

DISCUSSION PANEL: Restricting the right to use of the trademark in online sales' promotion

After the Guess Decision, the new EU VBER (namely, Article 4.1(e)(ii) of Regulation 720/2022) seems to follow a less restrictive approach, allowing “restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel”. The speakers will discuss about “do and don’t” in imposing restrictions to the members of distribution or franchise networks, regarding online advertising (not only limited to the use of Adwords, but also considering other advertising tools) in the framework of the new VBER.

Chair: Frédéric Fournier, Redlink, Paris

Paul Bridgeland, DG Competition at the European Commission, Brussels

Sara Citterio, General Counsel at Trussardi, Milan

Anastasia Dritsa, Kyriakides Georgopoulos Law Firm, Athens; IDI Expert for distribution in Greece

High-level explanations.

* Article 4 of Regulation 720/2022: *“Restrictions that remove the benefit of the block exemption - hardcore restrictions”*

“The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (...)

(e) *the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:*

(i) *other restrictions of online sales; or*

• (ii) *restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel;”.*

Hardcore restrictions specifically relating to online sales and Ads services

- requiring the buyer to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller. However, obliging the buyer to offer links to the online stores of the supplier or of other sellers is not a hardcore restriction
- requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory
- requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel (127 See Case C-439/09 - *Pierre Fabre Dermo-Cosmétique*, paragraphs 36 and 37);
- requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions;
- prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store;
- prohibiting the buyer from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third party server;
- prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison services, or restrictions which indirectly prohibit the use of an entire online advertising channel, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services. (...).

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Requirements relating to online sales benefiting from the exemption

- Examples :
 - requirements intended to ensure the quality or a particular appearance of the buyer's online store;
 - requirements regarding the display of the contract goods or services in the online store (such as the minimum number of items displayed, the way the supplier's trademarks or brands are displayed);
 - a direct or indirect ban on the use of online marketplaces(133);
 - a requirement that the buyer operates one or more brick and mortar shops or showrooms, for instance as a condition for becoming a member of the supplier's selective distribution system;
 - a requirement that the buyer sells a minimum absolute amount of the contract goods or services offline (in value or volume, but not as a proportion of its total sales) to ensure the efficient operation of its brick and mortar shop. This requirement can be the same for all buyers, or it can be set at a different level for each buyer, based on objective criteria, such as the buyer's size relative to other buyers, or its geographic location.

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Advertising and Ads Services

Examples of online advertising restrictions that can benefit from the exemption include:

- a requirement that online advertising meets certain quality standards or includes specific content or information;
- a requirement that the buyer does not use the services of particular online advertising providers that do not meet certain quality standards;
- a requirement that the buyer does not use the brand name of the supplier in the domain name of its online store.
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An inhouse legal attorney's insights:

- * Pros and cons regarding the VBER
- * How to put in place contractual arrangements regarding the use of trademark in online sales?
- * Any differences between EU and other countries ? China : where online sales are prominent?
- * How to deal with high-end pure players (net-a-porter, outnet, mytheresa, mr. porter...)?

- * while certain companies outside EU limit the range of products available online, which obstacle for EU based sellers?
- * Have your company experienced dual-pricing ?
- * Difficulties of an industry like luxury and fashion in juggling between the need to preserve the trademark value and antitrust (focussing on plain trademark may be a limitation, since trademarks are a part of the brand, which encompasses also other values (marketing, desirability, a lifestyle), all build in years of steady investments and a careful management of the image, which is neither protected nor considered by current legislation. Coty Case occasionally brought up the “aura” of the trademark, which vaguely refers to the effect of having a strong brand within a specific market, but such aura is still not regulated and not well protected.

Restricting the right to use of the trademark in online sales promotion

Online advertising, price comparison tools and use of trademarks

Anastasia Dritsa, Partner at Kyriakides Georgopoulos law firm, Athens; IDI Expert for distribution in Greece

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Key points – Q&As

- Pros and cons regarding the VBER ?
- How far can a restriction on online advertising go ?
- Use of Adwords increases the price of the purchase of words: how to manage this in *franchise* and *distribution* networks?
- Distribution v Franchise
- Price comparison - Caudalie case in Greece
- Practical tips ?

Anastasia Dritsa, Kyriakides Georgopoulos Law Firm, Athens; IDI Expert for distribution in Greece

Restrictions on online advertising

Restrictions of online advertising are exempted, provided that **they do not have the object of preventing the use of an entire online advertising channel.**
(Art. 4(e) VBER & VGL para 206(g))



Do's & Don'ts in online advertising

Suggested actions

Allow use of **all different online advertising channels** (search engines, social media etc.)



Justify restrictions, set **proportionate quality standards** (e.g. advertising and/or content requirements)



Avoided Actions



Do not impose **outright bans** of online advertising



Do not prohibit the use of the **most widely used** advertising service within a channel if the remaining services within the same channel are *de facto* not capable of attracting customers to the buyer's online store



Do not completely prohibit brand-bidding (see cases *Asics* and *Adidas*)



Avoid **indirect restrictions** on online advertising (e.g. requiring prior approval for each online ad)

Thank you for your attention !