

NEGOTIATING AN AGREEMENT WITH AN INTERNET PLATFORM: how to comply with VBER 2022?

Silvia Bortolotti, Buffa Bortolotti & Mathis, Turin

Alban Curral, Carlara International, Paris

Benedikt Rohrßen, Taylor Wessing, Munich

Jordi Ruiz de Villa, Fieldfisher, Barcelona

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SUMMARY OF THE FACTS

An Italian manufacturer of high-quality jewellery.

An Internet platform providing online intermediation services.

Appointment for the distribution of the products to consumers world-wide.

The platform takes care of

- delivery to consumers,
- cashing the price and transferring the amount to the producer, after having deduced its fee (commission?) for the service.

The platform is also distributing competing jewellery acting as reseller.

The producer wants its products to be offered for sale on the platform at the retail price advertised on its own website.

PROVIDER OF «ONLINE INTERMEDIATION SERVICES»

Reg. 2022/720, Art. 1 (e):

‘online intermediation services’ = ‘information society services’

“A service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services” (Directive (EU) 2015/1535, Art. 1 b)).

*(..) which **allow** undertakings **to offer** goods or services:*

- (i) to other undertakings, with a view to **facilitating the initiating of direct transactions** between those undertakings, or*
- (ii) to final consumers, with a view to **facilitating the initiating of direct transactions** between those undertakings and final consumers,*

irrespective of whether and where the transactions are ultimately concluded»

BROAD SCOPE OF APPLICATION

Allowing direct sales:

- E-commerce marketplaces
- App stores
- Delivery platforms

Providing advertising services (re-directing customers to other websites for sale/purchase, see VGL § 332):

- Price comparison tools
- Social media services

Other purposes:

- Franchisor's platform allowing its franchisee to sell
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“VERTICAL AGREEMENTS” IN THE ONLINE PLATFORM ECONOMY

Reg. 2022/720 (Whereas 10); VGL § 60 ss.: Both:

- the online intermediation services and
- the goods or services that are transacted via the online intermediation services

are considered as contract goods or services for the purpose of the Regulation

1) Supply of intermediation services: supplier – buyer

2) Intermediated transaction:

- The service provider is not a «buyer» in respect to the goods and services offered on sale by the undertaking
- The service provider cannot impose hardcore restrictions to the transaction

Buying/reselling activity of the platform excluded by the scope of the provisions (see also VGL § 65)

QUESTIONS TO BE ANSWERED:

- 1) Is it possible for the manufacturer to impose to the platform the resale price of its products:
 - if the platform acts as an intermediary (i.e. connection between seller and consumers on the platform, e.g. as commission agent)?
 - if the platform acts as a buyer-reseller (i.e. purchasing the products from the manufacturer to resale them to consumers)?
- 2) What impact may have the fact that the platform is selling at the same time competing goods (hybrid function)?
- 3) If the VBER is not applicable, how can the expectations of the producer regarding minimum resale prices be satisfied?

HYPOTHESIS 1 : PRICE FIXING IF THE PLATFORM ACTS AS A SIMPLE INTERMEDIARY

- Can the platform be regarded as an “*agent*”?
 - **What’s the gain?** Agency agreements still fall outside Art. 101 TFEU
 - **Precondition:** No significant financial or commercial risks
 - **Exception**, interpreted narrowly, case-by-case (details: VGL 30 et seq)
- **Question** therefore: Platform = “agent”?
 - Pro:**
 - A supplier who sells via platforms can bear significant risks
 - Platform as multiple agent can also positively impact inter-brand competition
 - Contra:**
 - Online Intermediary Services often operate as independent market players
 - Platform as multiple agent not integrated into supplier’s undertaking

HYPOTHESIS 1 : PRICE FIXING IF THE PLATFORM ACTS AS A SIMPLE INTERMEDIARY

- Can the platform be regarded as an “agent”?
 - **Commission: “No”**. Agreements btw undertakings in online platform economy “*generally do not meet the conditions*” (VGL 46 and 63)
 - **Three arguments** re undertakings in online platform economy:
 - Act as **independent economic operators**, not as part of other undertaking
 - May even **determine commercial strategy and conditions of sale**
 - Make typically significant market-specific **investments**
 - **Commission in line with previous case law**, e.g.
 - ECJ 1.10.1987 “*Vlaamse Reisbureaus*”, para. 20
 - Higher Regional Court of Düsseldorf 4.12.2017 “*Expedia*”, para 31



CAN THE PRODUCER IMPOSE THE PRICE RESTRICTION?

- Consequences:
 - Agreement with platform falls **within scope of Art. 101 (1) TFEU**
 - **Platform = supplier** of online intermediation services (Art.1 (d), VGL 67)
 - Commission's categorisation **as supplier affects**
 - Relevant **market shares** (Art. 3)
 - Applicability of **hardcore** (Art. 4) and **excluded restrictions** (Art. 5):
 - **Platform not a buyer** "*in respect of goods/services offered by third parties using those intermediation services*" (VGL 67)
 - **Platform's restrictions** on price, territories or customers re intermediated goods/services **are subject to Art. 4 VBER**
 - Conversely, a **producer can, following the above categorisation, consequently impose** price restrictions under the VBER

HYPOTHESIS 2: PRICE FIXING IF THE PLATFORM ACTS AS A BUYER-RESELLER (1/2)

- The Internet platform acts as a “*(re)seller of goods or services downstream*” (Reg. 2022/720, VGL n° 68), meaning an independent operator
- The platform should fix its own selling price to “*final consumers*” or “*undertakings*”
- The manufacturer:
 - must not restrict the **Internet platform’s commercial freedom**
 - can not impose a reselling price
- If the manufacturer fixes a minimum price or a fixed price
 - The agreement will be considered as anticompetitive
[Reg. 2022/720, Art. 2 1), Art. 3 1) and Art. 4 a)]
[VGL 185 et seq.]

HYPOTHESIS 2: PRICE FIXING IF THE PLATFORM ACTS AS A BUYER-RESELLER (2/2)

- Direct or indirect imposition of a minimum retail price ('RPM') is not covered by the exemption (Reg. 2022/720, Art. 4 a)).
- Maximum resale price or recommendation of a RP \neq hardcore restriction
- **Ways out (efficiencies):**
 - **Art. 101 (3) TFEU & pro-competitive effects**
 - **efficiency-enhancing effects (VGL 195)**
 - Introducing a **new product (VGL 197, a)**, **coordinated short-term low price campaign** e.g. in a franchise system (VGL 197, b), protecting the brand image of the product & prevent "**loss leader product**" (VGL 197, c), providing **additional pre-sales services (VGL 197, d)**

PLATFORMS HAVING AN HYBRID FUNCTION:

- Definition: Platform that is competing or potentially competing with buyer in the intermediated goods or services (VBER 1 c), VGL 67, e), VGL 104 and 106), i.e. if the platform is Amazon sells its own or third parties' manufactured jewellery
- Potentially means it is likely that will make the investments to sell jewellery within one year.
- The vertical agreements with Hybrid platforms **do not benefit from the exemption** (VBER. 2, 6° VGL 107) and cannot be considered agency agreements (Guidelines 46, 63 and 104).

WHAT ARE THE CONSEQUENCES? (1)

- If the platform acts as a simple intermediary the agency qualification is discarded (+ no exemption).
- horizontal guidelines apply on possible collusive effects
- These agreements are not considered as harmful per se, they still can benefit of :
 - An individual exemption
 - The “De minimis notice” applies when there is up to 5% market share in the two markets (provision online intermediation services/relevant market for luxury jewellery)
 - **Individual assessment:** if the Hybrid Platform does not enjoy market power in the online intermediation services market (análisis amount of commissions, number of transactions, intermediated number of Sellers/buyers and the extent of which those users use services of other platforms vg. start up: (108 VGL).

WHAT ARE THE CONSEQUENCES? (2)

- **Notice: In particular a Supplier that allows buyers of its goods or services to use its website to distribute, and this website does not sell competing goods or services and is only active in respect of these goods it is unlikely that the commission enforces action in the vertical agreement. Applicable to must franchise networks (109 VGL)**

HOW CAN THE MANUFACTURER MEET HIS OBJECTIVES IN TERM OF PRICE?

If the purpose of the Commission in this framework is to protect the manufacturer from a competitive behaviour of the internet platform and to balance the relation between the manufacturer and the «powerful» platform, why the undertaking would not be entitled to fix the price?

Thanks for your kind attention!

Silvia Bortolotti, Buffa Bortolotti & Mathis, Turin;
Secretary General IDI, IDI country expert for Italy

Alban Curral, Carlara International, Paris

Benedikt Rohrßen, Taylor Wessing, Munich

Jordi Ruiz de Villa, Fieldfisher, Barcelona