

# **Areas of risk to be considered for the antitrust compliance within distribution**

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# 1. THE AREAS OF RISK

- **Obligation to conform** to the **compliance program** of the Competition Authority (French Guidelines, 10 February 2012).
- **Three issues :**
  - What are the requirements of the Competition Authority ?
  - What are the main legal risks relating to commercial practices in a context of competition ?
  - How to comply with these requirements without being unduly vulnerable commercially ?
- **One solution :**
  - Find the right approach to balance the requirements to comply and the need to be efficient commercially.

## 2. WHAT EXACTLY IS REQUIRED BY THE FRENCH COMPETITION AUTHORITY ?

- **Guidelines of February 2012** provide **four binding obligations** for managers :
  - Name a « compliance officer » ;
  - Train and inform employees ;
  - Set up auditing and warning mechanisms ;
  - Set up tight monitoring procedures and appropriate sanctions.

## HOW TO MITIGATE THE RISK

- Mitigate risk of:
  - (i) mismanagement of antitrust sensitive issues by any of the players representing your Company in all the Countries where it does business or is likely to do business (the “Substance”);
  - (ii) mismanagement of relationships with competition authorities (the “**Form**”)
- Be always aware, both the Manufacturer and the Distributor, of related responsibilities not to distort the markets, either by coordinating with competitors and other players on the market, or otherwise abusing of their strengths





## THE FORM

### REQUIRED ACTIONS:

- To show that both the Manufacturer and the Distributor takes the antitrust proceedings very seriously
- To publish strict guidelines applicable, in such a respect to:
  - (i) all the employees;
  - (ii) all the distributors and their employees/subnetwork
- Educational activity and mandatory training

### RECOMMENDED TOOLS:

- Compliance Officer role
- Code of Conduct
- Competition Law Guidelines Booklet in several languages
- Antitrust Competition Policy as a part and parcel of a more comprehensive Legal Risks Policy



## **THE SUBSTANCE**

### **REQUIRED ACTIONS:**

- To be reasonably sure that any key resource in the Company fully understand:
  - (i) the importance of the issue;
  - (ii) its impact on the Company, including fines up to a maximum 10% of worldwide turnover, imprisonment of individuals and disqualification of directors;
  - (iii) its impact on his/her personal position
- To enforce strict guidelines applicable to:
  - (i) all the employees;
  - (ii) all the distributors and their employees.
- Management and sales staff effective training

### **RECOMMENDED TOOLS:**

- A Do & Don'ts Aide Memoire in place
- A Down Raid procedure in place

## WHICH ARE THE MAIN RISKS IN FRANCE ?

- **Pricing policy**, especially in exclusive and selective distribution (cf. French Supreme Court, Commercial Chamber, 11 June 2013, Case n°12-13.961, Perfumes case) ;
- **Restriction of sales**, especially in e-distribution (cf. French Supreme Court, Commercial Chamber, 24 September 2013, Case n°12-14.344, Pierre Fabre Dermo-Cosmétiques ; Paris Court of Appeals, 14 March 2014, Case n°13/00714, Bang et Olufsen) ;
- **Post-contractual non-competition clause**, especially in franchising (cf. Paris Court of Appeals, 6 March 2013, Case n°09/16817).



# “(Ad)venture without risk is Disneyland”

*Douglas  
Coupland*







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**Embedded risks. Not exactly Disneyland indeed...**

## **Steve Jobs, Antitrust Criminal?**

Apple Faces Damages Trial Over E-Book Antitrust Violation

Apple violated antitrust law in ebook price fixing conspiracy

**Apple Inc. and Antitrust Law: the Fine Line between Genius and Criminal Behavior**



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## Steve Jobs: a hard-nosed negotiation

**From:** Steve Jobs <[sjobs@apple.com](mailto:sjobs@apple.com)>  
**Date:** January 24, 2010 11:31:24 AM PST  
**To:** James Murdoch **REDACTED**  
**Cc:** Steve Jobs <[sjobs@apple.com](mailto:sjobs@apple.com)>  
**Subject:** Re: HarperCollins

As I see it, HarperCollins has the following choices:

1. Throw in **with Apple** and see if we can all make a go of this to create a **real mainstream ebooks market at \$12.99 and \$14.99.**
2. **Keep going with Amazon at \$9.99.** You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you **70% of \$9.99.** They have shareholders too.
3. **Hold back your books from Amazon.** Without a way for customers to buy your ebooks, they will steal them. This will be the start of piracy and once started there will be no stopping it. Trust me, I've seen this happen with my own eyes.

Maybe I'm missing something, but I don't see any other alternatives. Do you?

Regards,

*Steve*

## Apple eBook price case: from “wholesale” model...

### Wholesale Model

Publisher sets a  
Recommended  
Retail Price (RRP)

Publisher sells it at a  
wholesale price to  
the retailer, typically  
~50% of RRP

Retailer is free to  
sell it at whatever  
price they choose.

**Publisher**

**Retailer**

**Customer**

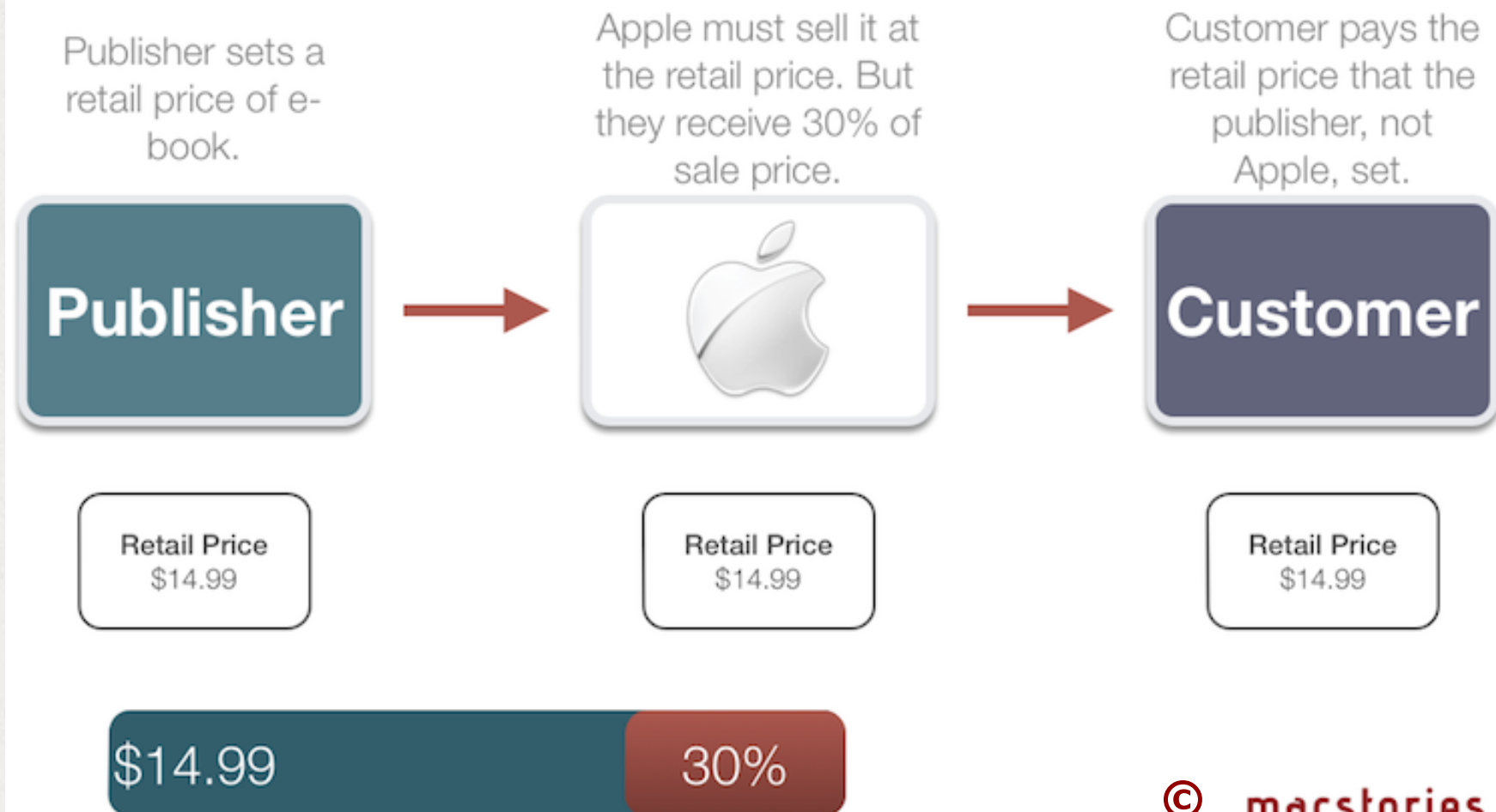
RRP  
\$24.99

Wholesale Price  
\$11.00

New Release  
Book  
\$ ?

## ... to “agency” model

### Apple’s Agency Model







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## The “most favored Nation clause”

### Most Favored Nation (MFN) Clause

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Has a wholesale agreement with publisher and decides to sell Book XYZ for \$9.99.



Publisher has agency agreement with Apple. Publisher had set a \$14.99 price.



Publisher must change the book price to \$9.99 on the iBookstore. Apple will still get 30% of the sale price.

© macstories

## Resale Price Maintenance: following “Leegin”



- **US Supreme Court (2007)**
  - Leegin Inc. adopted a **minimum resale price** policy refusing shipments to retailers which did not comply to the agreement
  - The Supreme Court overruled the nearly 100-year-old doctrine of “*per se*” illegality for minimum RPM
  - “**Rule of reason**” **approach**: actual effects analysis
- 
- Minimum RPM can **stimulate inter-brand** by reducing intra-brand competition
  - It encourages retailers to invest on services or promotional efforts

## Other dangerous waters

- Communication with competitors:
  - *pricing*
  - *market/customer allocation*
  - *refusal to deal*
  - *limiting competitor's freedom*





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**Ok, not exactly Disneyland.**

**But how to make it safer at least?**



## HOW TO COMPLY WITHOUT BEING UNDULY VULNERABLE COMMERCIALLY ?

- In France, in case of **anticompetitive practices**, the establishment of a **compliance program** to avoid these practices **should not lead to a strengthening** or (obviously) **a reduction** of the sanction.
- However, **it will not be so easy** to explain **why an efficient program set up** by the company **does not work** or **why the company set up an inadequate compliance program**
- Actually,
  - if the compliance program is **really** efficient, **the company will be unduly vulnerable commercially**.
  - if the compliance program is **not** efficient, **why has the company implemented it ?**
- So it is necessary to set up a suitable compliance program **that takes into account a certain but reasonable risk**.
  - For example : providing a relatively safe pricing policy by prohibiting any pricing recommendation or by excluding inspection of sale outlets.