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Annual Compliance
Conference 2022

Antitrust Compliance

Key Takeaways from the Annual Compliance
Conference 2022

In Brief

In this week's sessions, we delve into notable developments in Antitrust Compliance, including:

- Global Antitrust Hot Topics
- Information Exchange in the Supply Chain
- Evolving Risks in Antitrust Enforcement and Litigation

Session 2: Information Exchange in the Supply Chain

28 September 2022

This session examines information exchange in the distribution context across all levels of the supply chain from sourcing to end customer consumer sales.

We focus on the new EU and UK block exemptions and their respective guidance and regulations, and examine three key areas of risk: communications on pricing in a distribution context with a particular focus on resale price maintenance; information exchange in dual distribution systems; and risk of hub and spoke/price coordination at a downstream/retail level.

- **EU and UK vertical block exemptions:** The EU and UK regimes have been updated significantly to reflect the rise of e-commerce and digital markets. Although the EU and the UK regimes remain broadly aligned, they have started to diverge slightly. For example, wide retail parity obligations are treated more harshly in the UK. In both jurisdictions, the new rules offer more flexibility on certain aspects of pricing, the design of distribution agreements and online sales restrictions. A stricter approach in dual distribution should be expected where the supplier also competes with its distribution partners at any downstream resale level.
- **Communications on pricing in a distribution context:** The perceived flexibility suggested by the new rules does not extend to resale price maintenance (RPM) – any restriction on the buyer's freedom to set prices when reselling products, whether direct or indirect, remains a hardcore restriction in both the EU and UK, subject to the existing limited justifications under the efficiency defence. The new regulations confirm that minimum advertised pricing policies, whereby the supplier sets the price level at which products can be advertised, will be treated as RPM. A key development is that RPM may be permissible in the context of fulfilment contracts, i.e., where a supplier enters into a contract with a customer but selects another distributor or retailer to be the fulfilling party. Where the supplier selects the retailer, they can determine the resale price. There remains a fine line when it comes to recommended retail prices (RRP) and ensuring they are sufficiently non-binding. Follow-up communications on RRP and price monitoring tools may be found to constitute RPM where they place pressure on retailers to adhere to the RRP. Monitoring prices in itself is not RPM, provided that information is not used to address a retailer. Where there is very high adherence to an RRP, suppliers should examine their communications in more detail. Training on such communications should be as specific and practical as possible.
- **Information exchange in the context of dual distribution:** Information exchange in the context of dual distribution has been a controversial topic in the last few years. Dual distribution covers situations where a supplier competes at any downstream level with its distribution partners. The previous regime in the EU and UK recognized that these types of relationships were primarily vertical in nature and they were therefore covered by safe harbor. The new guidelines continue to provide a safe harbor for dual distribution, except where the exchange of information between the supplier and the buyer is not directly related to the implementation of the vertical agreement (or, in the EU only, not necessary to improve the production or distribution of the products or services). Even where these criteria are not met, the exchange of information needs to be assessed individually – there is no presumption of a breach and other provisions of the agreement can still benefit from safe harbor. The new EU and UK guidelines also provide for a whitelist and blacklist approach to information exchange that meets these two criteria, providing a non-exhaustive list of examples where the information exchange would or would not be considered problematic. This is likely an area that will experience significant enforcement action in the future in the form of test cases. Information barriers may be useful to prevent exchange of information in areas which are restricted. While there are clear advantages to having a blacklist, a number of questions remain unanswered, and there is a lack of clarity surrounding, for example, short term price promotions and customer discounts.
- **Price coordination at downstream / retail level:** 'Hub and spoke' arrangements involve the indirect exchange of information between horizontal competitors on the supplier level via a third party and have been the subject of continuing enforcement in a range of jurisdictions including Portugal, the Netherlands, Turkey and the US. Other jurisdictions (like China) have proposed amendments to their legislation so as to explicitly prohibit 'hub and spoke' cartels. Training is key when designing compliance solutions to this issue.
- **How should companies proceed?** Companies should raise awareness about the changes to the VBER / VABEO (e.g., dual distribution) and the implications of those changes, review their systems and controls in light of the updated VBER / VABEO (e.g., information barriers), and carefully assess the opportunities against the risks when examining the exchange of information.

Annual Compliance Conference 2022

Our popular Annual Compliance Conference, which attracts over 6,000 in-house senior legal and compliance professionals from across the world, took place across five weeks from 6 September - 6 October 2022. These sessions virtually delivered our cutting-edge insights and guidance on key global compliance, investigations and ethics issues.

The sessions provided practical insights and analysis on significant developments across:

- Anti-bribery, corruption and economic crime
- Customs and FTAs
- Export controls, sanctions and foreign investment
- Antitrust and competition
- ESG, supply chain and product compliance



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