

Vertical Restraints : e-commerce and competition

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Introduction

- In the debate around the revision of the regulation 2790/1999 and the guidelines, two topics are particularly discussed :
 - RPM (after Leegin) : cf. Massimo Motta's presentation.
 - E-commerce
- The french competition authority has been involved in many cases regarding e-commerce
- The solutions adopted are close to some of those considered by the Commission.

E-commerce and distribution (1)

- Retail sector in France : heavily regulated
 - Barriers to entry through regulatory constraints (a bit less since the 2008 law « LME »);
 - Relations between producers and retailers also regulated;
 - Opening of new stores should be authorised by a special commission, that involves representatives of incumbents.
- This is true for « brick and mortar » stores, not for e-commerce.
- Competition authorities are in general favorable to e-commerce, because it intensifies competition in a regulated sector.

E-commerce and distribution (2)

- Many retail networks are selective distribution networks.
- Producers often require a number of conditions in order to allow a retailer to sell their products and to be a member of the network :
 - Commercial services;
 - Before sale : demonstration of the products;
 - After sale services.

Restriction to competition

- Selective distribution networks have both anti and pro-competitive effects:
- Anticompetitive effects :
 - Selective distribution limits the number of sellers able to compete together, either through price competition or through other dimensions : the level of service may be +/- imposed by the producer.
 - Reduces intrabrand price competition.
- Procompetitive effects (efficiency gains) , among which
 - Better service;
 - Solution to the free riding problem
- Competition authorities often take into account the intensity of interbrand competition in order to assess the anti-competitive effects of selective retailing :
 - More interbrand competition should imply less anticompetitive effects of selective distribution.
- Selective distribution is not prohibited.

Vertical externalities

- Vertical externalities between retailers and producers :
 - the services provided by the retailers increase the demand and the willingness to pay of the consumers;
 - producers benefit from these services and give :
 - incentives to retailers to offer the services
 - protection against free riding.
 - Through different means : incentive contracts, selective retailing, exclusive territories...

Introduction of e-business

- Geographical relevant market : no longer restricted to the customer catchment area.
- Costs are different : more delivery costs, less « brick and mortar costs ».
- Changes the nature of price and non-price competition
 - Competition between brick and mortar and e-commerce : no head-on competition;
 - E-commerce offers services that are not (or less) provided by traditional retailers : customers opinions, selection of the products according to the profile of the customers, delivery...
 - And the reverse is also true.

Effects on services

- Possible effects on services :
 - If prices are lower at the e-business firm, then **free riding** on the services offered by the « brick and mortar » firms.
 - May result in less services provided by selected brick and mortar retailers.
 - May have anticompetitive effects : less incentives to provide services.

The general principles at work in the decisions of the authority

- When it comes in competition with a selective distribution network, exclusive sales on the internet may raise the issue concerning the costs borne for building the network and free riding.
- Online sales :
 - in one sense favorable to consumers (facilitate price competition),
 - may also constitute a source of competitive distortion between distributors (disappearance of services)

General principles (continued)

- Manufacturers are free to organise the distribution of their products (regulation 2790/1999, block exemption), subject to the limit that the organisation should not affect the functioning of the market.
- No text expressly provides for the possibility to reserve internet sales to the members of its network, but this solution appears compatible with the competition rules applying to vertical restraints.

General principles (continued)

- In the absence of parallel cumulative networks that could have foreclosure effects, and as long as the manufacturer has a market share below 30% (threshold of the Block Exemption), the supplier can exclude pure internet sellers from its network.
- An outright prohibition of internet sales cannot be justified absent exceptional circumstances.
- Restrictions to internet sales must be :
 - proportionate to the objective,
 - the requirements should be similar to those applying to brick and mortar shops.

Specific conditions

- Existence of a physical point of sale : the seller may reserve the possibility to sell products on the internet to members of its distribution network.
- Quality of the website : specific requirement on the way products are displayed, the use of information, logos, link to the supplier's website.
- In the « skin care products » case, some requirements were considered excessive by the authority :
 - example : « products should be sold on a website only dedicated to products sold on the advice of a pharmacist, which is not the case in a pharmacy.

Specific conditions (2)

- Sales through internet platforms :
 - Cosmetics case : some of the conditions regarding the quality of the website indirectly prevent distributors from using third-party platforms as intermediaries (eBay, Priceminister).
 - Problem of seller identification, product authenticity, counterfeit products.
- Advice and services to the customers : supplier may require some level of service (existence and quality of the hotline (cosmetics) , after sale services and demonstration in an outlet (hi-fi)).

Specific conditions (3)

- Advertising and brand use :
 - In the Festina case, the Council approved that non tariff advertising and advertising links should be approved by Festina.
 - Problem of the advertising through search engines (brand names as key words)
- Sales :
 - in the cosmetics case, some quantitative restrictions to sales (to avoid the development of a parallel market).
 - Some restrictions were considered excessive (recommendation to buy from a physical outlet, restrictions related to on-line sales)
 - Territorial restrictions.

Conclusion on e-commerce

- General principles [in France] regarding on line sales :
 - Bias in favor of e-commerce, partly to remove other barriers to entry in the distribution sector.
 - Problems arise mainly in the context of selective retailing.
 - Number of possibilities to find a way between requirements of the producer (free to choose the organisation of its retail network) and a higher intensity of competition at the retail level.