Distribution Law Center
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ANALYSIS | 25 November 2022

VBER INSIGHTS #1 - Fulfilment contracts

We have previously drawn your attention to this new exception to the prohibition on resale price maintenance ('RPM') introduced by the European Commission in the Vertical Guidelines.

As you may recall, under such a fulfilment contract, the supplier enters into an agreement with a buyer who undertakes to execute the agreement that the supplier previously concluded with a specific customer. The Vertical Guidelines clarify that, if the supplier selects the buyer that shall execute the agreement with the customer, requiring the buyer to do so at the price agreed with the customer does not amount to RPM. This may be particularly relevant for so-called key accounts that prefer negotiating their purchases with the manufacturer instead of with a local distributor. Manufacturers typically used to require their local distributors, executing orders made under the key account agreements, to respect maximum prices. They will now be able to impose fixed prices. The condition is however that the supplier selects the buyer that fulfils the agreement with the customer. The rationale behind this requirement is that this entails that competition for both the contract goods and services and for the fulfilment services has already taken. As a result, imposing a fixed price will not constitute RPM.

Various members of the European Commission's vertical case team confirmed to DLC that this selection could possibly be done by the supplier "in agreement with the customer".

They furthermore informed the DLC team that the same principle applies in the situation of a fulfilment contract involving two levels of the distribution chain. In such a case, the supplier would need to select both the wholesaler and the retailer. If the supplier would only select the wholesaler and it is left to the wholesaler to select the retailer, there would continue to be room for competition for fulfilment services. If both are selected by the supplier, competition on the resale price or on the price of the fulfilment services is excluded.