EUROPEAN DISTRIBUTION RULES LATEST: DUAL PRICING, SHARED EXCLUSIVITY IN; MAP POLICIES STILL OUT

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The European Commission has now published its proposed draft of the new EU rules, which will govern distribution agreements until 2032. These are set to replace the current EU Vertical Block Exemption Regulation (VBER) and Vertical Guidelines, which expire on 31 May 2022.

The draft proposed texts present some positive aspects for brands. These include increased flexibility for structuring their distribution arrangements in Europe, clarity in relation to applying different prices and criteria for online retailers, and welcomed comfort on how price monitoring software, online advertising restrictions, and website e-concession arrangements are likely to be assessed under the law. Conversely, the proposals also introduce some question marks and potentially stricter rules for brands who sell directly to consumers in competition with their resellers (notably marketplaces), as well as regarding the extent to which different distribution models at the wholesale and retail level can be combined in the same territory.

UNDER THE PROPOSALS:

Resale price maintenance (RPM)

Stipulating the price at which products can be resold continues to be a concern to the Commission (as is the case with national competition authorities in Europe and globally); though there seems to be a greater willingness to accept potential pro-competitive effects in limited instances:

- with respect to MAPs or minimum advertised pricing policies, it has been made explicit that it is illegal to sanction a customer for selling below MAP or to prohibit customers discounting or communicating that a final price may differ from a MAP;[1]
- it is clarified that the use of price monitoring software is not problematic in and of itself, but only if used as a tool for enforcing concerning RPM behaviours;[2] and
- there is further recognition that RPM could benefit from an individual exemption under certain circumstances (such as a temporary short-term pricing campaign for a new product launch or to prevent free-riding), although the requirement to prove that there is no less anti-competitive alternative to the proposed RPM measure remains a high threshold.

Dual pricing

In a major departure from previous rules, brands will be able to offer different wholesale prices according to whether products are to be sold online or offline, in order to support additional pre-sales services offered by retailers, so long as the differential does not in practice make online sales uneconomic.[3] Similarly, the ability to impose different criteria on online and offline dealers is now more explicit with no reference to the need for “equivalence”.[4]

Selective distribution

The possibility to require an authorised reseller to operate a brick and mortar store or to make a certain amount of sales offline remains block exempted where the parties are below the 30 percent market share threshold.[5] However, given the need – in principle – for consistent application of criteria across a retail network, these options may remain impractical for some brands or products (for instance, where the brand itself or key online partners do not have a physical presence or offer equivalent support). The proposals also clarify that selective distribution may be appropriate for any sort of high quality products (not just technical or luxury goods), although the benefit of the safe harbour may be withdrawn if this is not justified.[6] Consistent with the EU courts' decisional practice, it is also confirmed that in principle a supplier is allowed to prevent sales on online marketplaces even outside a selective distribution system - though the Guidelines remind suppliers that where the platform, the supplier itself, or certain authorised resellers, are permitted to sell on the platform, a ban on sales on the marketplace for others is unlikely to meet the requirements for exemption; but a supplier is permitted to require compliance with quality criteria for marketplace authorisation.[7]

Shared exclusivity and flow-down of restrictions

Brands will be able to grant a limited number of distributors (rather than only one distributor, as currently) shared exclusivity of a particular territory or customer group. It is also now possible to protect an exclusive territory or customer group from active sales both from the brand's direct customers, as is currently possible, as well as from indirect customers to whom the active sales restriction can be passed down.

Mix and match

It will become easier for brands to combine different distribution systems within the EU, for instance exclusive or free distribution in one territory and selective distribution in another (where the local conditions might support this model better). It will also be clearly acceptable to prevent customers and indirect customers from selling to unauthorised dealers in a territory where a selective distribution system has been implemented. However, the rules on combining systems within one territory (for example an exclusive wholesaler and selective retailers) remain somewhat unclear and should be kept under review pending the consultation, in case revisions to agreements might be required. Additionally, whilst the new rules further endorse the need to protect authorised members of a selective distribution system and system objectives (such as brand and consumer protection); they remain silent on how this can be enforced in practice, particularly against third parties. It will therefore be for national courts to confirm the tools available to suppliers seeking to protect these well-recognised rights.

Online active sales

Where exclusivity has been granted to a partner, active selling by other distributors or resellers can be prevented. The new rules are clearer around what constitutes 'active' selling in the online context and adopts a broader stance more reflective of e-commerce realities. Specifically, the following are now expressly deemed 'active' sales efforts: offering language options different to those commonly used in the territory in which the distributor is established (though English is an exception), using price comparison tools not commonly used in the distributor's territory / in a different language, and bidding for search engine terms targeting a territory.

Dual distribution

Where a brand sells products through a distribution network as well as direct to consumers in competition with its partners, the Commission is proposing tougher thresholds for exemption. The arrangement (including information exchanges) will be block exempted where the combined market share of the brand and its dealer does not exceed 10 percent at retail level. However, where it exceeds 10 percent but remains below 30 percent, the parties will be subject to the rules applicable to horizontal agreements concerning competitive information sharing. Strictly-speaking, whilst the safe harbour has been narrowed, this broadly mirrors the advice given by competition lawyers for some time. Nevertheless, the new rules may result in increased complexity when it comes to calculating market shares (for instance where a company owns multiple brands in the same sector). Additionally, more specific guidance on the expected treatment of information exchanges would be welcomed, since certain discussion topics that are essential for the efficient operation of a distribution relationship would be illegal under a pure competitor relationship. Risk management measures might include team separations between sales and D2C divisions, information exchange protocols, and ensuring sales reporting templates do not request customers' competitively sensitive data.

Agency

As before where a dealer is in fact an agent, the relationship is effectively exempt from some of the key limitations on what the seller/brand can require of its dealers, in particular the brand may specify the price at which the agent sells the products. There are some helpful relaxations in the draft proposals, which will assist brands setting up 'e-concession' windows or partnerships online, akin to what they might have in a brick and mortar department store. Specifically, it has now been clarified that a brief temporary passing of title will not in itself preclude an agency agreement if the partner is otherwise not taking on risk.[8]

Online intermediation services

In the light of their growing influence on the European markets, the new VBER will put a special emphasis on online intermediation services (i.e. marketplaces and other sales platforms). On the one hand, these service providers will be treated as 'suppliers' in the context of VBER, irrespective of the nature of their participation in the transactions they facilitate. This could further limit some of the conditions larger platforms may put on their business users (e.g. also in their general service terms). In particular, the new VBER expressly excludes from exemption any obligations put on businesses using online intermediate services not to offer their products or services under more favourable conditions via competing services, effectively prohibiting best-price clauses aimed against competing platforms. A major element of the new rules is that the safe harbours for dual distribution (described above) will not apply to online platforms / marketplaces that sell in competition with the suppliers/sellers they host. Additionally, due to their 'supplier' designation noted above, providers of online intermediation services (e.g. marketplaces) are in principle excluded from being agents so this should also be closely monitored in the context of brand-marketplace partnerships.[9]

Non-compete

The proposed rules introduce welcomed clarity that a non-compete obligation which is tacitly renewable beyond five years will benefit from the safe harbour (currently, where such agreements automatically roll-over, they are not exempted).[10]

Potentially longer safety periods for "successful" agreements exempted under VBER

Finally, since the VBER only applies to businesses with modest market shares, businesses that relied on its terms for exemption were always under a certain risk of becoming "too successful". Under the current VBER, if a market share that is initially not more than 30% rises above that level without exceeding 35%, the exemption will apply for a further two years. However, this protection is reduced to one year where the market share exceeds 35%. Under the proposed draft, the two year further protection will apply irrespective of the amount by which the market share increases over 30%. Note that if the VBER does not apply (due to larger market shares), this does not mean the arrangements are presumed unlawful; however, they are not automatically exempted and an individual assessment of their competitive effects will be required. Additionally, measures such as quantitative criteria and flexibility in the application of terms become less available.

UK

Following the Brexit process, the revised VBER and Vertical Guidelines will not apply in the United Kingdom. However, the United Kingdom has retained the existing rules and is considering a revised version under its own consultation process. The UK Competition and Markets Authority has in fact published a consultation document setting out its proposed recommendations to the Secretary of State for the UK approach.

The UK consultation has focused on similar themes to the Commission's and a wholesale parting of ways is not in prospect. For example, on points such as RPM, shared exclusivity, dual pricing and the possibility of different offline and online criteria, the two regimes are aligned. However, the United Kingdom proposed approach to combined selective and exclusive distribution systems appears more coherent. On the other hand, the Commission is taking a more relaxed approach to tacitly renewable non-compete agreements.

This divergence in itself could be problematic for brands who have traditionally been able to adopt a holistic European distribution strategy. Arguably, the greatest divergence is the timeframe - the UK is planning to have its revised verticals regime in place for just six years before renewing it, whereas the Commission is proposing that the new rules will remain in place until 2032.

NEXT STEPS

The deadline for commenting on the EU proposal is 17 September 2021; for the United Kingdom it is 22 July 2021.

Whilst immediate changes are not necessary pending finalisation of the draft rules, brands, marketplaces, and other players in the distribution chain should begin to assess their distribution structures and policies to flag areas that might need revision or clarification to ensure compliance going forward, as well as to identify opportunities where they can now take advantage of the additional flexibility. Please let us know if we can assist you in planning for the new regime.

FOOTNOTES

[1] Draft Vertical Guidelines, paragraph 174.

[2] Draft Vertical Guidelines, paragraph 175.

[3] Draft Vertical Guidelines, paragraph 195.

[4] Draft Vertical Guidelines, paragraph 221.

[5] Draft Vertical Guidelines, paragraph 194.

[6] Draft Vertical Guidelines, paragraph 136.

[7] Draft Vertical Guidelines, paragraphs 321 and 322.

[8] Draft Vertical Guidelines, paragraph 31(a).

[9] Draft Vertical Guidelines, paragraph 44.

[10] Draft Vertical Guidelines, paragraph 234.

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