



Training regarding external communication – coded language / mild threats can create harm; verbal communication may leave traces



Internal documents – avoid language that could be wrongly interpreted (test: what would authority say if they read this?)

Compliance learnings

How to minimise risks of investigations



- Finally: disgruntled customers are the biggest enforcement risk!
- Conduct a mini audit before any termination, cutting supplies, decreasing status of suppliers
- Internal protocols for consistent handling of customers regarding bonus, conditions, product access (selection and quantity) to ensure that decisions are based on objective reasons
- Recent fines imposed on resellers should help with customer complaints regarding other resellers' pricing

03

**Creating a compliant
online retail
environment**

General rules regarding online sales

- The starting point under EU competition law is that every distributor must be permitted to use the internet to sell the products supplied for distribution.
- Websites reach an EU-wide audience and enable end users wishing to purchase online and located outside the physical trading area of the relevant trader to access the product.
- Not allowing a distributor to sell online restricts access to the products by those consumers from those territories – restricting online sales is a form of resale restriction for customer groups or territories.

What is the challenge?



The supplier may consider its products unsuitable for online sales and argue it is not possible to replicate the qualitative features of the offline sale environment on the Internet



Common difficulties:

- accurately conveying the brand image to consumer
- specialised or custom-made goods
- delivery of personalised services to user
- technical products which require following specific instructions for use or a safety protocol

Ping: Custom fitting of golf clubs

Background

- Ping: a UK-based manufacturer of golf clubs, accessories and clothing
- In 2017, the CMA fined Ping £1.45 million for prohibiting its authorised dealers from selling Ping's golf clubs online
- Ping appealed (CAT and Court of Appeal) and obtained a reduction in the fine to £1.35 million
- But the substance of the CMA's decision was upheld - Ping's ban was, by its very nature, liable to restrict competition between retailers

Ping's internet sales policy

Background

➔ Selective distribution network based on qualitative criteria

➔ Online sales ban in place since 2000 for Ping hardware products (e.g., clubs)

➔ Dealers who breached the ban had their account closed by Ping

➔ Ping golf clubs were listed on the dealers' websites, but not possible to buy online

➔ Two options:

- click on a link to "Try before you buy" in a custom fitting centre
- call a telephone number to place an order

➔ Rationale: promote in-store custom fitting

Online listing examples

MENU **onlinegolf** Search OnlineGolf ...



	HEAD	HEADSET	PARALLEL
HEAD	LS 15°	LS 15°	LS 15°
HEADSET	WS	WS	WS
PARALLEL	WS	WS	WS

1 Select your Hand: Right Hand

2 Select your Loft: Select Loft

3 Select your Shaft type: Steel

SAVE £31.00
MRRP £130.00
From
£99.00

CALL TO PURCHASE 01615 092020

EARN 229 LOYALTY POINTS WORTH £2.29

PING

Ping do not allow their golf products to be sold via the Internet in Europe through the automated checkout service, however we would be happy to help you over the telephone.
Please contact us on +44 (0)161 509 2020 and our professional team will be happy to discuss your requirements, help you select the right Ping product and place your order.

Norton Shopping Guarantee 9/4/2020

By continuing to browse the site you are agreeing to our use of cookies or find out more here.

MENU **americangolf** Search American Golf ...



1 Choose Set options: 4-PW (7 Irons)

2 Choose Hand: Left Hand

3 Choose Shaft type: Steel

4 Choose Flex: Stiff

MRRP £882.00
SAVE £123.00

£759.00

Call to Purchase: 01925 939 999

As a PING Authorised Retailer, American Golf believes that every PING golfer should experience our FREE instore custom fitting process. Therefore PING clubs cannot be purchased online.

By continuing to browse the site you are agreeing to our use of cookies or find out more here.

Ping: Key questions for the CMA



Does the Online Sales Ban pursue a legitimate aim? **YES**



Is the Online Sales Ban suitable or appropriate to pursue the legitimate aim? **NO**

- No evidence policy resulted in a higher uptake of custom fitting
- Other manufacturers had success with custom fitting despite allowing online sales
- Customer decision whether to undergo custom fit is complex



Are there realistic alternatives to the Online Sales Ban? **YES**

Ping: "Realistic alternatives" to online sales ban

CMA's Alternative Measures

Express promotion obligation

Dealers required to promote custom fitting online (e.g., prominent promotional notice on webpage)

Personalised advice online

Requirement for online interactive features for personal advice (e.g., a "live chat" function)

Drop-down boxes

Only websites with drop down boxes showing all of Ping's custom fit options would be authorised

Mandatory tick-boxes

Requirement for a mandatory tick-box for consumers to confirm that they understand the importance of custom fitting and are happy to forego its benefits

Ping: "Realistic alternatives" to online sales ban

CMA's Alternative Measures

The CMA considered that these were:

Technically achievable

Authorised dealers already operated e-commerce websites and many had these features on their websites already

Realistic and commercially viable

Ping allowed authorised dealers to sell Custom Fit golf clubs online in the US

Suitable and appropriate

To achieve the aim of promoting Custom Fitting

Less restrictive than an absolute ban

Online selling was possible under each option vs. elimination of all competition via the Internet

Ping: "Realistic alternatives" to online sales ban

Ping Views

The CMA's alternative measures would:

- Lead consumers to make uninformed decisions, harming their interests and damaging Ping's brand
- Reduce investment by retailers and increase the risk of "freeriding"

Express promotion obligation

Not effective as could be ignored

Personalised advice online

Not viable to deliver, nor a substitute for face-to-face conversation

Drop down boxes

Impractical due to large number of possible customisation options

Mandatory tick-boxes

Risk consumers would 'guess' measurements rather than obtain an in-store fitting

Ping: "Realistic alternatives" to online sales ban

CAT Views

"Freeriding" problem was implausible in this case

- increased consumer demand for custom-fitting generally
- vast majority of custom fittings resulted in a sale

Express promotion obligation

Promotion of custom-fitting online was realistic and had commercial precedents in the industry

Drop down boxes

Similar to Ping's own approach in the US and the online sale of Ping's soft goods

Personalised advice online

No evidence that a "live-chat" feature would not be viable - especially if a telephone conversation was considered by Ping to be adequate

Mandatory tick-boxes

Frequently used in other online contexts

Stihl: Online sales ban on grounds of safety

Background

- Distributor of mechanical garden tools, such as chainsaws, hedge trimmers, and lawnmowers
- Selective distribution system in place
- No explicit ban on online sales but distributors had to hand-deliver products which Stihl deemed "dangerous"
- In 2018 the French Competition Authority ("FCA") issued a €7 million fine for the hand-delivery requirement
- The Paris Court of Appeal upheld the FCA decision but reduced the fine to €6M

Stihl: Hand-delivery requirement

Stihl's view

- Requirement only affected the conditions of delivery, not ability to buy online
- Necessary to demonstrate safe use of the products

Authority's view

- Hand-delivery requirement deprived customer of benefit on shopping online
- Disproportionate to achieve safety: not mandated by safety regulations and not imposed by Stihl's main competitors
- *De facto* ban on online sales which reinstated physical catchment areas and reduced intra-brand competition

Paris Court of Appeal

- Safety is a justified aim but means went beyond what was necessary

Online sales restrictions – practical tips



An absolute ban on online sales must be avoided in all circumstances

- strict treatment by competition authorities and courts
- even safety risk not guaranteed to be an "excuse"



Consider alternative ways of achieving the same aim

- express promotion obligations
- design, content and technical standards of authorised retailers' websites



Consider (and document) why you need any online sales restrictions

04

**Update on the
verticals review**

Verticals review – next steps

- Launch of the evaluation October 2018
- Request and analysis of submissions, workshop contributions and several studies throughout 2019/ Q1 and Q2 2020
- Staff Working Document published on 8 September 2020: sets out what will be reviewed, not how
- Impact assessment phase (Q3 2020 onwards): discussion on substantive changes
- Current regulation and guidelines expire in May 2022

Verticals review – update

What are the key points of debate

- SDS – should SDS be block-exempted or do they require justification depending on the nature of the product? Is 30% the accurate threshold?
- RPM - are there any efficiency reasons that could justify resale price maintenance? Exemptions need to be clarified in guidance.
- Online market place restrictions - are third party platform restrictions in themselves hardcore? Is Coty only applicable to luxury goods?
- Is the requirement to have a physical store as a prerequisite for selling online justified?
- Can a dual distribution relationship (where manufacturer competes at the retail level) fall under the safe harbour or should it be excluded? What kind of information exchange is exempted under the VBER?
- Dual pricing – raises many issues due to inconsistent views of NCAs and fixed fee solution not being workable in practice; more guidance is needed.

The image features a white speech bubble on the left side, containing the word "Questions" in a bold, dark blue font. The background is a dark blue gradient with a glowing teal particle trail that curves across the bottom right. The overall aesthetic is clean and modern, suggesting a focus on inquiry or technology.

Questions

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