



HERBERT  
SMITH  
FREEHILLS



# Supplier terms and pricing issues under EU competition law

---

## Introduction

Following a period of limited enforcement of vertical restraints at EU level over the last decade the EU Commission is increasingly focusing its attention on vertical agreements. This is to some extent triggered by the rapid growth in e-commerce, which has led to old issues re-emerging in a new guise, but focus has not solely been on the online sector. Rebate schemes operated by suppliers with a dominant position have also been under the spotlight, with the recent *Intel* ruling by the Court of Justice of the EU (CJEU) providing helpful guidance in this area.

## What is the basic position under EU competition law regarding resale price maintenance (RPM)?

RPM is one of the main vertical restrictions that qualify as a hardcore restriction and therefore as a restriction by object under EU competition law. The main competition concerns with RPM are that it may facilitate collusion between suppliers by enhancing transparency, reduce price competition between resellers and result in higher prices for consumers. There may be limited circumstances where RPM can be justified under Article 101(3) TFEU and will benefit from an exemption, for example where it is used in order to prevent free-riding, to allow for the introduction of new products or to support short term price campaigns. These arguments will however not be accepted lightly and the Commission's guidelines on vertical agreements (vertical guidelines) make it clear that the parties will have to "convincingly demonstrate" that the RPM agreement will benefit consumers.

Recommended retail prices (RRP) and maximum resale prices will generally be permitted provided they do not amount to a minimum or fixed resale price as a result of pressures or incentives offered by any of the parties. The vertical guidelines do flag the risk that a recommended or maximum price will work as a focal point for the resellers and might be followed by most or all of them, and that this risk will be higher the stronger the market position of the supplier. Recommended and maximum resale prices, although potentially permitted under competition law, will therefore nevertheless need to be considered very carefully.

### What do recent cases and investigations tell us about the Commission's position on RPM?

The Commission's e-commerce sector inquiry report highlights that RPM is becoming increasingly common in the online sector. Increased price transparency and easier price monitoring (including the use of automatic software programmes) has made it easier for suppliers to monitor and enforce price restrictions imposed on their retailers. The Commission saw evidence of widespread monitoring of retail pricing by manufacturers and of adherence by retailers to recommended retail prices. Some retailers reported manufacturers applying pressure to maintain recommended resale pricing, which included threats to remove discounts, delay or cease supply. Such conduct amounts to indirect RPM which is in breach of competition law.

In July 2018 the Commission imposed total fines of €111 million, in four separate decisions, on consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers in breach of Article 101 TFEU.

The four manufacturers engaged in so called "fixed or minimum resale price maintenance (RPM)" by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. The use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases.

Announcing the infringement decisions, Competition Commissioner Vestager said: "As a result of the actions taken by these four companies, millions of European consumers faced

*higher prices for kitchen appliances, hair dryers, notebook computers, headphones and many other products. This is illegal under EU antitrust rules. Our decisions today show that EU competition rules serve to protect consumers where companies stand in the way of more price competition and better choice."*

### How are online sales restrictions treated?

#### Are Platform restrictions permitted?

No, the starting point under EU competition law, (which is set out in paragraph 52 of the vertical guidelines), is that every distributor must be permitted to use the internet to sell the products supplied for distribution. This was confirmed by the CJEU in the *Pierre Fabre* case where a requirement that cosmetic brands be sold only in a physical space with a qualified pharmacist present to advise on the use of the products, was held to be an absolute ban on online sales and thereby a restriction by object.

Online sales are generally considered a form of passive selling, which cannot be restricted. To the extent that certain online activity is equivalent to active selling (such as targeted advertising specifically addressed to specific customers) this can be restricted in the context of exclusive distribution agreements. A supplier is also entitled to impose quality standards on the use of the distributor's internet site (in the same way it may require quality standards for a physical store, for catalogue sales or for advertising and promotion in general).

A supplier may also require that its distributors use third party platforms to distribute the contract goods only in accordance with the standards and conditions agreed between the supplier and its distributors. For example, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform. This provision in the guidance has been relied on by suppliers in the context of a selective distribution agreement to restrict the resale of their goods on certain third party platforms such as Amazon marketplace and eBay. The CJEU in its recent *Coty* ruling confirmed this approach and held that this type of restriction can be justified in the context of a selective distribution system.

### What about online pricing restrictions?

Under EU competition law a supplier is not permitted to operate a dual pricing regime under which the distributor is for example charged a higher price for the product when sold online than when the same product or service is sold in its physical store. The same applies to indirect dual pricing measures which would have a similar effect such as a discount system in which a lower discount is given if the products or services are sold via an online store. The supplier is however permitted to agree with the distributor a fixed fee to support its offline or online efforts.

This approach to dual pricing was criticised by a number of respondents in the Commission's recent e-commerce sector inquiry who argued that dual pricing may be necessary to ensure there is a level playing field between online and offline trade, by taking into account the different cost structures of these channels. The Commission does recognise that there may be efficiency justifications for dual pricing, and paragraph 64 of the vertical guidelines considers the possibility for dual pricing to meet the conditions of Article 101(3) TFEU for example where sales via one of the sales channels lead to substantially higher costs for the manufacturer than sales via the other channel. In its final report in the e-commerce sector inquiry the Commission clarifies that this is not the only example and that it remains open to consider efficiency justifications under Article 101(3) TFEU in individual cases. This may be the case where it can be shown that the dual pricing arrangement is necessary to address free-riding between offline and online sales channels in the case of hybrid retailers.

### What is the approach to discounts and rebates under EU competition law?

Suppliers with a dominant position in the relevant market need to take care how they structure any discount or rebate schemes to avoid a breach of Article 102 TFEU on abuse of dominance. This has traditionally been a controversial area under EU competition law. Whereas it is acknowledged that discounts may be part of legitimate price competition and lead to lower prices for consumers, there is also concern that they may be used by a dominant company as part of a strategy to exclude competitors and ultimately exploit consumers. This is the case in particular in respect of loyalty inducing rebates, which are seen as a financial inducement to customers to obtain all or most of their requirements exclusively from the



supplier, thereby denying other suppliers the opportunity to supply that customer. The Commission and the European courts have traditionally taken a hardline approach to exclusivity rebates, which are presumed to be a restriction on competition under Article 102 TFEU without the need for further assessment of their effects on competition.

### Have there been any recent developments in this area of competition law?

The recent ruling by the CJEU in the *Intel case* in September 2017 confirmed the existing position on exclusivity rebate. Importantly, however, the ruling also makes it clear that it is possible for a dominant company to rebut the presumption of breach of Article 102 TFEU for these rebate schemes. Where a dominant company submits supporting evidence that its conduct is not restricting competition, the Commission is required to consider these arguments and should take into account factors such as:

- the extent of the company's dominant position on the relevant market and the portion of the market covered by the practices concerned
- characteristics of the rebates such as their duration and the amounts
- whether the company operated a strategy aimed at excluding 'as efficient' competitors from the market.

This should give companies with strong market power more flexibility with their rebate schemes, although it will be important to consider the possible impact of those rebates on competitors and to establish the rationale for the rebate scheme upfront, in order to shore up a defence strategy if needed.

### Key contacts



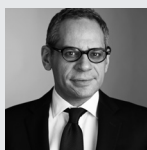
**Susan Black**

Partner

T +44 20 7466 2055

M +44 7785 255 009

[susan.black@hsf.com](mailto:susan.black@hsf.com)



**Kyriakos Fountoukakos**

Partner

T +32 2 518 1840

M +44 792 045 5155

[kyriakos.fountoukakos@hsf.com](mailto:kyriakos.fountoukakos@hsf.com)



**André Pretorius**

T +44 20 7466 2738

M +44 7809 200 532

[Andre.pretorius@hsf.com](mailto:Andre.pretorius@hsf.com)

## HERBERTSMITHFREEHILLS.COM

---

### **BANGKOK**

Herbert Smith Freehills (Thailand) Ltd

### **BEIJING**

Herbert Smith Freehills LLP  
Beijing Representative Office (UK)

### **BELFAST**

Herbert Smith Freehills LLP

### **BERLIN**

Herbert Smith Freehills Germany LLP

### **BRISBANE**

Herbert Smith Freehills

### **BRUSSELS**

Herbert Smith Freehills LLP

### **DUBAI**

Herbert Smith Freehills LLP

### **DÜSSELDORF**

Herbert Smith Freehills Germany LLP

### **FRANKFURT**

Herbert Smith Freehills Germany LLP

### **HONG KONG**

Herbert Smith Freehills

### **JAKARTA**

Hiswara Bunjamin and Tandjung  
Herbert Smith Freehills LLP associated firm

### **JOHANNESBURG**

Herbert Smith Freehills South Africa LLP

### **KUALA LUMPUR**

Herbert Smith Freehills LLP  
LLP0010119-FGN

### **LONDON**

Herbert Smith Freehills LLP

### **MADRID**

Herbert Smith Freehills Spain LLP

### **MELBOURNE**

Herbert Smith Freehills

### **MILAN**

Studio Legale Associato in association with  
Herbert Smith Freehills LLP

### **MOSCOW**

Herbert Smith Freehills CIS LLP

### **NEW YORK**

Herbert Smith Freehills New York LLP

### **PARIS**

Herbert Smith Freehills Paris LLP

### **PERTH**

Herbert Smith Freehills

### **RIYADH**

The Law Office of Mohammed Altammami  
Herbert Smith Freehills LLP associated firm

### **SEOUL**

Herbert Smith Freehills LLP  
Foreign Legal Consultant Office

### **SHANGHAI**

Herbert Smith Freehills LLP  
Shanghai Representative Office (UK)

### **SINGAPORE**

Herbert Smith Freehills LLP

### **SYDNEY**

Herbert Smith Freehills

### **TOKYO**

Herbert Smith Freehills