OPPORTUNITY TO HELP SHAPE THE KEY RULES THAT AFFECT HOW YOU SELL YOUR PRODUCTS IN EUROPE

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EU Antitrust, Competition & Trade Regulation Alert

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The European Commission ("Commission") has invited manufacturers and other interested market participants to provide their input on the laws that govern how products are sold in Europe, in particular the sorts of restrictions (so-called "vertical restraints") that manufacturers can and cannot impose on their distributors and retailers. Key vertical restraints under the spotlight include, for example, limitations on the use of online marketplaces, cross-border selling, cross-sales to other resellers, resale and advertised pricing policies, and the operation of authorised reseller programmes. This is an important opportunity for brands to have a say on these rules, which will impact how they can legally go to market and control product resale until at least 2032. It also coincides with a significant upswing in enforcement of, and penalties for, these sorts of practices in the last year - making it especially critical for manufacturers and market participants to ensure suitable legal tools are available to protect their businesses without risking legal exposure.

THE CONSULTATION

Specifically, the Commission is evaluating the EU Vertical Agreements Block Exemption Regulation ("VBER") and the accompanying Guidelines on Vertical Restraints ("Guidelines"), which are due to lapse in May 2022. The Commission previously announced its roadmap for the revision of the VBER, including a "fitness check" of the current regime. Please see our previous alert on this here, including a discussion on some key questions the Commission is likely to be considering. The consultation will remain open until 27 May 2019.

Given that the VBER and the Guidelines impact the way in which most businesses operate and sell their products and/or services in the EEA and Switzerland, the consultation provides a rare opportunity for businesses to convey up-to-date market realities to the Commission and see them reflected in law. In particular, consumer goods manufacturers and market participants should seize the chance to update the EU's competition regulator on the major challenges both brands and resellers are facing, such as in the e-commerce sphere, so that the future laws allow them to appropriately protect brand value, investments in quality and consumer satisfaction in this highly dynamic and ever-evolving space.

ENFORCEMENT CONTEXT

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This consultation comes at a time of highly intensified enforcement by the Commission and national competition authorities in the EU against manufacturers who have been found to commit competition law offences through the imposition of vertical restraints in their distribution channels. The last few months have also witnessed a steep increase in the level of penalties being imposed for vertical practices, of a scale historically reserved for horizontal cartels between competitors. For example:

- On 17 December 2018, the Commission issued a record-breaking fine of nearly €40 million (reduced from €80 million for cooperation) to the fashion brand GUESS for illegal restrictions on its retailers, in particular imposing: (i) minimum resale prices, (ii) territorial sales restrictions, and (iii) limitations on online search advertising. The Commission also found that GUESS had failed to apply its selective distribution criteria objectively, as required under the VBER.
- In October 2018, the French Competition Authority imposed a fine of €7 million against the chainsaw manufacturer Stihl for restricting its resellers' ability to sell its products online.
- In the summer of 2018, the Commission fined four electronics manufacturers a total of €111 million for imposing fixed or minimum resale prices on their retailers (see our alert on this here).

Recently, the Commission has also launched an investigation to assess whether an online marketplace provider can lawfully operate as both a third-party sales platform for online retailers and a standalone online retailer in its own right. In our view, this investigation is unlikely to reach a swift conclusion given the central importance of the issue to the marketplace provider's business model and will be hotly contested for several years.

Given the recent focus on vertical restraints in the EU and the dynamic and changing nature of the e-commerce sector, it has never been more important for manufacturers and market participants to ensure appropriate lawful protections are available to them, and to participate in the shaping of future EU law that will govern all levels of any distribution chain for many years to come.

HOW K&L GATES CAN HELP YOU

It is our "bread and butter" to design and enforce modern, effective and legally compliant go-to-market strategies for product manufacturers worldwide, including in Europe. We therefore have a deep understanding of the challenges brands are facing and pride ourselves in designing highly tailored, creative and pragmatic solutions to these issues.

Coupled with this we have broad experience in advocating our clients' interests before the Commission and national authorities. We acted for a number of stakeholders in the Commission's recent e-Commerce Sector Inquiry (see our previous alerts here and here) helping them to shape and refine their submissions and gather the necessary information, so as to ensure their views were strongly heard.

We would be happy to speak with you to understand the level at which you might want to participate in the Commission's consultation, whether anonymously or not, and can work with your business to promote its interests, with a view to shaping a sensible and workable legal framework.

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