LOYENS & LOEFF

THE NETHERLANDS
COMPETITION - DISTRIBUTION

Increased interest of competition authorities for distribution agreements

Focus on vertical agreements

In recent years, competition authorities in Europe have shown an increased interest in vertical agreements which may infringe national or supranational competition laws. A vertical agreement is a term used in competition law to define agreements between companies operating at different levels of the supply chain. Examples of vertical agreements include agency agreements, supply agreements, distribution agreements and franchise agreements.

The increased interest is particularly visible in the field of distribution and e-commerce. Fines have already been imposed in several Member States on companies that applied an anti-competitive e-commerce policy, such as a blanket ban on online sales. Another very recent example is the European Commission's decision to impose fines of more than EUR 110 million on a number of consumer electronics companies for imposing fixed or minimum resale prices on their online retailers.

The Dutch Authority for Consumers and Markets (**ACM**) has also tightened its policy on vertical agreements. ACM has made it clear in recent publications and speeches that it will target vertical agreements that are harmful to consumers.

Business needs

It is of great importance to take account of competition law when drafting, amending or terminating (vertical) agreements, as an infringement of competition law may entail serious consequences. An infringement may lead to the nullity of contractual clauses or even of the entire agreement, high fines for the companies (and sometimes even the persons) involved, damage claims from affected parties, disruption of business and reputational damage. Therefore, it is very important to test beforehand and from time to time which contractual clauses are permitted under competition law.

Appropriate distribution system

When a company makes a decision about the most suitable distribution system for its products or services, it should look at the various possibilities and impossibilities under competition law. Take as an example the difference between a selective distribution system and an exclusive distribution system. While it is generally not permitted in a selective distribution system to restrict active or passive sales to end users by members of a selective distribution system (operating at the retail level of trade), irrespective of the location of the end users, it is generally permitted in an exclusive distribution system to restrict active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor.

E-commerce

Since e-commerce has increased considerably in recent years and, in doing so, got the attention of the competition authorities, companies should be very much aware of the relevance of competition law for their e-commerce business. Case law of the Court of Justice shows for example that an outright ban on online sales is contrary to competition law, whereas a ban on sales via internet platforms such as Amazon and eBay may be permissible.

Agreements between platforms and suppliers generally constitute vertical agreements and often contain best-price-guarantee clauses. So-called *wide APPAs* (Across Platform Parity Agreements), whereby the seller undertakes to charge on the platform a price that is not higher than the price charged on any other platforms (including new entrants and the seller's own platform/website), may very well result in a restriction of competition. More limited *narrow APPAs*, whereby the seller only undertakes to charge on the platform a price that is not higher than the price charged on its own website, are less likely to create competition problems. In one of its publications, the ACM has clearly indicated that the negative effects on consumer prosperity are more plausible in the case of wide APPAs.

Expected future developments

As sales via the internet will continue to grow and the position of platforms may become even more important, competition authorities will closely monitor the effects of vertical agreements on competition and, ultimately, on consumer welfare. The decision practice of various competition authorities in the EU clearly demonstrates the same.

The same developments may lead to more disputes between the parties to a vertical agreement and result in court proceedings, in particular in relation to the validity of contractual clauses and early termination.

For these reasons, the do's and don'ts of competition law should be – and should continue to be – a point of attention for any company that is a party to vertical agreements.

Contacts

Marc Wiggers
partner/attorney at law
Amsterdam
T +31 20 578 56 14
M +31 651 10 27 75
E marc.wiggers@loyensloeff.com

Marc Custers
counsel/attorney at law
Amsterdam
T +31 20 578 52 63
M +31 620 60 46 05
E marc.custers@loyensloeff.com