



DISTRIBUTION PROBLEMS FOR US COMPANIES IN EUROPE AND HOW TO AVOID THEM

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Robert Bell is head of the EU & UK competition team at Bryan Cave with over 20 years of experience advising on complex competition and regulatory matters involving some of the leading cases before the Competition and Markets Authority, the European Commission and UK and European Courts.

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Agenda

- Competition law reminder
- The importance of compliance
- Resale pricing
- Geo-blocking
- Territorial restrictions
- Non-compete obligations
- Online market places
- Most favoured nation clauses

Competition Law Reminder

- EU competition law, the two main prohibitions:
 - Prohibition of anti-competitive agreements (Article 101 TFEU)
 - Prohibition of the abuse of dominance (Article 102 TFEU)
- UK and other national laws
- US antitrust law - The Sherman Act 1890

The importance of compliance

- Agreements found invalid
- Regulatory fines
- Private and collective damages actions
- Possible criminal sanctions
- Bad publicity

Resale Prices



Resale Prices

- Resale Prices
 - A wide reaching prohibition
 - Maximum prices
 - Recommended prices
 - Linking bonuses to prices
 - Guidance from the legislation – fixing maximum discounts, conditional rebates, linking to competitor pricing, threats, penalties and delays and combining any of these with a price monitoring system.
 - Price tracking – The Tobacco case
- Exchanging information
 - What information can you exchange
 - What should you avoid?
 - Using US style Minimum Advertised Price policies

Online sales & geo-blocking



Online sales & geo-blocking

- What is the basic position for online sales and distribution?
- Pierre Fabre Dermo-Cosmetique case
- Active vs passive sales distinction
- But what sort of online selling can be restricted?

Online sales & geo-blocking

- What is geo-blocking?
- Distinction between unilateral and contractual geo-blocking
- February 2017 E-commerce inquiry
 - Steam, the cloud computer games retailer
 - Hotels and tour operators
- Proposed EU legislation

Territorial restrictions



Territorial restrictions

- A common issue in vertical distribution systems
- The general ban on allocating customers, markets and territories
- Exclusive distribution – the exception to the rule
- Combining selective distribution with territorial exclusivity (exclusive distribution)

Non-compete obligations

- There are other EU competition offences that are often overlooked, known in the legislation as ‘excluded restrictions’
 - Non-compete obligations
 - Post-term non-compete obligations
 - Preventing resellers from buying products from a specific competing supplier

Online Marketplaces



Online Marketplaces

- Established commercial position was that under paragraph 54 of the Guidelines on Vertical Restraints 2010:
 - *“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 distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.”*
- EU Commission Communication on Online Platforms and the Digital Single Market, 25 May 2016
- French and German cases against Adidas.
- German Casio case
- BMW and Carwow

Most Favoured Nation Clauses



Most Favoured Nation Clauses

- ‘Price parity’ or ‘best price’ clauses.
- One party promises another to always offer its best rates or terms for a product or service.
- Wide vs narrow MFN
- Are they anti-competitive?
- US vs EU contrast

Most Favoured Nation Clauses

- The regulator's battleground = online hotel booking
- Expedia and Booking.com
- French Macron Act
- July 2016 questionnaire
- December 2016 update

Most Favoured Nation Clauses

- UK private motor insurance industry
- Remedial measure – only ‘narrow’ MFN clauses allowed
- What is the effect on other industries? – Online auction services investigated
- The effect of market power?

Conclusion

- Resale pricing
- Online sales and geo-blocking
- Territorial restrictions
- Non-compete obligations
- Online market places
- Most favoured nation clauses

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- Anti-competitive Agreements:**
 - Title:** COMBATIVE FRENCH PLAINTIFF OBTAINS EXTENDED JURISDICTION OVER CROSS-BORDER ONLINE MARKETPLACE SALES
 - Text:** On 21 December 2016, the European Court of Justice (ECJ) handed down an interesting interpretation of jurisdictional issues in cross-border competition law and online sales. The ECJ ruled that courts of a Member State have jurisdiction to hear an action to establish liability for infringement of a prohibition on price-fixing agreements between undertakings based on sales made by those undertakings to consumers in another Member State.
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