



EU Competition Webinar Series (Part II)

Keeping Distributors in Check in the Online Space

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This presentation is informational and is not intended to be used as a substitute for specific legal advice



WEBINAR TECHNICAL INSTRUCTIONS

PRESENTATION OF TODAY'S PANEL AND TOPIC

Today's Panel

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Agenda

- Setting the scene
- Online sales bans and obligations on resellers
- Online sales facilitation tools
- The Coty case
- Concluding remarks and Q&A

E-COMMERCE - SETTING THE SCENE

Why Is E-Commerce a Hot Topic?



- **Booming e-commerce**

- **New opportunities**

- For distributors

- Increase of distributor reach
 - Reduction of transaction costs for manufacturers and distributors (no limit to the amount of products that can be offered online; lower costs for delivery, inventory, staff)

- For consumers

- No physical limitations (distance, opening hours)
 - Increased choice
 - Increased price transparency

- Emergence of new market players

- Direct competitors (pure players, brick & click, third party platform)
 - New businesses (e.g. price comparison websites, evaluation systems)

- **Intensification of competition**



Why Is E-Commerce a Hot Topic?

- **... But new challenges for brand owners**
 - Avoid free riding
 - Preserve brand image
 - Ensure pre-sale services
- **Enforcers seek unfettered development of e-commerce**
- **Increasing scrutiny by competition authorities**
 - E-commerce sector inquiry
 - String of new EU cases
 - National cases (France and Germany lead the way)

Quick Reminder – Applicable Rules



- **Safe harbor: Vertical Block Exemption Regulation (VBER)**
 - Safe harbor for agreements with market shares < 30%
 - Hardcore (object) restrictions excluded from safe harbor, even below 30% threshold
 - Restriction on passive sales as a hardcore restriction
 - Hardcore restrictions may (in theory) benefit from individual exemption (Article 101.3 TFEU)

- **Guidelines on vertical restraints**
 - Address Internet sales when examining restrictions on passive sales
 - Internet sales regarded as passive sales...
 - ... therefore restrictions of Internet sales amount to hardcore restrictions
 - Guidelines are binding on the EC but not on national or European courts
 - Therefore, there is scope for debate

ONLINE SALES BANS AND OBLIGATIONS ON RESELLERS

Can I Prohibit My Resellers from Selling Online?



■ ***Pierre Fabre* (2011)**

- *De facto* prohibition of online sales (requirement to sell the Pierre Fabre products in a physical space and in presence of a qualified pharmacist)
- The CoJ considered that:
 - Prohibition of online sales = Restriction of passive sales
 - In view of the characteristics of the products at issue (cosmetics), a blanket restriction could not be justified by:
 - Need to provide individual advice to consumers
 - Need to maintaining a prestigious image
 - Prohibition of online sales could not be saved by the right for supplier to prevent resellers from operating out of an unauthorized establishment

**Following *Pierre Fabre*, very little scope to impose an outright ban
If considered, seek legal advice**

But Then, How Do I Control My Online Resellers?



- **By imposing strict selectivity/contractual requirements?**
 - Requirements may be imposed if:
 - Legitimate aim
 - Necessary and proportionate
 - Equivalence online / offline
 - Need for periodic/dynamic review of the requirements

But Then, How Do I Control My Online Resellers?



- **Examples of requirements:**
 - Use of images, logos, layout
 - Order and delivery policy
 - Return and warranty policies
 - Hotline and support
 - Compliance with data protection, consumer protection laws (including advertising)

But Then, How Do I Control My Online Resellers?



- **Requirement to operate at least one brick and mortar shop?**
 - Exclusion of ‘pure’ online players or incentivizing pure players to join promotional effort by going offline
 - Rationale? Ensure that consumers can access qualified staff, visualize and try the product
 - Positive stance by the EC in its Guidelines, but must not result in a direct or indirect limitation of online sales
 - E.g. by combining this requirement to an obligation on the distributor to limit its proportion of overall sales made over the Internet
 - EC’s recent look in the e-commerce sector inquiry
 - This requirement may not be suitable in a number of settings

LIMITING THE USE OF ONLINE SALES TOOLS

Can I Restrict the Use of Price Comparison Tools?



- **Prohibition of the use of price comparison tools in question?**
 - Rationale: avoid competition on price only, so as to incentivize pre-sale services; protect brand image
 - *Asics*
 - Highly concentrated running shoes market in Germany
 - Price comparison engines perceived as important tool
 - For consumers to obtain transparent price information
 - For small & medium size retailers to reach a potentially large pool of customers to compete
 - Treated as hardcore by BKA and by the Court in Düsseldorf: largely relying on *Pierre Fabre*
 - Court dismissal of Asics' defense on need to protect the brand and to offer adequate pre-sale services
 - Questionable reasoning: is this really a restriction by object?

Can I Restrict Use of Paying Referencing Tools?



- **Prohibition of the use of the brand for paying referencing purposes**
 - Objective of the prohibition: protect brand image of the supplier
 - The prohibition raised issues
 - Equivalence online / offline
 - Not proportionate
 - Ultimately left open in Asics

Can I Ban Resellers from Using Marketplaces?



- **Rationale**
 - Brand positioning
 - Fight against the sale of counterfeit goods
 - Etc.
- **Guidelines on vertical restraints** considers restrictions on the use of third party platforms, not full ban
- **Diverging views in the EU**
 - Cases at NCA level (e.g. Adidas in France and Germany)
 - National judgment (e.g. Caudalie in France)
 - EC position

The Coty Case



- Presentation
- Elements of the debate
- Outlook

CONCLUDING REMARKS AND QUESTIONS

Questions?



Thank You for Joining Us

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