

DATA PROTECTION AND ANTITRUST IN DISTRIBUTION

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E-COMMERCE : CHALLENGES AND OPPORTUNITITES 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**. Eg 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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She assists companies in developing compliance programmes on antitrust and data protection regulations, with a focus on commercial activities such as use of personal data in e-commerce and distribution systems.

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