E-COMMERCE: CHALLENGES AND OPPORTUNITIES FOR DISTRIBUTION

- **Antitrust**
  - Ensure a high level of investment and the right incentives within the network
  - Maintain the right brand positioning
  - Avoid free riding by online resellers and third party platforms
  - Vertical integration by setting up manufacturers’ eShops

- **Control over personal data and GDPR**
  - How to better know the final consumer, adapt to their needs and improve products
  - How to collect and process personal data (and technical data on the use of products) in compliance with data protection laws
  - Access to final consumer through own eShops
  - Gather consumer data within the network
Distribution Formulas and Antitrust

- **Vertical integration**
  - Distribution through subsidiaries, up to retailer or final consumer (own shops or eShop). Control over prices, margins, parallel imports
  - Single entity doctrine (no application to intra-group agreements)

- **Distribution via independent resellers**
  - **Selective distribution** → No control over resale prices, control over parallel imports outside the network, control over quality, exclusion of online sales on third party platforms/marketplaces
  - **Exclusive distribution** → No control over resale prices, control over active sales, incentive to invest, exclusion of online sales on third party platforms/marketplaces
  - **Open distribution** → No control over resale prices, no control over parallel imports (active or passive sales), exclusion of online sales on third party platforms/marketplaces

- **Dual distribution** → own distribution channel (vertical integration) in parallel to distribution through network of independent resellers
DATA PROCESSING IN DISTRIBUTION

- Challenge → get direct access to final customer, gather and use customer data and information on use of product, their preferences

- What personal data?
  - Final clients/consumers, list of distributors

- For what purpose? What legal basis?
  - Warranty
  - Technical data and user behaviour (IoT)
  - Marketing
  - Research & development, statistics
  - Notification of safety measures and recalls

- Who collects and processes such data?
  - Distributors, retailers
  - Manufacturer
DATA PROCESSING IN DISTRIBUTION
Example of warranty & repair services

- Technical data on the use of product are personal data if linked to a serial number or the client

- From the standpoint of the repairer
  - Processing of the data required for repair, service and maintenance, including data transmission to the manufacturer → Article 6 (1) (b) GDPR (contract)
  - Product improvements and developments, marketing, customer satisfaction surveys → Article 6 (1) (f) GDPR (legitimate interest)

- Product monitoring + product recall → Article 6 (1) (c) GDPR (legal obligation). Joint controllership distributor + manufacturer (26 GDPR)

- Manufacturer electronic data base repair history → Article 6 (1) (a) GDPR (consent)
DATA PROCESSING IN DISTRIBUTION WITHIN THE GROUP

Data processing and data transfer within the group (vertically integrated companies)

- **No intra-group exemption**
- An entity may qualify as **controller** or **processor** regarding a specific data processing activity
  - Controller/processor: processor agreement (28 GDPR)
  - Joint controllership agreement (26 GDPR)

- Data transfers between different group entities require a **legal basis**. E.g., processing of clients data → Art. 6 (1) (f) GDPR

- Specific rules re **transfer** of personal data to group entities located in a country **outside EEA** → adequacy decisions, EU Standard Contractual Clauses, Codes of Conduct, Binding Corporate Rules
DATA PROCESSING IN DISTRIBUTION

Data flow and transfer/sharing of data within the group

- **Manufacturer eShop**
  - manufacturer → controller (evt via processors)
  - manufacturer can use data for sales, marketing, statistics, R&D, recalls, etc

- **Shop run by manufacturer’s subsidiary, data collected and processed by subsidiary**
  - subsidiary → controller (evt via processors)
  - subsidiary can use data for sales, marketing for group products, statistics, R&D etc
  - manage consent/other legal basis for direct marketing from other entities
  - clarify information obligations and legal basis for warranty, ASS etc
  - monitoring and recalls → Article 6 (1) (c) GDPR for processing, including transfer to other entities
DATA PROCESSING IN DISTRIBUTION

Data flow and transfer/sharing in a distribution system

- Resale by independent distributors/retailers
  - data collected and processed by retailer as controller
  - retailer can use data for its own sales, marketing, statistics, R&D, recalls, etc.
  - manage consent for direct marketing from manufacturer
  - clarify information obligations and legal basis for warranty, ASS, data sharing with manufacturer etc.

- If joint data bases, clarify responsibilities:
  - joint controllership (Art. 26 GDPR)
  - independent controllers
  - controller – processor (Art. 28 GDPR)
DATA PROCESSING IN DISTRIBUTION

Data flow and transfer/sharing of data within the group, to independent contractors, outside EEA + Switzerland

- Shop run by independent distributors/retailers in the EEA and manufacturer outside the EEA
  - countries with adequate protection → Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework)
  - EU Standard Contractual Clauses
  - Codes of Conduct
  - Binding Corporate Rules

- Manufacturer in the EEA, shop run by subsidiary outside EEA, targeting and selling outside EEA → see applicable data protection laws in the country of sales to final consumer
DATA PROCESSING IN DISTRIBUTION

- Does vertical integration matter/help?
  - yes: more control over data, processing and GDPR compliance
  - but no “single entity doctrine”, no group exemption
    - eShop run by manufacturer – full control over data
    - Shop run by subsidiary – subsidiary is the controller, you may need agreements in place

- Does the distribution formula matter?
  - selective, exclusive or open not a relevant criteria in data protection

- Should data protection be included in distribution agreements?
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