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Brand Owners and the Commission E-Commerce Inquiry

Kai Schmidt-Hern (Lubberger Lehment) · Saturday, July 8th, 2017



On June 14, 2017, the Commission opened investigations against Nike, Universal Studios and Sanrio (“Hello Kitty”) for their distribution and licensing practices. The Commission suspects that the companies are containing online and cross-border sales by their dealers and licensees and thereby violate EU Competition law. These are probably the most prominent investigations into the distribution and licensing practices of companies the Commission has initiated recently.

The investigations arise from the Commission’s E-commerce sector inquiry of 2015 – 2016. The results were presented in a [Final Report](#) on 10 May 2017. With the inquiry, the Commission wants to ensure better access to goods and services via e-commerce across the EU. On the basis of the inquiry, the Commission sets its priorities when it comes to enforcing EU competition law. So the Final Report provides some guidance as to whether brand owners should be worried by the Commission’s investigations of Nike’s, Universal’s and Sanrio’s practices.

In the Final Report, the Commission states that manufacturers increasingly seek to control the distribution of their products with the aim of preserving quality and price. According to the Commission, manufacturers thereby respond to the increase of price competition and price transparency brought about by E-commerce. The means of better controlling distribution are, among others, direct sales by manufacturers to customers via online-shops, selective distribution and vertical restraints such as restrictions on pricing, platform bans and the exclusion of pure online traders by imposing brick and mortar requirements. 20 % of manufacturers who responded to the sector inquiry have, as a reaction to the growth of e-commerce in the last 10 years, introduced selective distribution systems, 40 % have introduced new criteria in their distribution agreements on how to sell and advertise online.

The Commission expressly acknowledges that brand image is an important factor in the competition between brands. There is no hint that the Commission questions the legitimacy of brand image as a concern. When it comes to restrictions aimed at preserving distribution quality – something closely linked to brand image – the Commission (still) seems to acknowledge that such restrictions can increase efficiency and inter brand competition.

In summary, these are the general guidelines following from the Final Report and the current law:

- To impose minimum prices on retailers selling online has not been and will not be an option: Immediate contractual restrictions on retailer's pricing are restrictions of competition by object pursuant to Art. 101(1) TFEU and hardcore restrictions according to Art. 4(a) of the Vertical Block Exemption Regulation ("VBER").
- To contractually restrict the territories into which a distributor may sell the goods is, in general, a "hardcore" restriction as well. One of a number of exceptions is the prohibition of active sales into territories exclusively attributed to another distributor.
- Selective distribution is exempted from the prohibition under Art. 101(1) TFEU by the VBER, unless the supplier's or the buyer's market share exceeds 30 %. Brick and mortar requirements as elements of selective distribution contracts are generally covered by the VBER as well. The Commission may withdraw the VBER's benefit in individual cases, should brick and mortar requirements have no apparent link to distribution quality or other efficiencies
- The Commission's preliminary view on bans of online marketplaces is that they should not be considered hardcore restrictions pursuant to the VBER. They do not restrict the effective use of the internet as a sales channel in general. The efficiencies resulting from such restrictions may, however, vary from one product to another. The Commission will of course look closely at the CJEU's ruling in the matter *Coty Germany C-230/16*. The High Court of Frankfurt has asked the Court whether a ban of third party platforms in a selective distribution agreement may be compatible with Art. 101(1) TFEU and whether it constitutes a hardcore restriction according to the VBER.

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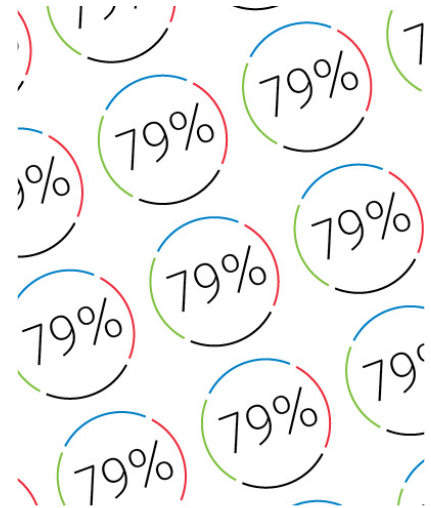
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