

EU competition rules in the field of distribution

New rules, options and risks

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Agenda



Agencies / Dual Distribution

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E-commerce: Traditional Online Selling

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Pricing

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E-commerce: Platforms

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Sales restrictions / Non-competes

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Agency Agreements / Dual Distribution

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Agency Agreements

What is new?

- **VGL 30**
 - Stronger emphasis on "no independent economic operator"-test
- **VGL 35**
 - Further elaboration on methods for the principal to cover the relevant risks and costs
- **VGL 35**
 - Further elaboration on the treatment of companies that act as agent and distributor for the same principal

Options and Risks

- **Options:**
 - Employ the same company as agent (with RPM) and as distributor (without RPM) in different geographic product markets
 - More flexibility to cover risks of agents and implement RPM
- **Risks:**
 - RPM of agents that act as independent operators for several principals
 - VGL 29: The financial or commercial risks which an agent that is subject to RPM may not bear are:
 - Risks related to the contracts concluded on behalf of the principal
 - Market-specific investments required for the agency and which are usually sunk
 - Risks related to other activities on behalf of the principal on the same product market

Dual Distribution (and information exchange)

What is new?

- **Article 2 (4) VBER**
 - Wider scope for application of the VBER to all aspects of the vertical agreement (VGL 96)
- **Article 2 (5) VBER**
 - Regulation of vertical information exchange
 - Not exempted is information exchange that:
 - is either not directly related to the implementation of the vertical agreement or
 - not necessary to improve the production or distribution of the contract products

Options and Risks

- **Options:**
 - OEM: Increase direct distribution in the VBER safe harbour
 - Avoid over-compliance, e.g. request further information from dealers
 - Recognition of "firewalls" (VGL 103)
- **Risks:**
 - Dealers: Be aware of direct distribution
 - Non-compliance in case of excessive information exchange

Pricing

Michael Bauer

Dual pricing

What is new?

- (existing) **GSK case law**
 - By object infringement
 - But exemption possible
- **VGL 209**
 - Possible (and even block-exempted) concerning online vs off-line selling if
 - intended to incentivize or reward an appropriate level of investments in online or offline sales
 - Impossible if
 - the object is to restrict sales to particular territories or customers

Options and Risks

- **Options:**
 - Lower resale price possible for brick-store business if delta is reasonably related to differences in the investments and costs incurred by brick-store selling
 - Same principles should apply concerning territorial differentiation (domestic sales vs export sales)
- **Risks:**
 - Hardcore restriction
 - E.g. if higher price makes selling online (or exports) unprofitable or financially unsustainable
 - Grey zone cases
 - E.g. if delta is not completely justifiable
 - Bad intent? Internal documents?
 - Abuse of dominance (AB Inbev)

RPM

What is new?

- **Minimum advertised prices (MAP)**
 - Indirect means to apply RPM (VGL189)
 - Individual exemption possible (VGL 197) to prevent a particular distributor from using the product of a supplier as a loss leader.
 - VGL 197 recognize that selling below the wholesale price can damage the brand image of the product, reduce overall demand and supplier's incentives to invest.
- **RRP printed on packaging**
 - No longer mentioned as supportive measure to apply RPM
- **Monitoring (191 VGL)**
 - Clarification that, on their own, price monitoring and price reporting are not RPM
- **Fulfilment contracts (193 VGL)**
 - No RPM if supplier agrees with specific customer on price and afterwards selects third party to execute (fulfilling) the supply agreement.

Options and Risks

- **Options**
 - Agreement no to sell permanently at a loss possible?
 - Fulfilment contract principle applies e.g. in case of online-selling by suppliers with subsequent execution via local resellers
 - Also applicable in similar scenarios?

Sales restrictions/Non-competes

Elisabeth Elias

Sales restrictions

What is new?

- **Shared exclusivity: exclusive territory or customer group may be allocated to up to 5 distributors**
- **Sales restrictions may be extended to next level of trade**
 - Exclusive systems: restriction to actively sell into other exclusive territories maybe imposed to buyers' customer
 - Selective systems: active and passive sales restrictions to unauthorized resellers maybe imposed to buyers' customer
- **Sales restrictions for sales into areas where other distribution systems apply:**
 - To protect a selective system: a distributor in an exclusive/open system can also be prohibited from active and passive selling to unauthorized resellers located in selective territories
 - To protect an exclusive system: a distributor in a selective/open system can be prohibited from active sales into exclusive territories

Options and Risks

- **Options:**
 - Increased flexibility for network organization
 - Better protection of distribution networks
 - Selective systems and exclusive systems can be protected so as to co-exist in different areas
- **Risks:**
 - Number of distributors in proportion to allocated territory/customer group
 - No passive sales restrictions in exclusive systems
 - Selective and exclusive systems cannot be combined in the same area

Non-compete clause

What is new?

- A non-compete clause that is tacitly renewable beyond a period of five years may be valid if it:
 - can actually be renegotiated after the five-year period, or
 - be terminated with a reasonable period of time and at a reasonable cost.
- A non-compete-clause agreed upon for an indefinite period of time is still not block exempted and thus remains invalid

Options and Risks

- **Options:**
 - Non-compete clause remains valid even if tacitly renewable, as long as negotiable after five years
- **Risks:**
 - The negotiability should be realistic
 - Other circumstances should not limit the effective possibility to re-negotiate (like loans and equipment)

E-commerce: Traditional Online Selling

Małgorzata Urbanska

E-commerce: Traditional online selling

What is new?

- **New hardcore restriction re: online selling**
 - The prevention of the „*effective use of the internet*”, without prejudice to the possibility to impose:
 - other online sales restrictions
 - restrictions of online advertising that do not prevent the use of the entire online advertising channel
 - Helpful list of block-exempted restrictions, incl.
 - dual pricing – if rewards appropriate levels of investments
 - different criteria for online/offline sales (no more „*equivalence principle*”)
 - bans on the use of online marketplaces (not only for luxury products)
 - online advertising restrictions – if do not prevent the use of an entire online advertising channel

Options and Risks

- **Options**
 - More extensive guidelines = more clarity
 - New very clear possibilities / block exempted restrictions
- **Risks**
 - Restriction as defined opens room for interpretation and creates legal uncertainty
 - How authorities and courts will interpret „*effective use of internet*”?
 - Case-by-case review needed? How it corresponds with the nature and the purpose of safe harbour?

E-commerce: Traditional online selling, ctd.

What is new?

- **Active and passive selling in online world**
 - **Useful explanations on when certain online conduct amounts to active or passive selling (VGL 212-214)**
 - **Passive selling (examples)**
 - setting up an online store plus resulting sales, incl. delivery of products, also when customer opts to be kept automatically informed and this leads to a sale
 - offering an app in an app store
 - use of search engine optimisation and general online advertising
 - **Active selling (examples)**
 - offering a different language option, commonly used in the (targeted) territory (with special rules for English)
 - setting up online store with a top-level domain corresponding to a (targeted) territory (as opposed to generic and non-country specific domain name)
 - targeted online advertising, etc.

Options and Risks

- **Options**
 - More clarity now on whether certain online conduct amounts to active or passive selling

E-commerce: Platforms

Carlos Vérguez

New rules on online platforms/Online Intermediation Services (OIS)

What is new?

- **Definition Art. 1(1)(e): OIS** allow companies to offer goods/services to facilitate direct transactions btw companies/consumers **and** btw companies
 - **VGL 64: Scope: OIS include:** (i) online marketplaces; (ii) App stores, (iii) price comparison tools, (iv) online social media services, etc.
 - **Art. 1(1)(d): OIS providers are “suppliers”*** (even if not selling goods)
- **VGL 46/63:**
 - “generally”, online platforms (& OIS) **≠ genuine agents:** 101(1) TFEU applies
- **VGL 67(b): market shares:** (i) case-by-case; (ii) market for OIS; (iii) substitutability (online-offline; types of goods; OIS-direct sales)
- **Art. 2(6) / VGL 104: Hybrid platforms** cannot benefit from “dual distr” exemption
- **Across-platform parity obligations not exempted** – Art. 5(1)(d)

Options and risks

- **Options:**
 - Only **products/services** affected by hybrid platforms excluded from the block exemption
 - If no **by-object** restriction/**market power** → hybrid OIS NOT enforcement priority (VGL 108-109)
 - Across-platform & above 30% → assessment
- **Risks:**
 - OIS (hybrid & non-hybrid) → “**suppliers**” → limited by Art. 4 hardcore restrictions*
 - **Hybrid platforms:** → HGL+VGL assessment
 - OIS as “actual” or “**potential**” competitor...
 - Effects of **narrow** parity obligations if limited competition on OIS or cumulative use (providers or buyers)

Bans on online marketplaces sales/Price Comparison Services (PCS)

What is new?

- **Codification of Coty case – bans on online marketplaces**
 - Online marketplaces = a relevant sales channel (VGL 333)
 - Marketplaces total bans/restrictions: **block-exempted** [Art. 4(e)(i)], if:
 - (i) they do **not** prevent “**effective use**” of the internet [Art. 4(e)]; and
 - (ii) market shares not exceed Art. 3 thresholds
 - Above 30% thresholds: **new guidance/conditions** (VGL 338, 341, 342)
 - **Inter-brand** competition; scope of restrictions
 - Marketplace **weight*** as sales channels in **prod./geog. market**
 - Proportional; non-discriminatory; coherent; less restrictive means
- **Restrictions on the use of PCS and search engines**
 - PCS/search engines = separate advertising channels [VGL 203/206(g)]
 - **Art. 4(e)(ii): Ban** on use of PCS/search engines = hardcore restriction

Options and risks

- **Options:**
 - Application to non-luxury products; **broad justification grounds** for marketplace bans (VGL 334, 342)
 - Covers exclusive/selective/free distrib. systems
 - Possibility of: (i) imposing *quality* standards on the use of PCS/search engines; (ii) prohibiting a *particular* PCS/search engine (not hardcore)
- **Risks:**
 - Above 30%, marketplace bans/restrictions need adequate justification
 - Future larger weight of marketplaces* so that no “*online sales channels remain available*”? (VGL 336) // Differences among Member States
 - ‘**Indirect**’ **PCS bans** (prior authorization; restrict supply of price info or brand use)

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