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DISTRIBUTION RULES OF SPORTING GOODS IN EUROPE 2022 – A DIFFERENT BALLGAME?

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This article deals with the substantial revision of EU competition laws in the area of vertical supply relationships in 2022. This is not just a legal topic, but of strategic importance and relevance for decision-makers at manufacturer/brand/wholesale and retail level. The EU Group Block Exemption Regulation Vertical 2022 ("VBER 2022") plus its accompanying comprehensive guidelines will come into force on June 01, 2022, and the author focuses on new key elements of the revised law as contained in the current draft version.

Introduction

2021 has been a challenging year for the global sporting goods brands and the retail trade – both for the good and for the bad. Covid19 Shockwaves hit many WFSGI member companies same as supply-chain shortages and substantially increases of material and transportation cost. We saw winners (in particular the bicycle sector), but also losers (such as the winter sports industry). And nothing is as constant as change. The challenges, but also new opportunities and chances will continue to exist in 2022 as well.

This is demonstrated by the topic of this article too: If compared with a football/soccer game, the legal framework of EU competition law rules governing the distribution of sporting goods within the European Union and the European Economic Area will face a significant modification just before the end of the first half time in 2022, i.e. from June 01 onward.
What is new?

To draw the big picture first: Online distribution is in the clear focus of this law revision and the modified terms of draft VBER 2022 reflect this in many regards. Whilst only a few years ago, European and national competition authorities were of the opinion that the online channel deserved specific protection - since it was viewed as being THE vehicle in particular for smaller to medium-sized traders to become visible - this view has meanwhile substantially changed. The Commission regards online sales now as a mature distribution channel, which to the contrary is about to threaten to some extent the existence of traditional retailers.

These are key new elements of the Regulation:

- It will be permissible to grant preferred (better) terms and conditions to the stationary trade than to pure online players, which under VBER 2010 would have been considered as undue discrimination and in most cases as a violation of EU cartel laws;

- Active marketing and sales efforts of B2B customers of a manufacturer/brand which interfere with exclusive rights of other marketing partners or those of the manufacturer itself can be contractually forbidden. This includes for instance cross-border activities such as entertaining a website with a foreign GTDL or a web presence of a distributor/retailer in a non-local language (with the exception of English);

- The presence of marketing partners on third-party marketplaces can be under normal circumstances restrained or even banned and this will no more be viewed as a hardcore violation of EU competition laws (which had been a highly controversially discussed hot topic among competition law experts, especially after the landmark Coty judgement of the European Court of Justice of December 2017);

- In addition, it will be allowed to establish a system of shared exclusivity e.g. in a certain territory/country or relating to a certain product range with two or more co-exclusive distributor/retailers;

- Best price (so-called parity) contractual clauses, which aim at preventing a contracting party from granting lower prices to third parties than to the intermediary concerned, will only be allowed under very narrow circumstances;

Basics

The EU Commission as a rule setter operates since the end of the 1960s in the area of vertical distribution with the instrument of the Block Exemption Regulation Vertical (“VBER”). What does this mean? Commercial operators along the vertical supply-chain doing business in Europe (be it manufacturers/wholesalers/distributors/importers/retailers with a market share not exceeding 30% in a certain relevant market) can feel safe not to violate EU competition laws as long as they steer their ship in the calm waters and the safe harbour environment created by the VBER set of laws and as long as they are compliant with such regulation. All practices which are not explicitly forbidden by VBER plus its accompanying guidelines in these vertical relationships are group exempted and the commercial traders do not need to submit their vertical agreements to the Commission or national cartel authorities to get them approved. Yet these Block exemption regulations do not remain in effect for an indefinite period. VBER 2010 will expire on May 31, 2022, and will then be replaced by its successor, VBER 2022 plus revised guidelines.

While previous versions did not face substantial modifications compared to their predecessors, all experts agree that this time the revision has been substantial. This has been primarily triggered by the massive changes we saw in the last few years rattling and disrupting traditional distribution channels. Terms such as omnichannel distribution, social media, online marketplaces, go direct to consumers or popup stores were fairly unknown a decade ago or did even not yet exist at all. Market powers considerably shifted and the lawmakers at the EU Commission level had to realize that global players are about to dominate the online trade by even threatening the continued existence of the traditional sales channels, in particular of the brick-and-mortar retailers. In a comprehensive exercise, which started in the last quarter of 2018 already and included several public consultations with the active participation of FESI, the European Federation of the Sporting Goods Industry, the Commission came up with a substantially revised first draft version of VBER 2022 and of 95 pages of guidelines to interpret the law provisions of the Regulation itself. Such a first draft was published in July 2021 already and was then followed by the last round of public consultation ending in the second half of September of last year. Since then, the Brussels authorities are working on a final version of this set of competition law, which will then be published in Q2 of 2022, in any event before June 01.
Still a highly controversial topic: In any case of dual distribution (i.e. in scenarios where a manufacturer/brand sells its products directly, to consumers, but does at the same time also deliver these products to third-party wholesalers/retailers) the present first draft of VBER 2022 restricts in a very unclear manner the information exchange between manufacturers/brands and their retail customers (provided the combined market share of the respective actors exceeds 10%) since they are then viewed by the Commission as competitors, where the stricter rules of the EU Group Exemption Regulation Horizontal will apply, which is currently equally under revision. FESI has strongly voiced its concerns in a position paper (to which I contributed as well), which was forwarded to DG Competition of the Commission in September 2021.

Retail Sales Price Maintenance (“RSPM”) Practices: From a brand perspective it would have been desirable to liberalize this topic, but the Commission remained firm in its opinion that any attempt to influence the pricing of the next vertical supply level towards their own customers constitutes a severe hardcore competition law violation under normal circumstances, which can trigger fines up to 10% of the global annual turnover of a commercial operator engaged in these illegal practices !!). Yet there is a small window opened in VBER 2022 and in its accompanying guidelines, where RSPM practices can be applied as a clear exception to the rule;

In this context, it is noteworthy to mention that the presence of e.g. retail customers on price search and comparison tools can under normal circumstances not be prohibited or restrained, yet the monitoring of the pricing of marketing partners at B2C level within the EU/ the EEA area remains permitted.

Online intermediaries, such as operators of marketplaces are now categorized as supplier of services and will be treated in a much stricter manner than in the past. The Brussels lawmakers are in particular critical if it comes to scenarios, where such intermediaries offer and sell in their own name the very same products as their customers being present on the marketplaces owned by the respective intermediary. Several high-level investigations are pending at EU Commission and national cartel office level, whether such intermediaries abused their dominating market power.

Selective distribution schemes will remain permitted under VBER 2022 but may require some finetuning and adjustments also from a strategic marketing point of view.

After VBER 2022 will come into force on June 1, 2022, commercial operators will enjoy a one-year grace period to adjust their existing vertical supply agreements and to make them compliant with the new law. Yet I recommend to all my individual corporate clients to start this process as early as possible since it could lead to a positive competitive advantage over others by being an early adopter.