

Distribution and product mix strategies meet competition law

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First things First

- A caveat and disclaimer
- Today's agenda:
 - Identifying what the agreement or practice is – questions to ask
 - Cartel conduct
 - The language of lawyers “vertical / horizontal” agreements and unilateral acts
 - Competition Issues with “pure” vertical arrangements
 - Resale Price Maintenance
 - Mixed horizontal and vertical agreements
 - Unilateral acts by enterprises with market power
 - Compliance Tips

Things to look at

- Competition law is not really the “dark art” it first appears – in fact it makes sense if we bear in mind that it is all about protecting the competitive process and protecting ultimate consumers
- The 4 P’s in sales and how competition law is relevant: Place, Product, Price and Promotion
- Does my method of sales or distribution restrict competition?
 - Where, how and to whom am I selling or reselling my product?
 - Are my distributors or resellers my competitors?
 - What about my pricing decisions and practices? Am I trying to fix the resale price?
 - What about my promotions practices? Am I tying or bundling sales?

(with apologies) Some jargon before we look at practical issues

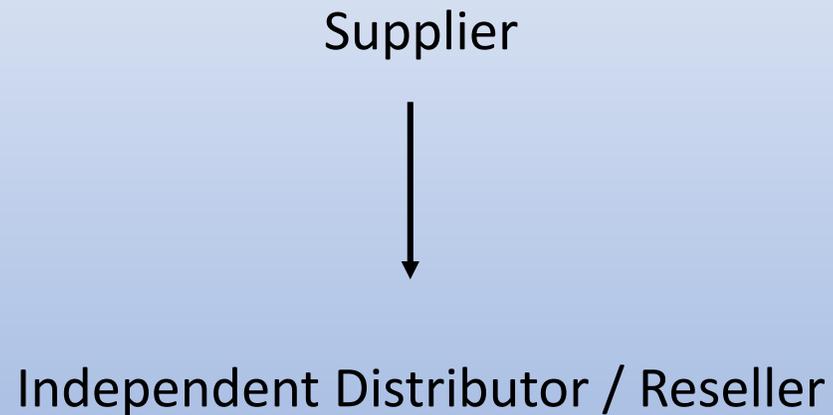
- Agreements “between enterprises”
 - An Intra-Group agreement (between companies in the same “single economic entity?”)
 - An Agency arrangement (but is it really?)
 - An agreement required by law? (but is it really?)
 - A distribution agreement with an independent distributor / reseller / retailer
 - Agreement between competitors (your distributors might be your competitors)
- “Unilateral conduct”?

A warning on collusion

- If I have competitors, the law says I must compete (obviously)
- So in your marketing, sales and buying decisions, don't agree with competitors to:
 - Fix sales or purchase prices
 - Share customers or carve up the market in any other way
 - Limit production or output
 - Rig bids or tenders
- It can sometimes be a bit confusing to work out who your competitor is (or is supposed to be)

Is it purely vertical or horizontal or is there a mix of both?

- What is meant by “vertical” and “horizontal” agreements?
- Pure vertical



I deal with the different types of “horizontal” arrangements later: basically they are agreements / arrangements between companies who should be competing with one another

Competition Issues with pure vertical arrangements

- Which laws apply? In sales / distribution agreements, it is where the distributor is selling the goods. On the purchasing side, it is where the buyer is buying the goods -- Know what rules apply – they are all different!
- (Very) generally, the main competition issues with “pure” vertical arrangements are Resale Price Maintenance (RPM) and exclusivity.
- Export bans – maybe mainly a European issue, but may be / become relevant in COMESA
- Other concerns relating to “unilateral conduct” may arise if either the supplier or the distributor / reseller has market power – we look at tying and bundling later

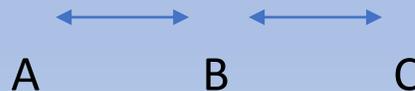
What is Resale Price maintenance (RPM)?

- RPM occurs when a supplier requires a distributor to resell at a certain price – RPM is prohibited in Mauritius (and in many other places)
- Some countries allow maximum RPM (allowing the supplier to dictate the maximum price) – most countries are concerned with *minimum* RPM
- As a general rule, Recommended Prices (if true recommendations) are OK –but it is RPM if the supplier taking steps to enforce a “recommendation”

Horizontal Arrangements

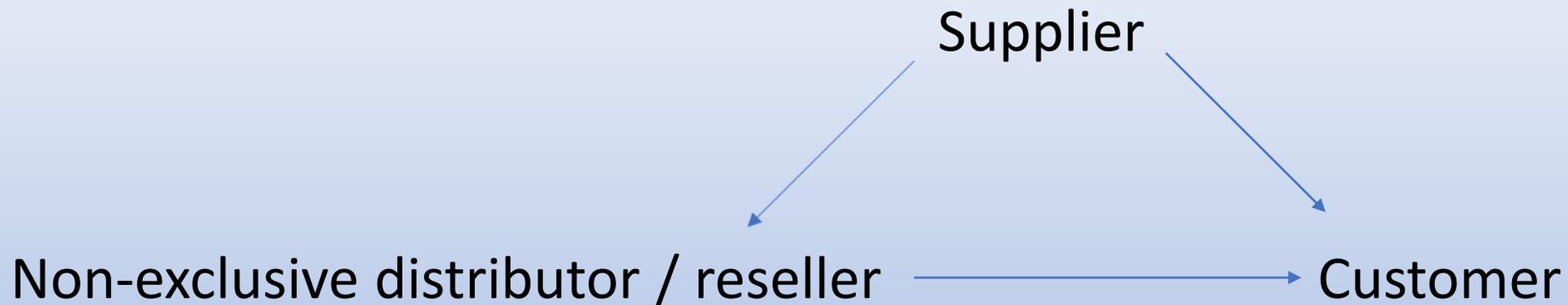
- Horizontal arrangements may occur in what look like “ordinary” vertical arrangements – this would include illegal (anti-competitive) arrangements between the distributors (or course, if suppliers colluded with each other, that is equally problematic!)
- Especially where distributors / resellers have non-exclusive territories and should be competing with each other (or with you)

Independent Distributors



Agree to fix prices / allocate customers or territories / limit supply

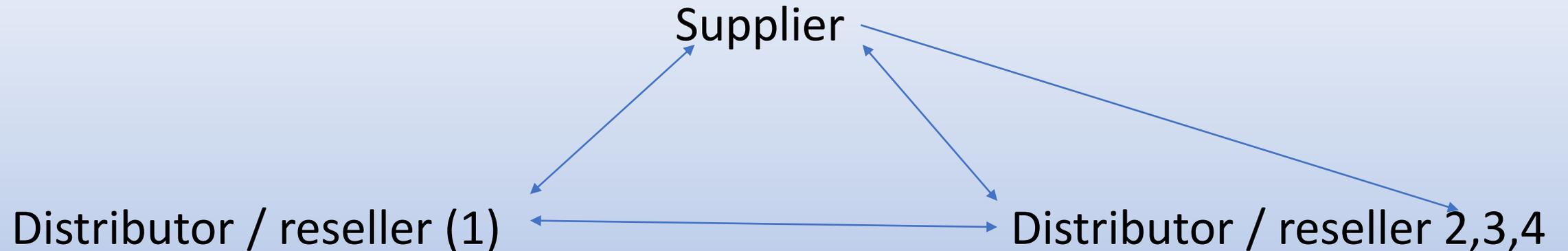
Mixed Horizontal and Vertical Agreements (2)



Risk of horizontal collusion between supplier and distributor who should be competing in a non-exclusive dealing arrangement

Mixed Horizontal and Vertical Agreements (3)

Hub and spoke



Risk of horizontal collusion between supplier and several distributors who should be competing in a non-exclusive dealing arrangement

Unilateral acts by enterprises with market power (1)

- Unilateral conduct is generally only of concern when an enterprise has “market power”
- What is “market power”? (very brief overview!)
- There is a “special responsibility” not to distort competition
- But the law should allow even firms with market power to compete fairly “on the merits”
- What kind of conduct by an enterprise with market power is relevant in distribution and sales agreements?

Unilateral acts (2)

- Assuming “market power” (MP) what do I need to look at?
 - Exclusive buying requirement imposed by supplier with MP
 - Tying sale of one product to sale of another (also called bundling)
 - Refusal to supply
 - Access to infrastructure (e.g. restricting others from supplying a service)
 - Buyer power (e.g. supermarkets)

These acts are only a problem IF (1) the Supplier or Buyer has MP OR (2) if the supplier or buyer does not conduct the act unilaterally but following an agreement with others

Unilateral acts (3)

- You may be able to defend your actions (even if you have market power) if you have an objective justification:
 - For exclusive purchasing: have you had to make an investment specific to your buyer which would justify some exclusivity (and is the length of the exclusive period reasonable)
 - Is the agreement (genuinely) justified on cost or volume grounds?
 - Are there safety or other objective reasons for bundling products?
 - Is there an objective reason for a refusal to supply (e.g. the customer is refusing to pay)

Compliance Tips (1)

- Ensure you understand the rules in the country where you appoint your distributor
- Make sure you check the local rules on RPM – it is easy to prove, and thus a good “target” for enforcement (and you want to protect your customers, obviously)
- If you sell into or have a distributor in Europe, understand the rules on export bans

Compliance Tips (2)

- If you have a non-exclusive distributor, you should compete with them and not try to fix the market
- If you have multiple distributors who should be competing with one another (e.g. non-exclusive distributors), DO NOT encourage collusion between them
- If you have market power either as a supplier or a buyer / reseller, make sure your marketing decisions are objectively justifiable

Compliance Tips (3)

- If you are arranging a distributor / dealer conference and there are dealers who should be competing:
 - Make it clear that you do not welcome or support any market coordination between them
 - Keep a record of the event: have a welcome note setting out your expectations, have an agenda, keep minutes, avoid “off the record” chats about things that can violate the law

Why comply?

- Above all, it is the “right thing to do” - (nearly) all businesses want to behave ethically and with integrity
- Failure to comply hurts your customers
- Failure to comply hurts your reputation
- Failure to comply costs money (and lots of it)

DO THE RIGHT THING

THANK YOU

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