THE IMPACT OF COMPETITION LAWS ON THE DISTRIBUTION OF SPORTING GOODS

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Elizabeth chairs the firm's Antitrust Practice Group. She regularly counsels clients on matters related to antitrust investigations, compliance, and litigation. She is known for her practical, results-oriented advice relating to product distribution issues including product pricing, price discrimination, collaborations with competitors, commercial agreements, advertising and marketing, supply chain relationships, and e-commerce.

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Kate supports clients in connection with antitrust litigation and compliance issues. Kate provides antitrust guidance related to intellectual property licensing and other issues, participation in trade associations and industry organizations, product distribution and supply chain logistics, joint ventures and commercial agreements, collaborations with competitors, and general antitrust compliance.

Since the WFSGI is a global industry federation, this article compares in a nutshell the European legal environment with the current competition landscape in two other key markets, the UK and the US. Such comparison is not meant to be exhaustive and does not replace the need for seeking individual legal advice.

Introduction:

In 2022 the European Union completed a substantial reform of its competition laws relating to the vertical distribution of goods and services, when a revised version of the Vertical Block Exemption Regulation together with its Guidelines became effective on June 1, 2022 ("VBER 2022") and will remain in force until May 31, 2034.

A. Key Topics of VBER 2022 in the EU

by Dr. Jochen M. Schaefer; Legal Counsel
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1. Governing Principle:
Very much simplified: Commercial operators in the vertical supply chain enjoy the benefit of the safe harbor principle of VBER 2022 in terms of being compliant with EU competition law rules, provided their respective individual market shares do not exceed 30% and the agreement in question does not involve any hardcore restrictions of competition such as resale price maintenance practices.

2. Preferential Treatment of Brick & Mortar Retailers:
The revised regulation reflects a substantial paradigm change of the EU Commission: traditional stationary sales channels (including hybrid retailers) now enjoy a higher standard of protection than pure online players, which includes inter alia that a brand/manufacturer is now generally entitled to grant more favorable conditions to brick & mortar retailers than to its online retail customers (so-called dual pricing policy) and that quality criteria defined for online and offline sales in a selective distribution system no longer need to be equivalent; Platforms and other online operators are no longer allowed to prevent their customers from offering and selling products at more favorable prices in other sales channels (so-called wide parity clauses).

3. Marketplace Operators with Dual Distribution Policies:
Marketplace operators, who sell products online in their own name and at the same time act through their dealer customers, fall outside of the scope and applicability of VBER 2022 and do not benefit from the safe harbor principle.

4. Better Protection against Gray Market Activities of Wholesalers/Retailers:
Brands/manufacturers are permitted to restrict/prohibit active marketing/sales activities of their customers, which are negatively affecting the exclusivity rights of other customers in other territories.

5. Price Fixing/Resale Price Maintenance Activities:
These practices in a vertical supply relationship remain strictly forbidden in almost all cases and constitute a hardcore competition law infringement in the EU, where fines can reach up to 10% of the global annual turnover of the infringer.

6. Communication Restrictions in Dual Distribution Schemes:
As an entirely new element, VBER 2022 now foresees that in those cases where a supplier/brand sells directly B2C and to the retail trade (so-called dual distribution), communications between the brand/supplier and its retailers needs to be restricted since they are intra-brand competitors at the same horizontal level. The scope of this restraint remains, however, quite unclear.

B. The Legal Situation in the U.K.

by Simon Barnes, Partner at Shoosmiths

Like the EU, the UK has also recently adopted new competition law rules for the distribution of goods and services.

Upon Brexit, they chose to retain into UK law the existing EU block exemptions. This continuity and consistency were welcomed by businesses who operated across both the EU and UK. However, that position has recently changed. Since June 1, 2022, a new UK-specific block exemption (called the Vertical Agreements Block Exemption Order, "VABEO") has applied in the UK, with accompanying guidance published by the UK's Competition and Markets Authority ("CMA").

In practice, the UK rules remain very closely aligned to those of the EU. There are differences in the language used in the respective block exemptions, but in substance they are very similar. The key themes highlighted above in relation to the EU apply equally in the UK, including: retaining a 30% market share test; greater flexibility for suppliers to support bricks & mortar outlets, and to impose conditions on how their products are sold online (albeit with warnings that restricting resellers' ability to make effective use of the internet is unlawful); continuing to permit dual distribution, albeit with somewhat cautious new guidance on the extent to which information may be shared between suppliers and resellers; and reinforcing suppliers' ability to operate exclusive and selective distribution.

There are however some differences in the UK, albeit most are relatively technical and not of general interest to businesses. For example, unlike the EU, the UK block exemption covers suppliers who, within a given territory, operate exclusive distribution at the wholesale level and selective distribution at the retail level. Also, in the UK, certain types of parity provisions applied by online platforms are designated "hardcore" restrictions of competition.

Of longer-term interest will be whether (and, if so, how) UK competition law might diverge from EU law over time. Whilst the CMA and the European Commission currently remain broadly aligned on competition policy, it is entirely possible that their enforcement priorities might differ in time as they respond to new challenges in the markets that they are each overseeing.

At a political level, there are also recent indications that the UK government wants to greatly reduce the extent to which pre-Brexit EU competition law remains relevant in the UK, which may open the door to new arguments that might be used to challenge – or, indeed, justify – business conduct in the UK on competition law grounds. Time will tell.

C. The Legal Situation in the U.S.

by Elizabeth A. N. Haas, Partner and Kate E. Gehl, Senior Counsel, at Foley & Lardner LLP/Milwaukee:

In the U.S., most vertical distribution agreements are evaluated under a "rule of reason" standard, which requires a court to balance a restraint's procompetitive benefits against its anticompetitive effects. As a result, vertical non-price restrictions such as customer or territorial restrictions are permissible provided the manufacturer has a legitimate procompetitive justification for the restraint and does not have a sizable market share.

Treatment of Online Platforms. In contrast to the VBER 2022, U.S. antitrust laws do not contain any rules or exemptions that treat online sales platforms differently than other sales channels.

Resale Price Maintenance ("RPM"). Certain RPM agreements are evaluated more leniently under the U.S. federal antitrust laws than under the VBER 2022. Competitive concerns arise for maximum RPM arrangements in certain circumstances, for instance, if the resale price ceiling does not permit sufficient margin for a reseller to compete effectively in the market. Though minimum RPM is no longer per se or automatically unlawful at the federal level, it can be difficult to establish procompetitive justifications for price floors and many states still forbid minimum RPM. Generally speaking, the ability to influence or control the resale price or price advertising, including minimum advertised pricing (or MAP) policies, unilateral pricing policies, suggested resale prices and RPM, can present some of the most challenging antitrust issues under U.S. laws.

Dual Distribution. A manufacturer may engage in direct-to-consumer sales in actual or potential competition with its authorized resellers. As with the VBER 2022, because the manufacturer becomes a competitor of its distributors and retailers, extra care is needed to avoid any improper agreements between the manufacturer's direct reselling arm and the competing distributors or retailers. Unlike the VBER 2022, online platforms engaged in dual distribution are not treated any differently...

Price Discrimination. The Robinson-Patman Act ("RPA") and state law equivalents limit a manufacturer's ability to offer different pricing or promotional assistance to distributors or retailers that compete for the resale of the same products. Several defenses to RPA claims exist, which include whether: (1) a different price is offered to meet a competitive offer; (2) the price differential is equivalent to the actual savings in the costs of manufacture, sale or delivery that the manufacturer realizes when dealing with the favored reseller; (3) the price differential constitutes a reasonable reimbursement for the cost of the functions actually performed by the favored reseller for the manufacturer; (4) the better price is practically available to all competing resellers; and (5) changing conditions, like imminent deterioration of goods , affect the marketability of the goods at issue.

Exclusive Distribution. Exclusive dealing arrangements are generally permissible provided significant harm to competition or market foreclosure issues are not present. Courts tend to assess the percentage of commerce foreclosed to competing sellers within a relevant antitrust market, often finding that market foreclosure of 30 percent or less is generally acceptable. Exclusive distributorships (where a distributor is the sole outlet for a manufacturer's products in a certain area or for a specific set of customers) can be permissible. In analyzing exclusive relationships, courts will consider whether the firm implementing the arrangement has monopoly power, the strength of Interbrand competition and the duration and geographic scope of the restriction.