

Beyond *Coty*: Selective distribution systems and online sales

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E-Commerce in the UK

- Competition law and e-commerce
- UK third largest e-commerce market in the world 2016 (behind US and China)
- £586 bn 2017. Retail £68 bn.
- 77% buy online
- ONS data - internet sales as proportion of UK retail sales:
 - August 2019 18.2%
 - Nov 2018 21.5%
- Amazon 31% of UK online retail sales 2018 (Euromonitor)

The Issue

- Selective distribution systems - system of authorised sellers – manufacturer controls the retail environment
- Major issue – extent to which manufacturer can restrict online sales
- Recent case law at EU and UK level:
 - 230/16 *Coty*
 - *Ping v CMA* [2018] CAT 13 (Court of Appeal next month)
- What is the legal framework? What factors are important under the existing case law?
- What questions remain?

Selective Distribution Systems

- Legal definition under Reg 330/2010:
 - ‘selective distribution system’ means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;
- SDS enhances non-price competition
- Pros - protects brand image, controls experience and service, protects investments in brand (including B&M), free-riding
- Cons - higher prices, foreclosure of distributors, cumulative effects, collusion

Legal framework – general

- Reg 330/2010
 - Safe harbour (market shares)
 - Excluded if include “hard core” restrictions - territorial restrictions / restrictions on sales to end users / authorised distributors at any level
- Outside safe harbour, no infringement of Art 101(1) if:
 - Nature of goods justifies restriction
 - Criteria are qualitative and non-discriminatory (training, environment, after-sales)
 - Do not go beyond what is necessary
- Quantitative restrictions different
- Exemption under Art 101(3)

Online sales – some questions

- Where an SDS is permitted, what the implications for online sales?
- Can a SDS restrict/prohibit online sales by a member of the system?
- Can a SDS restrict/prohibit online sales by third parties?
- What conditions can be imposed?

Pierre Fabre (2011)

- Cosmetics and personal care products
- SDS restricted sales to a physical space with a qualified pharmacist
- In effect a ban on internet sales – not explicitly addressed in VBER
- Referred question – “is this hardcore?” – unpacked into 3 Qs (object, hardcore, exempt)

Pierre Fabre (2011)

- CoJ – object restriction unless objectively justified – must pursue “legitimate aim in a proportionate manner”
 - Advice not required for non-medicinal products
 - “prestigious image not a legitimate aim” (para 46)
- Hard core as restricted sales to customers who want to purchase online (not close to physical shop)
- Ban was not equivalent to a bricks and mortar requirement (exception to hard core exception)
- Note – extreme restriction on non-extreme product?

Coty (2017)

- Luxury cosmetics
- Originally conditions around environment and décor
- Revised to permit an electronic shop window – subject to conditions
- No recognisable engagement of non-authorized retailer
- Parfumerie Akzente continued to sell through amazon.de
- National court found for AK following PF
- Appeal and reference – Qs object and hardcore

Coty

- CoJ - SDS in principle permitted for luxury goods – para 46 of PF confined to facts
- Gave guidance on proportionality of marketplace ban to objective:
 - Restriction to authorised distributors coherent given objective of SDS
 - Controls online environment
 - Contributes to luxury image
 - Coty had no right of action against amazon
 - Not absolute (own online sales available and only “recognisable engagement”)

Coty

- Hardcore?
 - Exception (only) applies to restrictions on territory or customers
 - Third party platform customers not a defined group (contrast PF)
 - Terms allow advertisement on third party platforms / search engines

Coty

- AG Wahl:
 - Para 69 – SDS may be required for quality as well as luxury goods
 - paras 136-138 – self assessment under VBER undermined if an in depth effects assessment is required in specific market context. Generally manufacturer has “great freedom”
 - Reached conclusions “at this stage of the development of e-commerce”

Ping (2018)

- Golf clubs – online sales ban –
- Purpose was to promote custom fitting (“maximise”)
- CMA applied PF – aim was legitimate - issue was necessity / proportionality to the aim
- (Ping only brand to prevent online sales of custom fit and customers could purchase without custom fit)
- CMA carried out detailed proportionality assessment and found that ban was not proportionate/exempt:
 - made limited contribution to increasing custom fitting
 - appropriate alternatives available

Ping

- Reconceptualised “objective justification” as akin to ancillary restraints doctrine
 - Objectively necessary for non-price competition
 - “Relatively abstract” and no “balancing”
 - PF did not create “special object test” incorporating proportionality for SDS
 - CMA approach risked emptying 101(3) of content
 - Not sufficient that there was a plausible pro-competitive rationale – object remained to prohibit online sales (but forthcoming appeal)

Ping

- Tribunal – some increase in Ping’s custom fit rates but modest; not solely attributable to ban eg lead times
- Alternatives – eg stronger promotion of custom fitting, advice through “live chat” facility; sale of customised clubs using drop down boxes (see competitors)
- Tribunal rejected fear of “guessing” given scale of investment and position of other brands
- Alternatives workable - compare online advice from “virtual pharmacists” (contact lenses)
- Rejected concern that free riding would lead to collapse
- Ban not necessary for non-price competition to exist
- Exemption failed (not indispensable; not fair share)

Observations

- Contrast outright ban with restrictions on online sales (incl third party bans)
- Must link to restriction to justification for the SDS (brand, environment, ancillaries)
- Other restrictions to ensure quality experience
- What should necessity really look like after Ping?
- AG Wahl plus Ping = move to “bright line” model
 - Generally “great freedom” and self assessment under VBER - but outside VBER high threshold for necessity
 - Proportionality a hurdle not a nuanced test
 - Different in 101(3)

Third parties

- Coty limited to luxury goods?
- Consistency with macro policy?
- Price comparison tools –
 - ban a restriction on passive sales?
- Restrictions on use of brand names (domain names; google ads)

Guess (Dec 2018)

“The restrictive provisions and practices implemented by Guess formed part of an overall company strategy that was aimed at diverting online sales of Guess products towards Guess's own web site and restricting intra-brand competition among authorised distributors. Guess restricted authorised distributors in its selective distribution system from doing the following:
...using the Guess brand names and trademarks for the purposes of online search advertising;

(ban on bidding at auction for keyword search results on Google Adwords; only permitted for Guess itself ; increased cost for distributors and decreased visibility)

Other issues

- Territorial – (“geo-blocking”)
 - VABER permits restrictions on active sales where there is an exclusive distributor
 - Restriction on passive sales = hardcore
 - Likewise cross-supplies across borders
 - Brexit?
- MFNs
 - Reduce price competition but generally “effects”
- Differential prices for different channels? – hardcore (possible exemption if higher costs)

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