Vertical Restraints in the Digital Era

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Structure

Overview
- What are the competition concerns with vertical restraints?
- How does competition law apply to vertical restraints?

Digital challenge: online retail & selective distribution
- What are manufacturers worried about?
- How have courts responded?
  - ECJ from *Pierre Fabre* (2011) to *Coty* (2017)
  - National Courts and National Competition Authorities
- Challenges for the Commission
Economic theory

Seller → Distributor

- Exclusive distribution over a territory
- Selected on the basis of quality/skills
- Retail price set by seller

ABSENT MARKET POWER

Vertical restraints are efficient:

- Sole distributor has incentives to increase sales
- Skilled distributor better at marketing
- Price controls = retailer makes greater efforts to promote the product to sell it
Vertical restraints and competition law

Seller 1 and Seller 2 agree on a price and impose minimum price resale price maintenance (RPM) with distributors.

S1 and S2 agree on a price

S1 and S2 impose minimum price resale price maintenance (RPM) with distributors.
Vertical restraints and competition law 2

EXCLUSION

S1 obliges D1 and D2 to buy exclusively from S1

S2 foreclosed from the market

Delimitis (1991)
Vertical restraints and competition law 3

MARKET DISINTEGRATION

D1 and D2 forbidden from selling into each other’s territories

Consten & Grundig (1966)
Competition Law and Vertical Restraints

• Two key provisions
  • **Article 101 TFEU – object & effect approach**
    • **Economic theory teaches**: all vertical agreements should be assessed by effects-based analysis
      • Vertical restraints usually increase sales
      • Stimulate inter-brand competition
  • **EU Law**
    • Some object restrictions, e.g. resale price maintenance, selective distribution
  • **Regulation 330/2010 – Automatic Art 101(3) Exemption if**
    • Low market power (seller and buyer <30% market share)
    • Avoids black listed clauses (e.g. RPM, territorial restrictions)
Digital trends 2010-2020

**Economic trends**

- increased online sales (own websites, third party platforms (e.g. Amazon, Ebay))
- Branded goods manufacturers’ concerns: brand image online may be harmed; risk of counterfeiting; internet drives prices down

**Enforcement patterns**

- NCAs: 392 cases started $\rightarrow$ 257 decisions $\rightarrow$ 89 appealed
  - Price restrictions: 222
  - Selective distribution: 64
  - Exclusive distribution:
French NCA approach: Pierre Fabre

Cosmetics (20% market share)

Selective Distribution

• Through knowledge of the product
• Qualified pharmacist must be present
• Advise consumers on proper use
• De facto: banning online sales
  • NCA: restriction by object
Case C-439/09 Pierre Fabre

• Organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that:

1. resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion
   • On the facts: yes

2. that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use
   • On the facts no: PF seeking to protect the ‘prestigious image’ of the product is not a legitimate aim

3. that the criteria laid down do not go beyond what is necessary
Critical assessment

Pierre Fabre has a market share of 20%
  • Where is the harm to consumers if all other suppliers (80%) sell on the internet?

Three criteria test is in line with earlier case-law but
  • ECJ general claim that selective distribution is restrictive by object
    • Not consistent with earlier case-law

  • ECJ claim that ‘prestige’ is not a reason for selective distribution
    • Metro 1, Case 26/76: technically sophisticated products
    • Leclerc, Case T-88/92: luxury goods
Coty v Akzente: 3rd party platform ban
Your views

Is a third party platform ban imposed by a manufacturer to distributors in breach of Article 101(1)?

A. Yes

B. No
Coty v Parfümerie Akzente, C-230/16

• Same test as in Pierre Fabre, but different approach
  • resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion
    • Uncontroversial: retail outlets selected with objective standards

• the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use

• the criteria laid down do not go beyond what is necessary
Product characteristics

Principle
“having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly.” [28]

Overruling?
“it cannot be inferred from the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique that paragraph 46 thereof sought to establish a statement of principle according to which the preservation of a luxury image can no longer be such as to justify a restriction of competition, such as that which stems from the existence of a selective distribution network, in regard to all goods, including in particular luxury goods, and consequently alter the settled case-law of the Court, as set out in paragraphs 25 to 27 of the present judgment.” [35]
Proportionality

• **Akzente may**
  - Sell via its own internet platform
  - Sub-contract internet platform design to 3rd party

• **Akzente may not**
  - Sell via Amazo.de

• **Coty can monitor compliance**
  - Ensure that internet space = luxury image of the goods
  - More difficult with Amazon (no contract btw Coty and Amazon)

• **Agreement does not preclude all online sales**
  - Distributor online shop principal place where consumers buy
Application of Regulation 330/2010

• Coty’s and Akzente’s market shares below 30% (Article 3)
• Is the ban on 3rd part platforms black-listed? (Article 4)

• 4(b): the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services  
  • There is no such thing as a category of 3rd party platform purchasers

• 4(c): the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade  
  • Akzente may advertise its website on other websites or on search engines
Back in the German Court

**Article 101(1) – court fears there is a restriction of competition**

- Amazon platform can preserve the luxury image of the product – up to Akzente to specify how Amazon should display the goods
- In Germany 3rd party platforms are more popular among buyers than in other EU Member States

Even if use of selective distribution is OK for luxury goods, doubts arise as to whether a 3rd party platform ban is proportionate

**Regulation 330/2010 - fulfilled**

- ‘the platform ban does not regulate to whom the defendant may sell, only in what form it may do so’
Critical Assessment 1: Luxury

• What are luxury goods? Is this requirement needed under Article 101(1)?
  • **Sports shoes** (Asics, VI-Kart 13/15 (V))
  • **Food supplements of high quality** (Higher Regional Court Hamburg U 250/16)
    • Restricting selective sales to luxury goods or technically high-quality products, which are not based on the law, would bypass the fact that a selective distribution system may also be required for other high-quality or otherwise special products, for example through a range of services that complement and accompany the sale of goods to underline the value and / or specialty of the products towards the relevant customer base
  • **Chainsaws** (Stihl, French NCA)
    • Product safety justifies the use of selective distribution
The oddity of the luxury goods requirement

Article 101(1)

• Selective distribution only allowed if the goods in question require selection of retailers

• Ad hoc, incremental approach
  • Technical complexity (ECJ, 1977)
  • Luxury (GC, 1996)
  • Brand prestige (2018) Germany
  • Safety (2019) France

• Regulation 330/2010, Art 1(1)(e) selective distribution system means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria...
  o no qualitative selection
  o no requirement that goods of a specific type
Critical Assessment 2: what online limitations are allowed?

- **Stihl**: consumer may order chainsaws online but must collect at point of sale (Paris Court of Appeal 18 October 2019)
  - Restriction by object
  - Less restrictive options exist: (a) professional purchasers should be able to order online; (b) online safety videos

- **ASICS**: ban on use of price comparison websites
  - Restrictive by object
  - Price comparison websites do not affect the quality of the product adversely
  - Price comparison website: important for retailers to reach a wider audience of clients

- **Food supplements**: ban on sales on eBay
  - Lawful: customers rely on advice and information
  - Unclear how the same pre-sales quality can be secured on eBay
Takeaways

• Selective distribution operates under two competition law regimes

  • Market shares below 30% = Regulation 330/2010
    • Applies to all goods
    • Allows some online restrictions (e.g. 3rd party platform bans)

  • Market shares above 30% = ECJ case law
    • Applies only to some goods (unclear which)
    • Forbids most online sales restrictions, but unclear which ones
Future Perspectives

Review of Regulation 330/2010 ongoing
• Evaluation of the Vertical Block Exemption Regulation SWD(2020) 173 final

“Vertical Guidelines are not well adapted to the market developments that took place since the adoption of the rules, notably the growth of online sales and of new market players such as online platforms.”