

COUNTDOWN | 22 February 2022

Distribution Law Center Countdown X - Hardcore restrictions (Dual Pricing)

What?

When a supplier or manufacturer charges different wholesale prices for the same product depending on whether the product is intended to be sold online or offline, or whether the buyer will sell it to a retailer or directly to end-customers, dual pricing is practiced.

A dual pricing practice does not always qualify as a restriction of competition, although it is a valid presumption that this is the case where sales via the internet are disadvantaged. The underlying rationale for such presumption is that the European Commission has considered that the internet is a powerful tool that allows distributors to reach a larger number, as well as greater variety, of customers whereby restrictions affecting a distributor's online sales are generally seen as resale restrictions.

Now?

Under the current VBER regime, a dual pricing practice disadvantaging online sales is considered to be a passive sales restriction as online sales are considered in principle to qualify as passive sales. Pursuant to Article 4(b)(i) VBER, a supplier may restrict some types of active sales by a distributor, but it is prohibited to restrict any passive sales.

Active sales refer to sales activities whereby customers are actively approached individually, for example, by direct mail, e-mails or visits, or whereby a specific customer group or customers in a specific territory are targeted by the distributor. Passive sales refer to a response to unsolicited requests from individual customers and general advertising.

In the current Vertical Guidelines, the European Commission states that an agreement that stipulates that the distributor shall pay a higher price for products intended to be resold online than for products intended to be resold offline amounts to a hardcore restriction. This means that the European Commission considers that such behaviour is so harmful to competition that it should be considered a by object restriction and therefore is forbidden.

Even though a supplier may not limit the online sales of its buyers, under the current Vertical Guidelines, it is allowed to agree to pay the buyer a fixed sum to support the buyer's offline or online sales efforts.

However, there are certain circumstances when a dual pricing practice may be individually exempted under Article 101(3) TFEU. This may be the case, for example, when selling a product online leads to substantially higher costs for the supplier/manufacturer than selling a product offline. The current Vertical Guidelines provide a practical example. A supplier/manufacturer of household appliances sells products to a retailer that sells the products both online and in physical stores. When the item is purchased by an end-customer in a physical store, but not when purchased online, installation of the product is included. It is possible that online sales lead to more customer complaints and/or customers making claims under the product's warranty from the supplier/manufacturer because the product does not function as well without a qualified person installing it. A dual pricing practice in this scenario, whereby the cost charged to the distributor for a product intended to be sold online may be higher than the price of a product intended to be sold offline, is motivated by the higher costs for the supplier generated from the online sales channel. As such, the dual pricing practice does not aim to limit or discourage online sales and may then be considered to fulfil the conditions for an exemption under Article 101(3) TFEU.

Ultimately, the European Commission will assess whether the restriction is likely to limit internet sales and hinder the distributor from reaching more and different customers.

The future as of 1 June 2022?

The draft VBER contains the same provision for sales restrictions meaning that some types of active sales may be restricted, but passive sales may not.

However, the current proposals of the Vertical Guidelines provide an interesting difference in approach with respect to dual pricing, as the European Commission states that dual pricing arrangements may benefit from the safe harbour of the VBER in certain circumstances. This requires that the dual pricing practice aims to incentivize or reward the appropriate level of investments respectively made online or offline. In other words, a product intended to be sold offline can be offered at a lower price to the distributor than a product intended to be sold online, provided that the difference in price reflects the difference in investments and/or costs incurred. For example, a supplier who wishes to reward the buyer for its efforts in offline sales may offer the supplier a lower price for the products intended to be sold offline.

According to the European Commission's proposals, dual pricing will no longer necessarily be considered a hardcore restriction. It is further stated, in the current proposals of the Vertical Guidelines, that the difference in price should relate to the differences in the cost incurred in each channel by the distributor at retail level. If the wholesale price difference instead prevents the use of the internet for online sales, the dual pricing practice will still be considered a hardcore restriction by the European Commission.

In practice?

- The current VBER regime on dual pricing will remain largely unchanged after 1 June 2022. Dual pricing practices will still amount to a restriction of passive sales when preventing the effective use of the internet.
- The European Commission's proposals of the Vertical Guidelines clarify and highlight the fact that dual pricing does not, per se, amount to a hardcore restriction as a dual pricing practice may give a supplier the possibility to incentivize and reward fairly and proportionately the difference in investments by a distributor in each of the sales channels used.
- A manufacturer will be able to set different (wholesale) prices for its products depending on the sales channel its distributors will use to resell the products as long as the price difference is balanced and clearly applied to encourage and/or reward investments and costs incurred for each channel, without running the risk of infringing competition law.

Assessment?

The difference in approach introduced in the current proposals will provide more legal certainty for suppliers in relation to the fact that dual pricing may benefit from the safe harbour of the VBER, at least in certain circumstances.

The new approach that dual pricing is not necessarily a hardcore restriction if the price difference can be attributed to cost-differences between sales channels provides much welcomed flexibility for suppliers.

The difference in approach also helps to fulfil the aim of ensuring the effective use of the internet as a sales channel, more efficiently and in a targeted manner, while allowing suppliers greater contractual freedom.

The new approach raises the interesting question of whether a pricing advantage for the online channel at the expense of the offline channel would be admissible and to what extent it would not constitute a restrictive dual pricing practice. In other words, can offline sales channels be put at a disadvantage without falling foul of the competition rules at all? Based on the reasoning in the proposal for the Vertical Guidelines (and in particular the fact that internet sales qualify in principle as passive sales), it certainly appears so, and we understand that this is in line with the European Commission's views on this topic.

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.

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