COUNTDOWN | 10 May 2022

Distribution Law Center Countdown XXI - E-commerce (Online promotions and active sales)

What?

Digitalization and innovation of technology have been a focal point over the last decade in the development of the modern world. Online marketing and sales have become an ever more powerful tool to reach a variety of customers. Accordingly, online promotions have gained more attention compared to 2010, when the current Vertical Block Exemption Regulation (the "VBER") was introduced. In the draft VBER and Vertical Guidelines, the European Commission has revisited the rules concerning online promotions and added a number of useful clarifications.

Now?

Classic notions in the world of distribution agreements are those of "active sales" and "passive sales".

Under Article 4 of the current VBER, the imposition of restrictions on passive sales constitutes a hardcore restriction. As such, restrictions on passive sales may not benefit from the safe harbour of the VBER and are also presumed not to qualify for an individual exemption. The same applies to restrictions of active sales, with limited exemptions. The block exemption regime notably accepts that distributors must refrain from active sales into the territory or to a customer group that is allocated to an exclusive distributor or reserved exclusively for the supplier (see, DLC countdowns no. 12, 13 and 14).

The definition of active sales and passive sales can be found in the current Vertical Guidelines. The definition of active sales refers to a targeted approach towards a particular customer group or territory, whereas passive sales refer to sales in response to unsolicited requests from individual customers without having initiated the sales by means of active targeting of such customers.

According to the current VBER and Vertical Guidelines, where a distributor uses online promotions to sell products, that is considered a type of passive sales. However, the European Commission accepts that sales following online promotions specifically targeted at another distributor's exclusive territory or customer group are active sales and therefore may be prohibited.

The future as of 1 June 2022?

The key principles regarding active or passive sales are expected to remain unchanged under the draft VBER and Vertical Guidelines. However, the proposals contain amendments to the definition of active sales and passive sales, including with respect to online promotions.

Importantly, the notions of active and passive sales are likely to be defined in the VBER itself, rather than in the Vertical Guidelines. The new definition of active sales can be found in Article 1(1)(l) of the draft VBER. Active sales mean actively targeting customers by direct communication or through offline or online targeted advertisement and promotions. This includes communication via online media, price comparison tools, as well as any advertisement on search engines targeting customers in specific territories or specific customer groups. Offering language options on a website different than the ones commonly used in the territory by the distributor or offering a website with a domain name corresponding to a territory other than the one in which the distributor is established, also constitute active sales.

This amendment to the definition of active sales clarifies the range of restrictions on online promotions that may benefit from the VBER and be imposed on an exclusive distributor.

Restrictions on passive sales, including online passive sales, will still be blacklisted. The new definition of passive sales can be found in Article 1(1)(m) of the draft VBER. Passive sales mean responding to unsolicited requests from individual customers, including delivery of goods or services to such customers. The new definition of passive sales clarifies that it concerns responding to unsolicited requests without having initiated the sale through advertising actively targeting the customer group or territory. It follows from the definition of active sales that an example of such active targeting would be when a distributor offers language options on its website that are not commonly used in the specific territory or uses a domain name corresponding to the target territory rather than his own territory.

In practice?

The rules on restrictions of active and passive sales remain largely unchanged. However, the definitions of active and passive sales have now been inserted in the draft VBER and have been clarified, including when it comes to online promotions. Particularly the definition of active sales has been updated, making it clear that active sales are the catch-all category (all forms of selling that are not passive sales are active sales) and that this category includes certain online sales which previously were not mentioned but have become more important in the last decade.

In order to protect efforts and investments made by an exclusive distributor, the draft VBER will continue to accept

a prohibition of active sales into the territory or customer group allocated to an exclusive distributor, or the supplier itself. Compared to the current VBER, this will also entail the online promotions categorized as active sales in the future, i.e., targeting customers in specific territories through price comparison tools or search engines.

Further, the draft VBER is supplemented by more detailed guidelines and examples of active and passive sales in the proposal for the draft Vertical Guidelines.

Assessment?

In the EU, customer and territorial restrictions are presumed to be hardcore restrictions of competition infringing Article 101(1) TFEU. Given the internal market objective, this approach will stay unchanged under the new VBER, which will elevate the definition of active and passive sales from soft law to hard law and update them to include present day examples of online promotions. This will be useful to avoid discussions on whether certain online promotions are active or passive sales.

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, Danish, Portuguese,Romanian, Spanish, Swedish.

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