



European Antitrust and Internet Sales – The Dealer Network

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Overview

INTRODUCTION

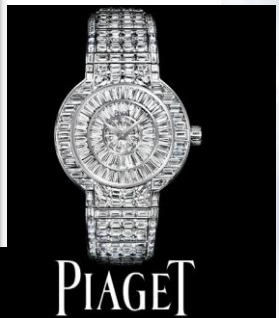
A.INTERNET – WHOSE CHOICE IS IT ?

B.NEW VERTICALS REGIME & INTERNET

C.CASE LAW

D.CONCLUSIONS

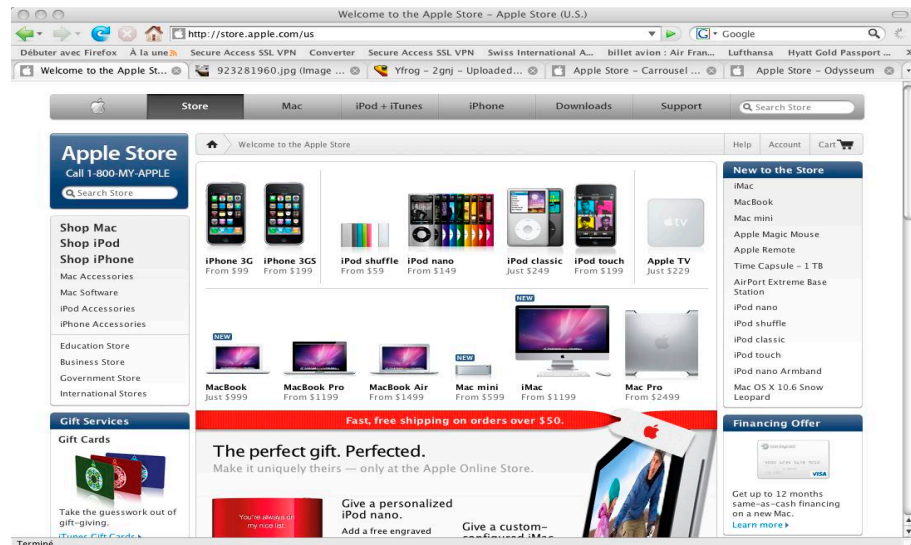
INTRODUCTION



A. INTERNET – WHOSE CHOICE IS IT ?

Choice of Chanel – Online Sales

- Trend : Multiple distribution chanel
- Choice of chanel : Liberty & flexibility for Brands to choose ?
- Different legal approach in US vs Europe



Whose choice is it?

Choice of Chanel – Online Sales - EU

- European Regulation : Did the new Verticals overdo it ?
- Leave more to market forces and developments
- EU : strengthen market integration through harmonized rules on distant sales etc, online tools, easy access to applicable rules and case law
- Review current Verticals after a few years

What about Online Sales in the new Verticals ?

- Nothing in the text of the Regulation (unchanged), but more detailed explanations in the new Guidelines (GL)
- Introduction of further hardcore restrictions through the Guidelines
- In general : internet marketing and online sales qualified as passive sales (no restrictions possible) (Art. 4(b), GL 50/51)
- In principle : online sales to be allowed, subject to some exceptions, and possibility to define objective online criteria (GL 52 et seq)

Internet – General Rule (Guidelines 52 / 56)

Powerful tool

« The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. »

Overall «equivalence»
between online and
offline criteria

No Prohibition

« In principle, every distributor must be allowed to use the internet to sell products. »

«...the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction.»

B. NEW VERTICALS REGIME & INTERNET - DEALER NETWORK

B. NEW VERTICALS REGIME & INTERNET

Passive versus Active Sales –
Exclusive Distribution

Internet – Passive vs active sales

- Online sales and marketing generally regarded as passive sales.
Extensive definition of « passive sales »
- Understandable from an internal market policy angle, but questionable from a technical angle :
 - e.g. : operation of online store as passive sales, even if in different language versions
 - e.g. : targeted online advertising (how to differentiate)
- Thus, not possible to require distributor :
 - to block customers in other parts of EU to view the distributor's website
 - to automatically re-route such customers
 - to terminate check out transactions with such customers
- But ok, to prohibit active sales of exclusive distributors

Allowed Restrictions – Exclusive Distribution

Allowed restriction on active sales, in the context of exclusive distribution :

- Prohibit the distributor to approach individual customers by for instance active direct mails, including the sending of unsolicited emails or visits
- Prohibit the distributor to actively approach a specific customer group or customers in a specific territory through targeted advertisement in media, on the internet or other media

B. NEW VERTICALS REGIME & INTERNET

Possible Requirements for
Selective Distribution

Point of Sale Requirement & Quality standards

Guidelines 54 : Quality standards

« However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. »

One or more
points of sale or
showrooms

« Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors.»

Allowed Criteria and Conditions for AR

Supplier may require its authorised retailer :

- To operate a physical authorized point of sale (brick and click)
- one or more authorized points of sales or showrooms (GL 54)
- To sell a minimum amount (value or volume) through the brick and mortar store (but not : limitation of online sales volume)
(GL 52 (c))
- To meet defined quality standards : online criteria have to « pursue the same objectives, and achieve comparable results » as offline criteria
- otherwise, may be qualified as hardcore (GL 52 (c) / 54/56)
- To use platforms only in a way that customers do not visit distributor website through 3rd party website

Criteria – offline / online sales ratio

Guidelines 52 (c) : Consistency with distribution model & minimum sales through physical point of sale

« an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paragraphs (54) and (56)). »

Sufficient to
protect against
sham POS ?

« This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location. »

Allowed restrictions - Platforms

Guidelines 54 :

- Use in accordance with standards and conditions agreed by the distributor
- Not to visit the distributor's website through a site carrying the name or logo of the third party platform

« Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributors' website is hosted by a third party platform, the supplier may require that customers do not visit the distributors' website through a site carrying the name or logo of the third party platform. »

Prohibited Limitations on AR

Be aware :

- Not possible : dual pricing (Guidelines 52 (d))

Not possible to charge different prices for products sold online vs offline

But possible to pay a fixed fee to support the (online or) offline sales efforts

- But possible, if online sales represent an extra cost for the supplier

Prohibited Limitations on AR

Be aware, not possible :

- Not possible : territorial limitation of sales within Europe

But possible : to limit sales to end customers, to limit number of products sold to same customer, to limit sales to cross supplies to other authorized retailers

Important : where a territory is not officially supplied, « reserve » it for selective distribution (Regulation Art. 4 (b) (iii))

- No resale price fixing – see case law (Ciba Vision, Germany; Yamaha, Nintendo, EU Commission)

Beware : Risk of Fines !

ECJ, 13 October 2011, Pierre Fabre Decision - Exceptions

Noteworthy :

- Ban on internet sales only justified in limited, exceptional cases
- Advocate General Mazár on «free riding» (Para. 40) :

« a manufacturer can impose proportionate and non-discriminatory conditions on its selective distributors selling via the internet in order to counteract such free-riding, thereby ensuring that the manufacturer's distribution network operates in a balanced and 'equitable' manner»

- Obiter dictum by ECJ at Para. 46 appears inconsistent with case law (Para. 40 of Pierre Fabre case/Leclerc case Para. 109/COPAD judgment at Para. 24 to 37) :

«The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.»

C. CASE LAW

CASE LAW - SELECTIVE DISTRIBUTION / INTERNET

1. European Court of Justice/ General Court (Court of First Instance)

- 1.1 L'Oréal v eBay – C-324/09 (12 July 2011)
- 1.2 Ker-Optika – C-108/09 (2 December 2010)
- 1.3 Copad SA v Christian Dior and SIL –C-59/08 [2009]
- 1.4 Deutscher Apothekerverband (DocMorris) – C-322/01 (11 December 2003)
- 1.5 Metropole v Commission - T-112/00 [2001] ECR II-2459
- 1.6 Leclerc v Commission (Yves St Laurent) – T-19/92 [1996] ECR II – 1851
- 1.7 Metro v Cartier –C-372/02 [1994] ECR I-15
- 1.8 Pronuptia C-161/84 [1986] ECR 353
- 1.9 Metro v Commission (Metro I) [1977] ECR 1875

2. Referral to the European Court of Justice (Reference for Preliminary Ruling)

- 2.1 Pierre Fabre - Case 2008/23812 (29 October 2009). Hearing Report of November 2010. Opinion of Advocate General –C-439/09 (3 March 2011)

3. European Commission

- 3.1 Topps – IP/04/682 / COMP/C-3/37.980 (26 May 2004)
- 3.2 Yamaha – IP/03/1028 / COMP/37.975 (16 July 2003)
- 3.3 Nintendo – IP/02/1584 / COMP/35.587; COMP/35/706; COMP36.321 (30 October 2002)
- 3.4 Yves Saint Laurent – IP/01/713 (17 May 2001)
- 3.5 B&W Loudspeakers – IP/00/1418 (6 December 2000)

4. France – Autorité de la Concurrence (former Conseil de la Concurrence)

- 4.1 Opinion - Decision no. 11-SOA-02 (1 July 2011) regarding e-commerce sector
- 4.2 Cosmetics – Decision no. 07-D-07 (8 March 2007)
- 4.3 Bose/Focal/Triangle – Decision no. 06-D-28 (5 October 2006)
- 4.4 Festina – Decision no. 06-D-24 (24 July 2006)
- 4.5 Ongoing – Sector Inquiry into competition in the e-commerce sector (4 July 2011)
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1654

5. France – Cour d'Appel de Paris

- 5.1 eBay v Louis Vuitton Malletier - Case no. 2010-015044 (3 September 2010) /
eBay v Christian Dior Couture - Case no. 2010-015040 (3 September 2010) /
eBay v Parfums Christian Dior, Kenzo, Givenchy, Guerlain -
Case no.2010-015041 (3 September 2010)
- 5.2 Pierre Fabre - Case 2008/23812 (29 October 2009)
- 5.3 PMC Distribution v Pacific Creation - 2007/04360 (18 April 2008)

6. France – Cour de cassation

- 6.1 Pierre Fabre/Easyparapharmacie – Cass.Com, no. 09-70304 (21 June 2011)

7. Germany – Bundesgerichtshof (BGH)

7.1 Lancaster Group GmbH v Beauty Net AG, KZR 2/02 (4 November 2003)

8. Germany - Bundeskartellamt (BKART)

8.1 Phonak B3 – 69/08 (15 October 2009)

8.2 CIBA Vision B3 - 123/08 (25 September 2009)

9. German Courts

9.1 Distributor A v Sternjakob – Oberlandesgericht Karlsruhe 6 U 47/08 (25 November 2009) (appeal)

9.2 Amer Sports – Oberlandesgericht München U(K) 4842/08 (2 July 2009) (not appealed)

9.3 Sternjakob v Distributor B – Landesgericht Berlin 16 O 729/07 (21 April 2009) (appealed to the Kammergericht Berlin 2 U 8/09 – appeal withdrawn)

9.4 Sternjakob v Distributor A – Landesgericht Mannheim 7 O 263/07 (14 March 2008)

10. Belgium

10.1 MAKRO v Beauté Prestige, Belgian Supreme Court (10 October 2002)

11. Switzerland – Competition Commission (COMCO)

11.1 COMCO v Electrolux AG & V-Zug AG (11 July 2011)

NEW VERTICALS REGIME (330/2010)

Review of 1999 Verticals (2790/1999) – New Verticals Regime

- September 2008 : EU Roundtable
- July 2009 : consultation launched on first Draft Regulation and Guidelines
- Over 150 submissions
http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html
- 20 April 2010 : new Block Exemption Regulation (330/2010) & Guidelines published, in force since June 1, 2010
<http://ec.europa.eu/competition/antitrust/legislation/vertical.html>

D. CONCLUSIONS

Conclusions

- Evolution rather than revolution
- Questionable to introduce new hardcore restrictions in Guidelines
- “Guidelines” as tool stretched to the limits
- “Guidelines” remain a complex text
- Legal uncertainty
- Enforcement by national competition authorities and courts : risk of conflicting decisions
- Free riding not sufficiently treated
- More room for flexibility and economic analysis desirable
- Review after a few years suggested
- Beware : online resale restrictions & RPM = fines !!

THANK YOU !

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