

E-Commerce of Healthcare Products in the EU

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HAUSFELD

The Hausfeld logo consists of the word "HAUSFELD" in a bold, green, serif font. Below the text is a solid dark blue horizontal bar.

Introduction (I)

- Growing importance of online sales (goods and services)
- Online sales turnover in the EU in 2015: 407.4 billion EUR; Forecast for 2016: 509.9 billion EUR (source: www.ecommerce-europe.eu)
- Percentage of people aged between 16 and 74 that have ordered goods or services over the internet in 2016: 55 %



Introduction (II)

Why would anyone want to restrict online sales?

- Protection of „brand image“
- Prevention of „free riding“
 - Free rider problem occurs when those who benefit from resources, goods, or services do not pay for them
 - Customers go to a brick and mortar store, get advice there and buy the product online at a cheaper price
 - The store owner bears the expense, the internet trader benefits
- Lower end customer prices (due to lower costs and/or price transparency) – need for manufacturer to lower prices

Introduction (III)

E-commerce = enforcement focus

- So far, mainly enforced by national competition authorities
- German Federal Cartel Office (FCO) and German courts particularly active
- European Commission announced a sector inquiry into the e-commerce sector on 6 May 2015, published preliminary report on 15 September 2016 and final report on 10 May 2017
- Enforcement activities by the European Commission expected



AGENDA

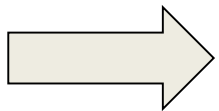
- Legal Background
- Sector Inquiry
 - Facts
 - Main Findings
 - Main Competition Concerns
 - Policy Conclusions
 - Investigations opened by the Commission
- Areas of Particular Interest



Legal Background (I)

Article 101(1) TFEU

“The following shall be prohibited as incompatible with the common 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.”



Covers horizontal and vertical agreements

Legal Background (II)

Art. 4 lit. b) (i) Vertical-BER

(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

Legal Background (III)

Active vs. Passive Sales

- Active Sales: Actively approaching individual customers
- Passive Sales: Passively fulfilling unsolicited orders

European Commission, Vertical Guidelines para. 52:

“In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor.”

Legal Background (IV)

ECJ, judgment of 13 October 2011, *Pierre Fabre*, Case C-439/09:

Selective distribution system for cosmetics in which all sales had to be made in the presence of a pharmacist

- a contractual clause “prohibiting de facto the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.”

Legal Background (V)

Therefore:

- In principle traders must be allowed to sell online, even if a region is exclusively allocated to a competitor.
- Forbidden:
 - Obligation to re-rout customers to other retailer's website; stopping credit-card transactions from customers located in another region
 - Agreement that the distributor shall limit its proportion of overall sales made over the internet
 - Punishing online sales / rewarding offline sales ("dual pricing")

Legal Background (VI)

Exceptions – is it ever possible to ban online sales?

- Guidelines, para. 60: “Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1). For example, a hardcore restriction may be **objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected.**”
- If national law prohibits online sales of certain products for health reasons, they can of course be prevented. If not, a case by case assessment has to be made.
- CIBA-case (FCO): Not objectively necessary to restrict online sales of contact lenses since less restrictive option available (e.g. requiring proof of a recent contact lens fitting)

Sector Inquiry - Facts

- Sector Inquiry was launched in May 2015
- Sector Inquiry covered digital content and consumer goods
- “Cosmetic and healthcare products” one of the product categories
- EU Commission received information from almost 1,900 entities; collected 8,000 distribution agreements
- 15 September 2016: EU Commission published 290 page preliminary report
- 10 May 2017: EU Commission published final report consisting of two documents, a short summary of 16 pages, and a 298 page Staff Working Document (largely a restatement of the Preliminary Report)

Sector Inquiry – Main Findings

- High degree of price transparency leading to an increase in price competition
- Increased direct retail activities by manufacturers (especially in the cosmetics and healthcare sector)
- Expansion of selective distribution
- More contractual sales restrictions
- Free riding (both ways)

Sector Inquiry – Main Competition Concerns (I)

- **No particular concerns** with regard to **selective distribution agreements**; exception: brick and mortar shop requirements without any apparent link to distribution quality and/or other potential efficiencies
- **Restrictions on selling and advertising online**
 - Pricing restrictions/recommendations:
 - Resale price maintenance = restriction of competition by object
 - Price recommendation = exempted by the VBER if the recommendation does not amount to a minimum or fixed resale price as a result of threats, pressure or incentives

Sector Inquiry – Main Competition Concerns (II)

- **Restrictions on selling and advertising online (continued)**
 - **Dual pricing:** prohibition to charge different wholesale prices for the same products to the same retailer depending on whether the products are intended to be sold online or offline
 - **Marketplace restrictions:** „the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered as hardcore restrictions”
 - [will be decided by the ECJ in C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*]
 - **Price Comparison Tools:** Absolute bans which are not linked to quality criteria potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales

Sector Inquiry – Main Competition Concerns (III)

- **Restrictions on selling and advertising online (continued)**
 - **Cross-border sales and advertising restrictions:** „agreements or concerted practices which are aimed at partitioning markets according to national borders [...], **in particular those which are aimed at preventing or restricting parallel exports**, have as their object the restriction of competition”
- **Data-collection and usage:** The exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are direct competitors

Sector Inquiry – Policy Conclusions

- The European Commission will
 - **target enforcement of the EU competition rules** at the most widespread business practices that have emerged or evolved as a result of the growth of e-commerce and that may negatively impact competition and cross-border trade and hence the functioning of a Digital Single Market;
 - **broaden the dialogue with national competition authorities** within the European competition network on e-commerce-related enforcement to contribute to a **consistent application of the EU competition rules** as regards e-commerce-related business practices.
- No need to review the VBER before its expiry in 2022

Sector Inquiry – Investigations opened by the Commission

- 2 February 2017: The European Commission opened three different investigations into online sales practices in the areas of consumer electronics, video games and hotel accommodation
- Consumer electronics: Retail price restrictions
- Video games: Geo-blocking
- Hotel accommodation: Discriminate between customers on the basis of their location

Areas of Particular Interest (I)

- Preventing online sales
- Resale price maintenance
- Prohibiting cross-border sales between Member States
- **Dual Pricing**
 - **More flexible approach?** - “Comments in relation to dual pricing point to the need for a more flexible approach to performance-related wholesale pricing. A more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline), value added services.”
 - Possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis

Areas of Particular Interest (II)

Dual Pricing

“[...] some comments also reveal a potential misunderstanding of the rules on pricing practices where the manufacturer sets a different (wholesale) price for the same product to the same (hybrid) retailer, depending on the resale channel through which the product is to be sold (offline or online) and practices where the manufacturer sets a different (wholesale) price for the same product to different retailers.

The Final Report clarifies that charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process. Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction under the VBER. “

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