CPI's Europe Column Presents:

The e-Commerce World after *Coty* – Competition Law Catch Up

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In recent years, as regards competition law, it is actually hard to find a more captivating topic than e-commerce. The internet has revolutionized shopping itself, making it easier and more accessible, but many would say competition law failed to keep up.

As *Pierre Fabre* and *Coty* led the way, commentators noticed that in the EU *on-line* sales restrictions are important as they generally work against the consumer, but they also work against cross border trade, and in turn the *Single European Market*. Internet bans normally exist to divide and protect local and national suppliers and distributors, thus leading to a restriction on the freedom of exchange of goods. Therefore, as confirmed in the recent *Guess* decision, modern distribution models that encourage cross-border trade cannot be limited unless the restrictions are proportional and based on legitimate reasons. Put another way, the internet sales channel should have a special status for which the freedom to use should be protected and upheld.

Let's take a closer look at several post-*Coty* cases in order to summarize the *status quo* of competition law enforcement in the e-commerce sphere since that landmark ruling.

Bicycles – Not Dangerous enough to Justify On-line Sale Restrictions

On July 1, 2019, the French Competition Authority ("FCA") issued a decision concerning a bicycle distribution company, Bikeurope, which had prohibited its authorized retailers from selling its bicycles online between 2007 and 2014.

In the general terms and conditions of sale, Bikeurope inserted provisions setting out that any online sales of its bicycles must be followed by a delivery to "an authorized place of sale" – which meant in the distributor's understanding that delivery must be made to the retailer's store. Regardless of the above, the general terms also provided for explicit prohibition of any online sales.

However, the definite *on-line* sales prohibition was not of greatest importance for the FCA, as it indicated that the store delivery requirement has the effect of distorting the whole online shopping concept.

The FCA underlined that the Internet is a useful tool for consumers as they can compare different offers and choose the most suitable one. The essence of online shopping and its main advantage manifests itself in the fact that one can purchase physical goods with direct-to-home delivery, or with delivery to another chosen (by the consumer) location.

The justifications put forward by Bikeurope, that *on-line* products and prices' presentation were allowed to enable "some research," cannot be accepted as such "research" has no value, particularly when in order to buy a product, the consumer is forced to make an additional effort to visit a specified physical (location) store.

As the FCA examined whether the restrictions imposed by Bikeurope were of an infringing nature, it took into consideration the factors indicated by the Court of Justice of the European Union ("CJEU") in the *Pierre Fabre* and *Coty* cases. First of all, the FCA analyzed whether it is necessary to restrict *on-line* distribution in order to preserve product quality and ensure its proper use. Second, the FCA analyzed whether those objectives are not already satisfied by national laws governing admission to the re-sale trade or the sale conditions. Third, the FCA verified the proportionality of such restriction.

The FCA went even a bit further and analyzed the economic and legal context of the restrictions as well as the actual operating conditions and market structure.

From the perspective of the consumer, for whom the FCA observed a bicycle purchase is infrequent, the absence of online distributors restricted competition in the sector, and led to an increase in prices. It was also taken into consideration that, during the infringement time, the number of bicycles sold online in France was systematically growing due to the growth in demand and popularity of the sport.

The FCA concluded that the ban imposed by Bikeurope was not proportional to any security concerns, and store delivery is not required by any national or European regulation concerning the products in question. Users' security could be ensured by a bicycle's pre-shipment inspection and attachment of the necessary assembly tools. Bikeurope claimed it required individual client consulting alongside its sales due to its high-quality brand and advanced business model, which should justify *on-line* sales prohibition. Conversely the FCA reasoned that this could all be readily achieved in a less restrictive way, e.g. by offering personalized maintenance services or by operating an info-line.

A Long "Drive" before Finding the "Sweet Spot"

Another interesting e-commerce case was recently considered by the UK Court of Appeal following previous assessments from the UK's Competition & Markets Authority ("CMA") and Competition Appeals Tribunal ("CAT"). The renowned golf-club manufacturer – Ping fought to overturn a £1.45 million fine over an online-sales ban. Ping attempted to protect its corporate and strategic ethos based on selling individualized clubs that are custom-made to the individual customer rather than being "off the rack."

Thus far Ping's arguments have not been successful. It seems that recent UK Court of Appeal's ruling on the case is a clear signal that blanket online bans by manufacturers on the sale of their products online are against the law.

Ping's appeal aimed to show that its policy of allowing only authorized retailers to sell its clubs, and mainly in-store only, has a pro-competitive aim and market effects. Therefore, any anticompetitive impact is objectively justified. Ping claimed that that the CMA failed: (i) to take account the ban's legitimate objective of encouraging custom fitting; (ii) factor in that the ban was part of a pro-competitive "selective distribution" system; and (iii) prove that the harm arising out of the policy was serious enough to conclude a "by-object" finding, which should instead be reserved for hardcore cartels and price-fixing offences.

The CMA and subsequently the CAT and the UK Court of Appeal noted that while the promotion of custom fitting was a legitimate goal, the ban not only hindered shoppers from buying clubs outside their local area and comparing prices, but also inherently restricted the retailers' ability to make sales via an important sales channel. The CAT held that the ban was unnecessary and that when applying the correct legal standard, Ping's policy revealed a "sufficient degree of harm to competition."

While Ping argued that the Coty ruling shows that a legitimate commercial aim can justify an Internet sales ban, to some extent, and that not all online-sales bans are "by-object" infringements, the CAT ruled that it is important to make a distinction as the Ping case wasn't the same as that of *Coty*, whose restriction hadn't placed any "significant limitation on retailers' ability to sell to consumers over the Internet" and therefore didn't cause sufficient harm to the competition.

After all, this boils down to determining whether the *per se* rule can be automatically applied to an Internet sales ban (i.e. is any on-line sales ban automatically illegal and anti-

competitive) or could it be justified in theory by special circumstances, and therefore should the presence of a pro-competitive aim and effects form part of an objective assessment. From Ping's point of view such balancing exercise must always be carried out before concluding a "by-object" finding. After the recent ruling we do know that this argument was not exactly a "hole-in-one" shot for Ping.

Ban on the Advertisement Campaigns – Infringement by Object

Not only an online sales ban can be problematic. In the recent *Guess* case decision (with a €40 million fine in the background), the European Commission questioned the selective distribution organization model, geo-blocking and trademark-use restrictions.

In its final e-commerce report of 2017, the Commission noted that as online sales were developing manufacturers started to make greater use of selective distribution systems, where the products can only be sold by pre-selected authorized sellers to preserve brand quality, as well as increased use of contractual restrictions to better control product distribution.

Guess operated a complex distribution network that covered different EEA countries and different levels of distribution including exclusive distributors, mono-brand retailers and multi-brand retailers. In its distribution agreements and sales terms, Guess inserted a number of restrictions. The agreements with their authorized distributors required each distributor to obtain Guess' written approval before carrying out any advertising campaigns or other promotional activities but the company systematically rejected all such requests. Manufacture *de facto* prohibited any brand names or trademarks used as keywords in Google AdWords for online advertising.

The Commission regarded such behavior as a "by object" restriction, stating that firstly the manufacturer's main purpose was to guarantee visibility on the Internet only of its own website and secondly, to prevent an increase in Google advertising costs which would be a natural consequence of distributors making use of these advertising means.

The commission also concluded that Guess restricted cross-border sales to end-users as each authorized distributor was only permitted to sell Guess products within its own allocated territory. It was particularly emphasized that the restrictions were aimed at both active and passive sales as neither advertising, nor sales were allowed, outside the allocated territory.

Shopping Platform's Dual Role

When an entity has a dual role as a platform, i.e. it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers, the entity cannot favor its own online store in relation to the sales activity conducted by other sellers. The two most highlighted cases in this regard are Amazon (currently under investigation of the European Commission and several other national competition authorities) as well as Google receiving a penalty of € 2.4 billion.

Other shopping platforms are also under the national competition authorities' scrutiny, as for instance, the currently ongoing proceeding against Allegro in Poland.

Allegro is by far the most popular online shopping platform in Poland. Research conducted at the request of the Polish Competition Authority ("PCA") shows that when buying a new item on a trading platform – 79 percent of consumers use Allegro. For some entrepreneurs, the option of selling on Allegro may be the only way to reach a wide range of customers.

PCA suspects that by using its significant market power, Allegro favored its own – Official Allegro Store.

First, in order to better position and display its own offers, the company was able to use information on the platform's operation, including the relevancy algorithm, which was unavailable to other sellers. Secondly, some sales or promotional functions were only available to the Allegro Official Store, and other sellers were not able to use them. PCA highlighted as an example a search suggestion system. When the consumer entered the product name in the search engine, an automatic recommendation led to the Official Allegro Store. The platform owner also had the option to exclusively use the special promotional banners that increased the traffic of its own offers on the platform.

Consequently, the products of independent online stores may have been less visible on the platform compared to Allegro's own offers and as the result may have been less frequently chosen by shoppers.

The problem is not – as the PCA emphasized – the sales algorithms or data collection itself*: We only state that Allegro's own store should operate under the same conditions as any other seller on the platform.*

Conclusions

There is no doubt that the *Coty* and *Pierre Fabre* rulings and their aftermath shed some light on the competition law enforcement in the e-commerce sector. To sum up the current status quo we note the following:

- Subjective convictions of the producer / distributor about the need to ensure customer safety (even those claimed to be in the best interest of customers) will not be enough to impose on-line restrictions. Local product safety laws are of great importance and should be verified before any restriction is put in place;
- Blanket online-retail bans will, in most cases, attract competition authorities' attention regardless of the outcome of the Ping case. The question would be still the same - whether such ban is ever really necessary or proportionate to restrict on-line distribution in order to preserve product quality and ensure its proper use;
- Even partial on-line restrictions if they consist in limiting the possibility of running the advertising campaigns or other promotional activities when consequently forbidden by the distribution network organizer can be considered as "by object" infringement;
- Favoring one's own products by shopping platform operators is fraught with risk – a fair and non-discriminatory rules should be available to all platform users.

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