Competition issues in Online Retailing

Josep M. CARPI BADIA
Deputy Head of Unit
COMP/E2 (Antitrust: Consumer Goods, Basic Industries and Manufacturing)
12 March 2014
Outline

1. EU competition rules on anticompetitive agreements
2. Main features of the EU regime on supply and distribution agreements
3. Online sales restrictions (hardcore and non-hardcore)
4. Case Study (1): Pierre Fabre
5. Case Study (2): e-Books
6. Case Study (3): Hotel Bookings
EU Competition Rules on Anticompetitive Agreements
Article 101 TFEU addresses agreements between firms which are independent from each other.

Art. 101(1) prohibits agreements that have as their *object* or *effect* to restrict or distort competition.

Art. 101(3) declares the prohibition inapplicable if the agreement and its restrictions are indispensable to create efficiencies which benefit consumers, without eliminating competition.

**Effects based approach**: overall outcome for competition and consumers determines assessment.

---

*Article 101 (ex Article 81 TEC)*

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   — any agreement or category of agreements between undertakings,
   — any decision or category of decisions by associations of undertakings,
   — any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
Restrictions by object

Agreements that have as their object to restrict competition are considered serious restrictions of competition

E.g price fixing cartels and RPM

Hardcore restrictions:

- Presumption of negative effects under Article 101(1)
- Presumption that it is unlikely that the conditions of Art 101(3) are fulfilled

This does not entirely exclude individual exemption in case of convincing evidence of likely efficiencies, but highly unlikely

The order of bringing forward evidence / showing effects is reversed

- First, likely efficiencies need to be shown by the defendant
- Before the likely negative effects are shown by the authority/plaintiff
Restrictions by effect

Agreements that have as their effect to restrict competition
Authority/plaintiff must show likely negative effects under Article 101(1)
Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established ("consumer welfare test")
“Safe harbour” created by Block Exemption Regulations (BER) for many types of agreements below certain market share thresholds
- Net positive balance presumed
- Exception: hardcore restrictions

Guidelines help to interpret BER and provide guidance on a case by case assessment of negative and positive effects where BER do not apply (above the market share thresholds)
Main features of the EU regime on supply and distribution agreements
In 2010 Commission adopted:

**Vertical Restraints Block Exemption Regulation** (Rec. 330/2010; VRBER)

**Vertical Restraints Guidelines** (VRGL)

Apply to vertical agreements...

Between two or more undertakings

Operating, for the purposes of the agreement, at a different level of the production or distribution chain

Concerning the conditions for the purchase and (re)sale of products

For all sectors (car specific rules remain)

Do not apply to vertical agreements between competitors

Except dual distribution at retail level
Basic features of the VRBER/GL

A wide block exemption with...
... a limited hardcore list (cf. article 4 VRBER), and...
... a limited list of excluded restrictions (cf. article 5 VRBER)

Safe harbour below 30% market share threshold (cf. article 3 VRBER)

No presumption of illegality above the market share threshold
If the conditions of the VRBR are respected, competition will generally force firms to offer best quality and prices to consumers and vertical restraints can be expected to lead to efficiencies. Commission and NCAs can still intervene by withdrawing the benefit of the VRBER and prohibit the restraints for the future if in an exceptional case consumers are harmed. Above 30% market share, individual assessment under Article 101
Hardcore Restrictions

Art. 4 BER: serious restrictions of competition which exclude the benefit of the block exemption for the whole agreement

   No severability

   While this does not exclude individual exemption in case of convincing evidence of likely efficiencies, it is unlikely (thus, high risk of fines)

Resale Price Maintenance (RPM)

   Agreeing fixed or minimum resale price

Sales restrictions on the buyer

Distinction: Hardcore restrictions / Excluded restrictions
Sales Restrictions

Sale restrictions: concern is market partitioning and price discrimination

In principle buyer/distributor should be free to resell where and to whom it wants:

Passive sales: sale in response to unsolicited requests

Passive sale restrictions are hardcore (main exception selective distribution)

Active sales: sale as a result of actively approaching customers

Active sale restrictions are hardcore except to protect areas where there is exclusive distribution
The Commission Notice on definition of the relevant market for the purposes of Community competition law provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues.

The VRGL deal with specific issues that arise in the context of vertical restraints.
The relevant **product market** comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use.

Markets are in general not defined by the form of distribution.

Cases where the supplier produces both original equipment and the repair or replacement parts for that equipment.

The relevant **geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighboring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

The geographic wholesale market is usually wider than the retail market.

Retail markets may be wider than the final consumers’ search area.
Online sales restrictions
VRBER and VRGL apply to agreements concerning both on- and offline sale and purchase of goods and services.

The VRBER Hardcore restrictions, in particular, apply to offline and online sales:

No new hardcore restrictions

VRGL clarify and provide examples of what are hardcore online sale restrictions:

Clarification of how the distinction between active and passive sales applies to online sales (only relevant for exclusive distribution) and what are considered hardcore sales restrictions.
Hardcore Online Sale Restrictions

Once distributors are appointed, they should be free to have a website and engage in internet sales to allow consumers to benefit from the internet

*Confirmed by recent Pierre Fabre judgment*

Distributors should not be obliged to reroute customers depending on their IP address to other distributors' or the supplier's website

Distributors should not be obliged to terminate online purchase requests depending on the consumer's IP address

A distributor should not be obliged to pay more for the product if it intends to sell it online instead of offline
Non-Hardcore Online Sale Restrictions

Suppliers should be free to choose distributors /distribution format and prevent possible free riding

A supplier may decide not to sell to online-only distributors and require its appointed distributors to have one or more brick and mortar shops

A supplier may require equivalent conditions regarding response time/expertise of personnel etc. for both off- and online sales

A supplier may require its distributors not to use third party platforms

While not hardcore, all these restrictions can be addressed under the effects-based approach
Pierre Fabre judgment

CASE STUDY
Judgment of the Court of Justice of the EU of 13/10/2011 in Case C-439/09

Reference for a preliminary ruling from the Appeals Court of Paris

Background:

Action for annulment by Pierre Fabre Dermo-Cosmétique against a decision of 29 October 2008 of the French Competition Authority, regarding the ban imposed by Pierre Fabre (in its selective distribution contracts) on distributors which it previously chose to authorize, on the sale of its cosmetics and personal care products via the internet.
Products involved:
Cosmetics and personal care products, which are not classified as medicines

Market share:
In 2007, the Pierre Fabre group had 20% of the French market

Contested agreements:
Distribution contracts for various brands stipulating that sales must be made exclusively in a physical space, in which a qualified pharmacist must be present

Particular requirements excluded de facto all forms of selling by internet
Question raised by the national Court:

« Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article [Article 101(3) TFEU]? »
« Agreements constituting a selective distribution system [...] necessarily affect competition [...]. However, [...] there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution [are] not prohibited by Article 101(1) TFEU, to the extent that 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, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary. »

Judgment, cf. paras 39 to 41
« Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a **contractual clause** requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a **restriction by object** within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, **that clause is not objectively justified.** »

Judgment, cf. para 47
« [T]he block exemption [...] does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met. »

Judgment, cf. para 59
e-Books

CASE STUDY
Main Features:

Horizontal case

Concerted practice with the object of raising retail prices

Retail price MFN clause as a commitment device

Two Commitment Decisions:


Legal Assessment

The 5 publishers and Apple engaged in a concerted practice with the object of raising retail prices for e-books in the EEA above those of Amazon and/or of avoiding the arrival of such low prices in the first place.

Direct and indirect contacts

Retail price MFN clause contained in the agency agreements concluded between the publishers and Apple acted as a commitment device to force Amazon on the agency model.

Restriction of competition by object:
Publishers and Apple had the object of raising retail prices both in the US and in the EEA.
Commitments Publishers:
Termination of the relevant agency agreements
2 year cooling-off period
During cooling-off period: discounting discretion for the retailer across the whole catalogue and up to the full aggregate commission
5 year prohibition on price MFN clauses

Commitments Apple:
Termination of agency agreements with the publishers
5 year prohibition on retail price MFN clauses
« While each separate publisher and each retailer of e-books are free to choose the type of business relationship they prefer, any form of collusion to restrict or eliminate competition is simply unacceptable. The commitments proposed by Apple and the four publishers will restore normal competitive conditions in this new and fast-moving market, to the benefit of the buyers and readers of e-books. »

Joaquín Almunia
EU Commission Vice-President in charge of Competition Policy
CASE STUDY

Hotel Bookings

CASE STUDY
Online hotel portal HRS's 'best price' clause violates competition law – Proceedings also initiated against other hotel portals

Date of issue: 20.12.2013

Bonn, 20 December 2013: Today the Bundeskartellamt prohibited HRS from continuing to apply its 'best price' clause (most favoured nation clause) and ordered the company to delete it from its contracts and general terms and conditions by 1 March 2014 as far as the clause affects hotels in Germany.

Andreas Mundt, President of the Bundeskartellamt: "Only at first view do most favoured customer clauses used by online booking portals seem to benefit consumers. Ultimately the clauses prevent the offer of lower hotel prices elsewhere. Most favoured customer clauses thus restrict competition between existing online portals. Moreover, they make the market entry of new platforms considerably more difficult because they prevent new platforms from offering hotel rooms at lower prices. For these reasons we have now also initiated proceedings against the online hotel portals Booking and Expedia because of similar clauses in their hotel contracts."

The most favoured customer clauses in the contracts concluded between the HRS online platform and its hotel partners oblige the hotels to always offer their lowest room price, maximum room capacity and most favourable booking and cancellation conditions available on the Internet also via the HRS portal. Since March 2012 the hotels are even prohibited from offering guests better conditions if they book directly at the hotel’s reception desk.

HRS may file an appeal against the order with the Düsseldorf Higher Regional Court and apply for interim relief against the immediate enforceability of the order. The proceedings against Booking and Expedia were initiated because the contracts concluded by these companies with hotel partners contain similar clauses.

Hotel online booking: Decision to accept commitments to remove certain discounting restrictions for Online Travel Agents

31 January 2014

OFT1514dec
**German Case**
Prohibition decision of the Bundeskartellamt of December 2013

Complaint by a small hotel against HRS (a large Online Travel Agent or OTA)

Focus: parity clauses

Investigated clauses: parity clauses on prices, conditions for bookings, cancellations and room availability imposed by HRS (and possibly other OTAs) on Hotels

**UK Case**
Commitments Decision of the OFT of 31 January 2014

Complaint by a small OTA against Bookings, Expedia and Intercontinental Hotels Group

Focus: resale price maintenance (RPM)

Investigated clauses: discounting restrictions placed by Intercontinental Hotel Group (and possibly by other hotels) on Booking and Expedia (not excluding existence of parity clauses imposed by OTAs)
German Case

Product market:
Hotel portals combining the functionalities of searching, comparing and booking of hotel rooms in one hand

Geographic market:
Not larger than national

UK Case

Product market:
Online supply of Room-Only hotel accommodation through OTA and Hotel websites
Left open: inclusion of offline hotel bookings

Geographic market:
Likely to be at least national (left open)
Possible competitive harm of parity clauses and RPM

Hinder competition among OTAs for lower room prices to end customers
Hinder competition among OTAs for lower commissions to hotels
Hinder market entry of new portals offering (e.g. innovative services)
Reduce competition among hotels