

How We've Helped Businesses With This Issue

- Reviewing and ensuring that competitively sensitive agreements and documents with suppliers, customers and business partners comply with antitrust laws globally.
- Providing training to key personnel to ensure antitrust compliance.
- Developing global antitrust compliance programs.

Pricing Discussions Between Manufacturer and Supplier in Dual Distribution Channel Under Antitrust Scrutiny in the US

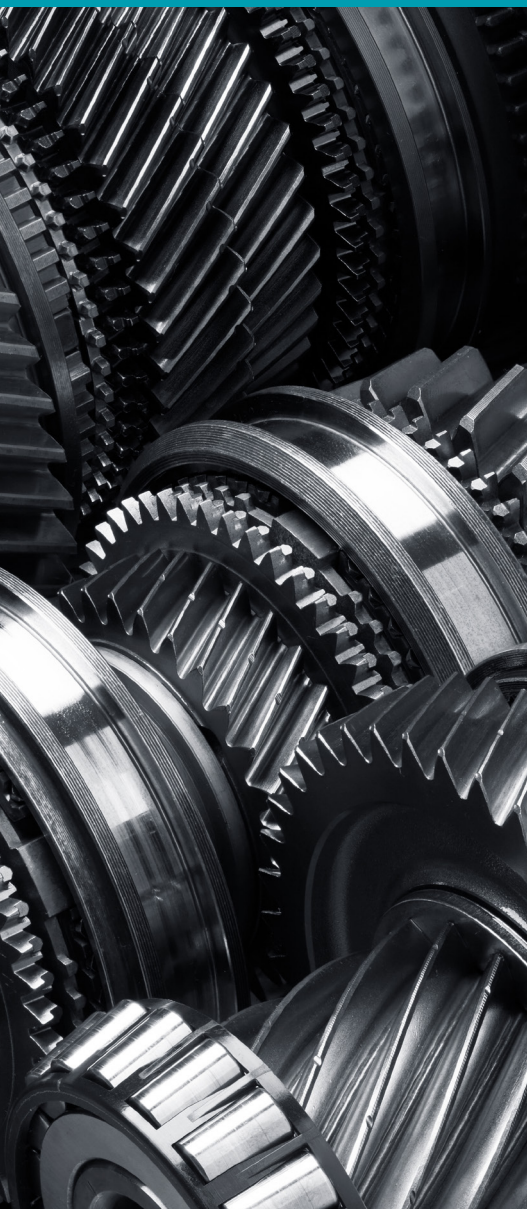
A recent decision by the US Federal Trade Commission (FTC) in *Fortiline* marked the first FTC challenge of an alleged invitation to collude between firms that are in both a horizontal and vertical relationship to one another. The FTC has long held that invitations to collude violate Section 5 of the FTC Act but has never taken action against parties in a vertical relationship for an alleged invitation to collude. The case highlights the need for parties in dual distribution arrangements to be vigilant in their communications in order to avoid attracting antitrust scrutiny.

In *Fortiline*, the FTC challenged communications regarding the price of ductile iron pipe between the distributor Fortiline and a manufacturer ("Manufacturer A") that Fortiline competed with in some markets and had a distribution agreement with in other markets. The FTC's challenge arose from just two communications between Fortiline and Manufacturer A. In the first, Fortiline sent Manufacturer A an email that expressed dissatisfaction with Manufacturer A's pricing. The email claimed Manufacturer A had undercut its rivals' prices, which was construed by the FTC as an invitation to Manufacturer A to use a desired multiplier in its bids to contractors. In the second, Fortiline approached Manufacturer A at a trade association meeting and complained that Manufacturer A was selling at a price "20% below market."

Ultimately, the FTC agreed to settle the case with Fortiline under a consent order that prohibits future efforts to collude.

Implications

- This decision marks a controversial and novel approach by the FTC. This is the first time the FTC has challenged an "invitation to collude" by a firm that was in both a horizontal and vertical relationship to the alleged conspirator. Previously, the FTC has only challenged invitations to collude between horizontal competitors. In a dissenting statement Commissioner Olhausen pointed out that there are legitimate reasons for firms in a vertical relationship to discuss price and that the factual record in *Fortiline* did not make clear in what capacity (i.e., horizontal or vertical) these price discussions between Fortiline and Manufacturer A took place.
- In the EU, dual distribution agreements are generally unlikely to be problematic where each of the suppliers and distributors has a market share not exceeding 30%, and their agreement does not contain restrictions on the distributor's freedom to determine its resale price, or restrictions on responding to unsolicited requests from individual customers from anywhere in the EU. However, parties to a dual distribution agreement ought to avoid discussing future or current prices or quantities regarding customers or business opportunities for which they are potential or actual competitors, unless the appropriate safeguards are in place (such as an information barrier between the production and distribution teams within both the supplier and the distributor).



Looking Forward

- In light of the FTC's actions in *Fortiline*, businesses should think carefully about their communications. The case suggests that a vertical relationship (such as manufacturer-distributor) will not shield a firm from antitrust liability if communication between the firms enters, or appears to enter, areas in which the firms compete.
- Appropriate safeguards should be put in place (such as an information barrier between the production and distribution teams within both the supplier and the distributor) and, where the business is global, such safeguards ought to take account of potentially different approaches in the enforcement of antitrust rules by competition agencies in different countries.

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