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# **Recent enforcement and policy developments in EU competition law**

Kurt Haegeman and Mara Ghiorghies | Tokyo, January 2023



# Key focus areas

**1** Cartels and competitor collaboration: purchase cartels, sustainability, human resources

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**2** Supply chain issues: new EU block exemption and guidelines

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1

# Cartels and competitor cooperation

# Anti-cartel enforcement reinvigorated

## A global snapshot



Post-pandemic, antitrust agencies appear to be 'back in business'



Mainstream cases/classic cartels plus a bit more...

- EU looking carefully at innovation/R&D/green-blocking
- HR cartels a clear global trend



Authorities focusing on improving detection mechanisms:

- Investment in digital tools to spot violations (e.g., tools targeting bid-rigging or RPM)
- Internet, social media, public statements
- International cooperation between authorities (also multi-disciplinary cooperation)

# Dawn raids

## Back in business and coming home



**No sector left untouched**

**Coordination of raids amongst  
authorities**

**More raids at home**

**Across all subject areas – cartels,  
verticals etc.**

**Including in relation to “novel” theories of  
harm**

# Joint buying – cartel trend



**EU:** fines of €68 million imposed for fixing prices for purchasing scrap automotive batteries (2017)



**EU:** fines of €260 million imposed for fixing of a part of the ethylene purchase price on the ethylene purchasing market (2020)



**EU:** fines of €157 million for participating in a cartel concerning purchases on the styrene monomer merchant market (2022)



**Germany:** fines of €100 million for car OEMs exchanging information on uniform surcharges for the purchase of long-steel products (2019)



**Italy:** fines of €67 million on 3 media agencies for colluding on the purchase of international broadcasting rights for Serie A games (2019)



**Netherlands:** two major collectors of used cooking oil fined €4 million for fixing purchase price of used cooking oil. (2021)

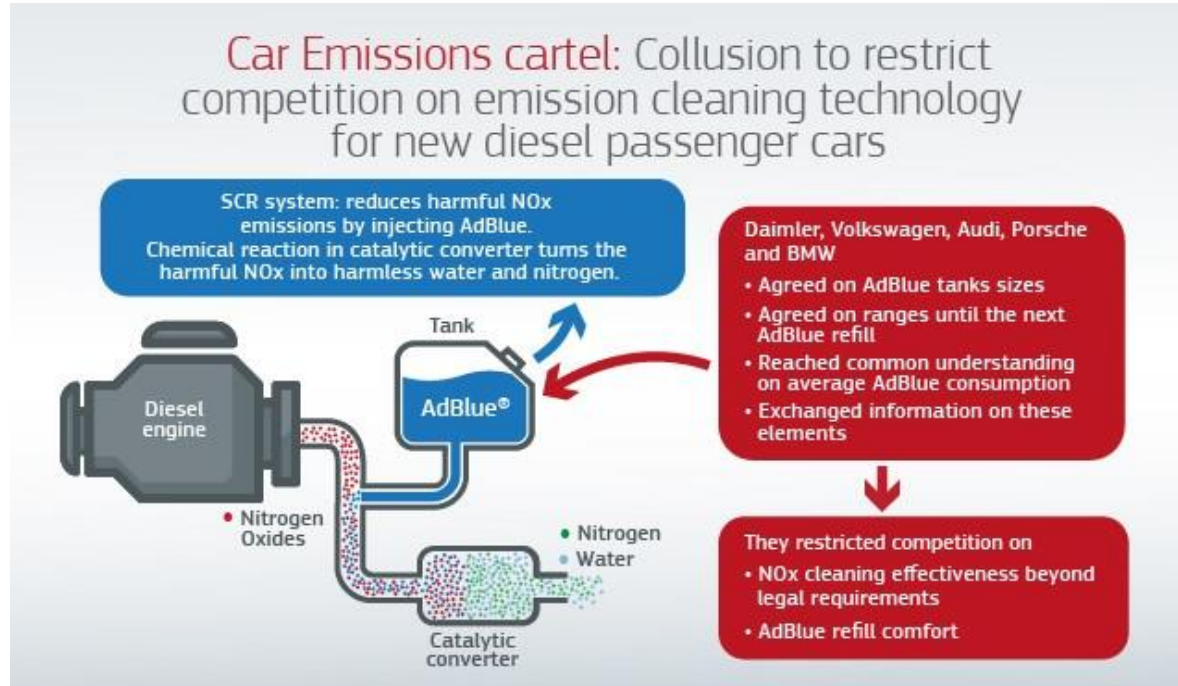


**Spain:** fined three steel producers over €24 million for operating a scrap iron purchasing cartel (2022)



# Antitrust and sustainability

€875 million cartel fine on car manufacturers for restricting competition in emission cleaning (2021)





# Sustainability and collusion

## 'Green-blocking' : illegal market stabilisation



**Consumer Detergents** (EU, 2011) – price fixing to achieve market stabilisation



**Floor coverings** (France, 2017) - €30m – agreement not to advertise individual environmental performance of its products



**Food companies** (France, ongoing) - alleged collusion not to disclose information to consumers about the presence of a chemical in food packaging



**Batteries** (Hungary, 2019) €90,000 – battery producers agreed to pass the waste management fees of their portable batteries to customers



**Trucks** (EU, over €3bn in total. 2016/7): collusion on timing and passing-on of costs for the introduction of trucks complying with an EU standard





# Human Resources and Antitrust: a new risk is emerging

Non-exhaustive  
Last updated:  
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## United States

- Jan 2022: Federal grand jury returned an indictment charging four managers of home health care agencies with participating in a conspiracy to suppress the wages and restrict the job mobility of essential workers during the COVID-19 pandemic.
- Dec 2021: Six aerospace executives and managers were indicted for their roles in long-running conspiracy to restrict the hiring and recruiting of employees among their respective companies. First no-poach outside of healthcare sector.
- Jul 2021: A federal grand jury indicted another healthcare company and its former chief executive for allegedly conspiring with rival companies not to hire each other's employees.
- Apr 2021: Companies in multiple industries disclose DOJ probes of hiring practices in SEC filings.
- Mar 2021: Health care staffing company and executive indicted for colluding to suppress wages of school nurses. **Sept. 2022: Defendant Files Notice of Intent to Plead Guilty.**
- Jan 2021: A federal grand jury returned a two-count indictment against a surgical outpatient services company, marking the first time DOJ challenged a no-poach as a criminal violation.
- Dec 2020: DOJ brought first criminal wage-fixing case indicting the former head of a Texas-based therapist staffing company for alleged participation in a conspiracy to fix the rates paid to physical therapists and physical therapist assistants.

## Brazil

- Oct 2021: CADE disclosed that it again changed a target of its probe into wage-fixing in the healthcare market because of errors in the original list. Alcon Laboratórios do Brasil was incorrectly included in the probe, and have been removed, while Alcon Brasil Cuidados com a Saúde has been added. In July, CADE changed two targets of its probe.
- Mar 2021: Three dozen companies, as well as 108 individuals, targeted in a formal probe in Brazil for allegedly engaging in wage-fixing labor agreements in the healthcare market. The investigation marks the first time CADE probed the labor market. **Sept. 2022, settled with 6 subsidiary companies, 35 individuals for \$6.62 million for sensitive info exchange of employees.**

## Canada

- June 2022: Competition Act amendments passed, Bill proposes to outlaw wage-fixing and no-poaching agreements as of June 23, 2023.
- May 2021: The Competition Bureau released its updated Competitor Collaboration Guidelines (CCGs). The CCGs confirm that "purchasing" agreements, including employee non-poaching and wage-fixing agreements, may be subject to review under the reviewable matters provision in the Competition Act.

## Mexico

- Sep 2021: COFECE fined 17 top-tier professional soccer clubs, the Mexican Soccer Federation (FMF), as well as eight unidentified individuals for a total of USD 8.5 million for imposing salary caps and restricting player movement. Investigations began in 2018.
- May 2021: COFECE announced that it had found evidence of possible collusion relating to the signing of professional football players. Investigation begun in 2018, conduct said to have restricted mobility of workers and affected their wages in the market.

## Colombia

- Dec 2021: SIC launched an investigation into the national men's professional soccer association for allegedly preventing players from negotiating contracts with other teams, and establishing a list of players that they collectively agreed not to poach from one another.

## Peru

- Feb 2022: INDECOPI launched an investigation into six construction companies after they allegedly agreed not to hire each other's employees, marking the agency's first-ever probe into alleged no-poach agreements.

## EU

- Oct 2021: Competition Commissioner confirmed in a speech titled "A New Era of Cartel Enforcement" that, for the first time, the commission will focus on labor market competition, including no-poach and wage-setting agreements, as means of "restricting talent moving where it serves the economy best."

## UK

- July 2022: the UK CMA opened an investigation into suspected collusion by companies involved in the production and broadcasting of sports content. The investigation relates to alleged agreements on the prices paid by these companies to freelancers who support the production and broadcasting of sports content in the UK.

## Portugal

- Apr 2022: Authority fined 31 football clubs and national football league for anticompetitive no-poach agreement.

- Sep 2021: AdC issued Best Practices on anti-competitive agreements in the labor market.

## Switzerland

- Dec 2022: 34 banks in Switzerland, are under preliminary investigation by competition enforcer over whether they entered into illegal agreements through the exchange of information about the salaries of certain categories of employees. The authority Comco said its probe is the first of its kind in relation to the labor market.



\* This map indicates known antitrust agency or court interest in terms of major cases, investigations or sector inquiries since 2020, and should not be considered exhaustive.

## Romania

- Jan 2022: Investigation opened into alleged no-poach agreements between automotive manufacturers and related components, investigating whether the companies coordinated their behavior with regard to their automotive engineering workforce, in a move to share the market for specialized labor and to impose an artificially low (minimum) wage level.

## Poland

- Oct 2022: Fined the country's top men's basketball league and its 16 member teams for illegally colluding to terminate players' contracts and withhold their wages with a combined fine of €197,616, in the agency's first no-poach infringement decision.
- May 2022: The UOKiK has opened an investigation into the Polish Automobile and Motorcycle Federation and the PGE Ekstraliga regarding alleged agreements on maximum levels of and cuts to the wages paid to motorcycle speedway riders.
- Apr 2021: The UOKiK began antitrust proceedings against the Polish basketball league and sixteen basketball clubs, having reportedly seen indications of coordination in respect of termination of players' contracts and withholding of players' remuneration.

## Lithuania

- Dec 2022: The Lithuanian Association of Real Estate Agencies (LAREA) and its 39 members were fined EUR 969,060 for agreeing not to solicit each other's clients and brokers, and thus restricting competition.
- Jan 2022: Finding competition breaches in the labor market will be one of the main priorities for the Competition Authority in 2022. The focus will be on the health sector, e-commerce, and the retail trade.
- Nov 2021: the competition authority fined the Lithuanian Basketball League and 10 basketball clubs for agreeing not to pay basketball players salaries or other financial remuneration for the rest of the season after the termination of the basketball championship 2019–2020 due to the pandemic.

## Hungary

- Jan 2021: Recruitment association fined EUR 2.8 million for imposing rules on its members that set minimum prices for their services and prevented them from recruiting each other's employees.

## Japan

- May 2021: JFTC has since warned various sports bodies from limiting athlete transfers to other teams on unreasonable grounds. Some associations have responded by removing such restrictions; no fines have been imposed to date (NPB investigation Nov. 2020).

## Turkey

- Apr 2021: Investigation against 32 undertakings - active in various different markets including food delivery, chain restaurants, FMCG, e-commerce, technology, and media - in order to determine whether the Turkish competition law has been violated in the labor market.
- Nov 2020: Cartel probe into eight private hospitals, as to whether the hospitals colluded to impose "no-poach" agreements to prevent doctors from transferring between hospitals.



2

# New EU block exemption and guidelines

# Scope of the new EU VBER



VBER continues to provide safe harbour for vertical agreements IF:

- Agreements between non-competitors (except dual distribution....)
- Market shares not higher than 30%
  - When market shares higher than 30%: VBER does not apply, individual assessment based on Vertical Guidelines
- No hardcore restrictions of competition:
  - RPM
  - Territorial & customer restrictions
  - Online resale restrictions



Key areas of focus: **dual distribution, pricing, online sales, and distribution systems**

# Dual distribution





# Safe harbour for dual distribution



EU safe harbour continues to cover dual distribution (at all levels of the supply chain)...

- ...except for the **exchange of information** between the supplier and the buyer that is (i) not directly related to the implementation of the vertical agreement, or (ii) not necessary to improve the production or distribution of the products/services
- The New Guidelines provide for a **whitelist and blacklist approach** to information exchange that meets these two criteria
- Where the two criteria are not met, the exchange of information needs to be assessed individually under Art. 101 (no presumption of a breach + other provisions of the agreement can still benefit from the safe harbour). Safeguards include aggregation of information, delaying the receipt of data, firewalls etc.,

# Safe harbour for dual distribution



## **Whitelist** – the block exemption covers:

- Technical information (registration, certification, maintenance, repair, upgrading, recycling, regulatory compliance)
- Logistical information (related to production & supply, inventory, stocks, sales volumes, returns)
- Information related to customer purchases, preferences, feedback (BUT caution with identified end-user information)
- Wholesale prices
- RRP and maximum resale prices
- Marketing information (promotional campaigns, new product launches)
- Performance related information

# Safe harbour for dual distribution



## **Blacklist** – the block exemption does not cover:

- Future prices: supplier or the reseller's future prices, discounts, etc to their respective customers
- Individual end-customer information, **except** where necessary
  - to satisfy a particular customer's requirements (e.g., customisation/adaptation, special end customer conditions),
  - for pre- or after sales services, guarantee services, customer loyalty schemes
  - to implement or monitor compliance with exclusive or selective distribution network
- Information related to a distributor's / reseller's own brands

# Online intermediation service providers



**Examples:** e-commerce marketplaces, app stores, price comparison tools and social media services



Unlikely to be genuine agents. Instead, classified as "suppliers" (noting that they may still act as resellers in some instances)



Classification has an impact on the application of the market share thresholds



Also restrictions imposed by OIS providers on buyers of those services are subject to Art. 4 VBER (hardcore restrictions)



Online platform services with a hybrid function, i.e., that sell on their own behalf and host the sales of third-party sellers, do not benefit from the dual distribution exception/ Wholesale relationship remains covered by VBER





# Distribution systems



## Exclusive, selective and open distribution: new sets of rules with new flexibility introduced

- Exclusive distribution: suppliers can require their customers to pass on active resale restrictions to their respective direct buyers. Shared exclusivity covered by safe harbour (max 5 distributors in the EU)
- Greater protection for selective distribution systems (SDS): safe harbour covers prohibition on all sales (active and passive) by exclusive or open distributors to unauthorised resellers in territories where SDS is operated



## Franchising: no changes



## Non-compete obligations exceeding a duration of five years continue to be excluded from the EU block exemption

- EU only: non-competes that are **tacitly renewable** beyond a period of five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice and at a reasonable cost

# Online sales



## Dual pricing is block exempted

- But a hardcore restriction "where the difference...makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online"



## Imposing online and offline criteria in a selective distribution system that are not equivalent is block exempted



## Online advertising restrictions

- Quality standards OK. Requirement on distributor not to use brand name in domain name OK.
- Ban on trademarks/brand names in online advertising, price comparison websites... hardcore

# Pricing



## Resale Price Maintenance (RPM):

- No substantive changes, remains a hardcore restriction
- Some flexibility for
  - New product launches
  - Short term low price promotions (2 – 6 weeks maximum)
  - Fulfilment contracts
- Minimum Advertising Pricing (MAP) is considered tantamount to RPM, EXCEPT where used to prevent regular "loss leader" behaviour



## Wide retail parity obligations are an excluded restriction in the EU

- In the EU this applies to parity obligations imposed by online intermediation service providers
- Safe harbour continues to apply to narrow parity obligations, parity obligations for products offered to customers that are not end-users, and purchase parity obligations

# What's next?



Stricter rules under  
new VBER /  
Guidelines enforced  
from 1 June 2023



Ongoing consultations  
on Horizontal  
Guidelines and HBRs  
– expected in 2023



New EU Informal  
Guidance Notice



New Immunity /  
Leniency FAQs



# Questions



# Your key contacts



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## Professional summary

Kurt Haegeman is the global chair of Baker McKenzie's Consumer Goods and Retail Industry Group and a partner in Baker McKenzie's Brussels office. Kurt is also a member of the Firm's Global Cartel Task Force and European Competition Law Practice Group.

## Practice focus

Kurt has extensive experience in advising CG&R clients and clients from other industry sectors on complex multijurisdictional antitrust matters, including antitrust investigations focusing on horizontal and vertical conduct, dawn raid defense and leniency strategy. Kurt assists CG&R clients regularly in the development, roll-out and policing of Europe-wide distribution systems, and has particular expertise in advising on selective distribution and ecommerce management. Kurt has been at the forefront of Baker McKenzie's efforts to support CG&R clients in their response to the pandemic.

## Representative clients, cases or matters

- Represents the Brands for Europe coalition of more than 20 global brand owners in connection with the European Commission's review of the EU Vertical Restraints Block Exemption & Guidelines, and before in the context of the EU's e-commerce sector inquiry.
- Represents several consumer goods manufacturers in ongoing antitrust investigations into resale price maintenance, territorial and customer restraints, and online sales restrictions.
- Represented Pioneer in the European Commission's investigation concerning resale price maintenance and territorial restrictions, securing a 50% discount in the first EU settlement in a verticals case.
- Acted for a multinational FMCG supplier in the Belgian Competition Authority's first cartel settlement decision concerning the Belgian grocery sector.
- Represented Mitsubishi Electric in the settlement of the European Commission's cartel investigation in the car parts sector (alternators and starters).
- Represented an automotive parts supplier in the European Commission's ongoing cartel investigations in the car parts sector, successfully securing the closure of the case.
- Advised Mitsubishi Electric on the European Commission's cartel investigation involving gas-insulated switchgear, and securing on appeal before the General Court complete annulment of the fine.
- Counseled Mitsubishi Electric on the European Commission's cartel investigation involving elevators and escalators, securing the lowest fine for the client.

# Your key contacts



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## Professional summary

Mara Ghiorghies is a Senior Associate member of the Baker McKenzie Global Compliance and Investigations team, with a particular focus on antitrust/competition law and international trade. Mara advises clients across a number of sectors on global regulatory reviews of cross-border conduct and transactions, building defence strategies and securing commercial settlements. Mara has also spent time working in Baker McKenzie's Brussels and Tokyo offices.

## Practice focus

Mara has particular experience in advising large brand manufacturers, financial institutions and industrials on a wide range of antitrust behavioral issues, including horizontal competitor collaboration, pan-European vertical distribution networks, market power issues and abuse of dominance, and merger filing requirements. She passionately represents clients in the management of internal and external investigations, including developing robust compliance programs, responding effectively to dawn raids and requests for information from UK and EU antitrust authorities, conducting in-depth forensic investigations, audits and witness interviews, securing favourable settlements with government agencies and developing defence strategies in competition damages litigation.

## Representative clients, cases or matters

- Representing a consumer goods company in a global cartel investigation involving authorities in the EU, UK and US.
- Representing a media company in a UK investigation involving purchase price fixing
- Advising the Brands for Europe coalition of more than 20 global brand owners in connection with the European Commission and UK Competition and Market's Authority reviews of their Vertical Restraints Block Exemption & Guidelines
- Advising a large Japanese corporate in a series of joint venture merger and foreign investment notifications across multiple jurisdictions.
- Advising a global financial institution on a series of significant multijurisdictional investigations into potential breaches of financial services regulation, competition law and compliance policy.
- Advising a multinational pharmaceutical company on an internal investigation covering possible breaches of antitrust, regulatory and anti-bribery and corruption laws.
- Advising a Japanese conglomerate on the European Commission's investigation into a global cartel, including in respect of reporting strategies, fining policies, settlement, relevant defence matters and potential civil litigation exposure.
- Advising a leading manufacturer of electronic products in a contested EU investigation, leading to a successful acquittal.
- Advising a number of large consumer goods companies in a number of industries (IT, music and cosmetics) on distribution agreements, including on risks arising in respect of resale price maintenance, territorial restrictions and online sales.
- Carrying out market risk assessments for an international cosmetics company with a view to analysing behavioural issues arising in instances of potential market dominance.
- Advising private equity companies on EU and UK merger control and liaising with the EU and UK authorities on merger notifications.



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