Distribution Law Center
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Distribution Law Center Countdown XVIII - Dual distribution (Information exchange (Article 2(7) VBER))

What?

Dual distribution occurs where a supplier sells goods or services both directly and through independent distributors, thereby competing with these independent distributors on the downstream market. A classic example would be that of a manufacturer of a clothing brand who sells these clothes in his own stores but also relies upon independent retailers to sell the clothes in their stores.

Dual distribution is hardly a new phenomenon. Already in 2010, it was applied by manufacturers for various reasons. To set an example for their independent distributors in so-called "flagship stores", to offer more choice to the end-customers, etc. Over the past decade, however, dual distribution has become increasingly important due to the significant increase in online sales.

The increased use of dual distribution has led the European Commission to examine whether the existing legal framework is still adapted to the changed market conditions, but it has also prompted stakeholders to point out certain shortcomings of the legal framework. This countdown discusses information exchanges in the context of dual distribution, in particular in view of providers of online intermediation services or third-party platforms.

A provider of online intermediation services runs a hybrid platform when on the one hand it provides online intermediation services, namely the platform, and on the other hand additionally sells goods or services on its own platform in competition with the companies using the platform.

This special competitive relationship between two users of the platform when one user owns the platform may raise horizontal concerns. For example, the European Commission decided in 2019 to initiate (still ongoing) antitrust proceedings against Amazon. The European Commission is concerned with the standard agreements between Amazon and its marketplace sellers, which allow Amazon to use competitively sensitive information about the activities of its competing sellers on its platform.

Now?

Currently neither the VBER nor the Vertical Guidelines specify if the block exemption covers vertical agreements

between a supplier of online intermediation services who also sells goods or services in competition with companies to which it provides such services (hybrid platform) and those companies. Article 2(4), first sentence, VBER states that the exemption does not apply to agreements between competitors.

In the case of a hybrid platform, the supplier of the online intermediation services and the marketplace sellers are competing sellers on the platform.

Therefore, the question is whether the exception of Article 2(4), second sentence, VBER for dual distribution applies as well to the case of hybrid platforms. One difference between a dual distribution scenario and the hybrid platform scenario is that in dual distribution the competing parties use different distribution channels. In contrast, in the case of a hybrid platform, the platform is the only distribution channel used by both the supplier of the platform and its competing sellers on the platform.

The future as of 1 June 2022?

Article 2(7) of the draft VBER clarifies that the exception of Article 2(4), second sentence, VBER for dual distribution will not apply in a hybrid platform scenario. Therefore, vertical agreements between a supplier of online intermediation services with a hybrid function and companies to which it provides the intermediation services will not benefit from the VBER exemption. The definition of suppliers of online intermediation services (Article 1(1)(d) of the draft VBER) is wide and seems to include for instance manufacturers and dealers that open their own trade platform to other dealers that offer competing goods or services.

In practice?

Vertical agreements between a hybrid platform and its users must be assessed on a case-by-case basis, notably by reference to the Vertical Guidelines and the Horizontal Guidelines. This assessment must cover all aspects of the relationship between the providers of online intermediation services that have a hybrid function and the companies to which they provide online intermediation services, including for instance any exchange of information between them.

Assessment?

Article 2(7) of the draft VBER brings some clarity into the assessment of vertical agreements concluded by a supplier of online intermediation services with companies that sell goods or services on the platform in competition with the supplier of the services.

However, some questions remain. Article 2(7) of the draft VBER provides for the inapplicability of Article 2(4) draft VBER (dual distribution exemption) but does not include Article 2(5) draft VBER (on the exchange of information). This would seem to suggest that providers of online intermediation services can still benefit from the block exemption if they comply with the information exchange rules referred to in Article 2(5) draft VBER. Paragraph 92 of the draft Vertical Guidelines points however in a different direction and suggests that in any event a case-by-case assessment is needed. This possible inconsistency should be ironed out in the final texts.

Paragraph 92 of the draft Vertical Guidelines state that vertical agreements between a hybrid platform and its users must be assessed on a case-by-case basis and refers to Section 8 of the Vertical Guidelines. However, Section 8 of the Vertical Guidelines contains just general guidance for the examination of vertical agreements regarding Article 101 TFEU. The section does not provide any guidance for the special case of vertical agreements between a supplier of online intermediation services with a hybrid function and the companies to which it provides such services. Therefore, it remains unclear how to examine this main area of vertical agreements, in particular for example what kind of information can be exchanged by a hybrid platform and its users.

Want to know more? Stay tuned...

Counting down towards 1 June 2022 we aim to provide you with regular updates and the necessary legal knowhow in order to fully prepare your business for the future. Please also check out the Distribution Law Center platform and our LinkedIn page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.

A translation of this Countdown newsletter is available in the following languages: Czech, Portuguese, Romanian, Slovak, Spanish, Swedish.

Read the available DLC Countdown newsletters on the changes to be expected here.