Online sales of branded goods: what restrictions are permissible?

October 2015

The internet has revolutionised the way we buy branded goods. It has influenced everything from how we decide which goods to buy, to how we purchase and pay for them. However, the speed and extent of the advances in online selling is posing a number of issues when it comes to ensuring that online marketplaces remain competitive to the benefit of consumers, retailers and brand owners alike.

Highlighting that online markets are a "major priority", the Competition and Markets Authority ("CMA") is currently conducting an in-depth research project analysing how branded and luxury goods makers may be restricting access to online sales platforms. The European Commission is also conducting a sector inquiry into limitations on cross-border online selling in a number of branded sectors including clothing, shoes and electronics.

Both initiatives are designed to identify key areas of concern and have the potential to lead to greater antitrust enforcement. Clearly, the competition law spotlight is focused intently on the online sector.

Online sales guidance

Understandably, brand owners are motivated to protect their valuable intellectual property, often by seeking to retain some control over the distribution chain and how online technologies are utilised.

However, EU and UK competition law imposes strict limitations on the extent to which suppliers can restrict a distributor’s behaviour. These limitations are set out in the Verticals Block Exemption and the associated Guidelines.

Every distributor must, in principle, be allowed to use the internet to sell products – even if this results in a distributor selling to consumers outside of its allocated territory.

Maintaining the image of a prestigious brand is not a sufficient justification for preventing online sales.

In the context of internet selling, online sales are generally considered to be a form of ‘passive selling’ as a company’s website is easily accessible to consumers without any direct approach by the distributor. Therefore, any absolute restriction on a distributor’s ability to sell via the internet risks infringing competition law.

The following actions are likely to be deemed ‘hard-core’ restrictions of competition and are strictly prohibited:

- preventing customers located in other territories from accessing a distributor’s website or automatically rerouting customers to another distributor’s website in the ‘correct’ territory (however requiring that the distributor includes additional links to other distributors’ or the brand owner’s website is acceptable);
- requiring that transactions are terminated if the customer’s credit card details reveal that they are in a different territory;
- agreeing that distributors must limit the proportion of overall sales made over the internet (however it is permissible to require a certain level of sales to be made offline in a ‘bricks and mortar’ shop); and
- charging a distributor a higher price (or giving a lower discount) for products it sells online as compared to those it sells offline. However, this can be acceptable if there is an adequate justification such as the increased costs to the brand owner caused by an increased risk of complaints associated with online sales.

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Competition authorities are also sensitive with respect to other measures that directly or indirectly limit the possibility to sell over the internet. For example, if a distributor is allowed to use copyrighted material such as product photos for printed catalogues, a restriction to use this material for online catalogues is likely to be considered as an indirect restriction of internet sales.

There are however certain ‘active’ sales restrictions that can be applied to online sales (typically in selective or exclusive distribution arrangements) without which certain retailers (such as online only sellers) could ‘free-ride’ on the efforts of the brand owner and those retailers with a more balanced sales portfolio. While these restrictions still require some ‘effects’ analysis (e.g. relating to market shares and duration) these restrictions are more likely to be acceptable:

- restricting ‘active’ online advertising such as unsolicited emails, territory based banners on third party websites, or paying search engines to display adverts to users in specific territories;
- setting quality standards for online selling equivalent to those imposed for offline selling (that are proportionate to the nature of the product), e.g. requiring provision of an after-sales service, or protecting the terms and conditions of sale even if a third party platform is used; and
- requiring that a distributor in a selective distribution system has at least one bricks and mortar store.

However, such is the pace of change in the online sector; it is not always easy to reconcile the Guidelines and associated case law with modern technologies and marketplaces. There are a number of practices which currently fall within ‘grey areas’ and require detailed consideration on a case by case basis.

Online third party platforms

The Guidelines state that where a distributor’s website is hosted by a third party platform, a brand owner may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform.

This has been widely interpreted as effectively allowing brand owners to prevent retailers from selling on third party sites such as eBay. However, recent case developments in Germany have cast doubt of whether such practices are acceptable.

On 27 August 2015, the Bundeskartellamt found that Asics’ selective distribution system, which prevented sales of its shoes via eBay, Amazon and price comparison websites, infringed competition law. Specifically, the policy prohibitively restricted small and medium sized dealers who rely on online marketplaces to reach consumers.

Cases such as Asics pose difficulties for companies seeking to operate a coherent compliance policy throughout the EU. Foreseeably, uncertainty created by varying interpretations of the law may lead to a ‘chilling effect’ on otherwise acceptable business strategies.

What is clear is that brand owners need to be careful when implementing online sales restrictions, particularly where its distributors are considerably smaller companies, or where they are operating in the context of a selective distribution system.

Online restrictions - case examples

- **Pierre Fabre** (cosmetics) – French decision against a requirement that a pharmacist be present for sales of cosmetics (effectively preventing online sales).
- **Roma Medical Aids** (mobile scooters) – UK decision against the circulation of a message specifying that certain products could be sold “in-store” only. The case also involved resale price maintenance and online price parity clauses.
- **Bang & Olufsen** (electronics) – French infringement decision relating to the prevention of “distance selling” in a selective distribution system.
- **Gardena** (garden products) – German infringement decision in which Gardena offered a staggered trade discount to retailers based on which sales channel they used (online vs offline).

Other hot topics

Online sales are posing a multitude of contentious questions with regards the commercial relations between brand owners and retailers. While too complex and varied to cover in detail in this briefing, some of the key areas for concern include:

- **Price parity or “MFN” clauses**: these have featured in both the OFT’s investigation of Amazon Marketplace and the CMA’s market investigation of the private motor insurance market. In private motor insurance the CMA concluded that “wide” MFN’s (as between different price comparison websites) were prohibited, but “narrow” MFN’s (between a price comparison website and the insurance provider’s own website) were allowed. Elsewhere in the EU, there have been a number of settlements involving hotel booking sites which also appear to promote a “narrow” MFN approach. However, the picture is not consistent and there are conflicting decisions. Careful contextual analysis is therefore required to assess the validity of such clauses.
- **Price ceilings**: while initially appearing to benefit consumers by ensuring that resale prices do not increase above a certain level, in certain circumstances price ceilings can become price floors, deterring lower-priced entry to a market and leading to market coordination.

1 See also Sennheiser which confirmed a brand owner cannot restrict sales via a third party platform (Amazon Marketplace) where that third party is also an authorised dealer as part of a selective distribution network.

2 It is notable that following the OFT’s investigation into Amazon price parity requirements, Amazon removed this clause from agreements across the EU, regardless of where concerns had been raised.
Resale Price Maintenance/Internet Minimum Advertising Price: the practice of brand owners directly or indirectly setting distributors’ resale prices (whether relating to all sales or online advertising) is strictly prohibited. However, where a reseller is merely acting as a genuine agent of the brand owner (rather than a distributor) such practices are generally not prohibited. Correctly establishing the distinction between a genuine agent and a distributor is particularly complex in an online context and has been extensively debated in the Skyscanner, Booking.com and Expedia cases.

Information exchange: price comparison websites have lead to a considerable increase of price transparency on a multitude of markets. However, the fact that the information on price comparison websites is publically available does not necessarily mean that it can be freely forwarded from one competitor to another. Regular screening, summarising and circulating of the results of price comparison websites among competitors remains problematic.

Conclusions
As online marketplaces continue to innovate there will be increased tension between existing guidance and case law, and contemporary business practices. Given that there are already a number of grey areas and in light of the competition authorities’ focus on the online retail space, brand owners need to properly assess the risks around reselling restrictions in the context of their distribution arrangements.