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The European Commission is currently working on the revision of the Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) EC to certain categories of vertical agreements ("vBER")[1] and the respective Guidelines[2] as the current rules will expire on May 31, 2010. A major issue in this revision is the question of how to deal with online commerce that has been developing at an ever-increasing speed since the making of the vBER in the late 1990s. Commissioner for Competition, Neelie Kroes, has shown a high interest in online commerce and in how to explore its full potential in the future. A roundtable of stakeholders organized by Commissioner Kroes and a public consultation revealed a number of controversial issues that the Commission will have to address in its revision work in 2009. In the following, we shed light on the antitrust law issues regarding selective distribution and online commerce as well as on the ongoing policy debate in this respect.

I. SELECTIVE DISTRIBUTION AND THE CURRENT EC RULES

In a selective distribution system the supplier sells its goods “only to distributors

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[1]OJ L336, 29.12.1999, pp. 1-25.

[2]Commission Notice, Guidelines on Vertical Restraints, OJ C291, 13.10.2000, pp. 1-44.

selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorized distributors."[3] Selective distribution is usually applied to products that are complex from a technical point of view and therefore need specific services by qualified staff. Furthermore, suppliers of brand products often choose selective distribution in order to protect and further the brand image. The latter is the case for a broad range of luxury products and prestige cosmetics.

Such agreements between suppliers and distributors are exempted by the vBER as provided for in article 81(1) EC, and therefore enjoy a safe harbor, as long as the market share of the supplier does not exceed 30 percent and no hardcore restrictions are included. However, in the event of negative effects on market access or on the competition in the market, the European Commission or the competent national authority can withdraw the exemption according to articles 6 and 7 of the vBER. The exemption for these vertical restraints and thus equally for selective distribution systems is justified as "for most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition." Furthermore, economic studies have shown that vertical agreements tend to be pro-competitive and increase efficiency.

A comprehensive number of judgments and decisions exist both at the European and national levels that have deemed selective distribution systems legitimate and have stressed their necessity. For branded and luxury products, the Court of First Instance Yves Saint Laurent judgment[4] clearly stated that, by using selective distribution, producers try to preserve their brand image by the means of a special way of presenting

[3] Commission Regulation (EC) No 2790/1999, Art. 1(d).

[4] Case T-19/92 *Groupement d'achat Edouard Leclerc v Commission of the European Communities* [1996] ECR Page II-01851.

products in combination with high quality services. The court drew the conclusion that "it therefore does not follow that the luxury image would remain intact if there were no selective distribution."[5] To reach these basic goals selective distribution agreements usually entail certain quality requirements imposed by the supplier on the authorized distributor. These range from requirements regarding the outlets' interior to the presence of trained staff and the availability of after-sales services or customer hotlines.

II. SELECTIVE DISTRIBUTION AND ONLINE COMMERCE

The rise of the internet as a distribution channel has had a considerable impact on business in some sectors. In fact, the internet has turned out to be an efficient means of commerce for various products such as books, CDs, and electronic equipment. So called "pure players"—retailers that only sell online and that do not maintain physical "brick and mortar" outlets and auction platforms—have dramatically changed certain markets within a few years. These changes, however, are ambiguous in their welfare effects for suppliers, distributors, and consumers and in particular pose difficulties for those supplying, distributing, and buying premium products. Among others,[6] one tricky question for suppliers is how to deal with online commerce in a selective distribution system.

First, the internet might not be a suitable distribution channel at all for certain products. For instance, websites cannot serve all human senses as nowadays—and likely so in the medium-term—only audio and video can be provided. As touching or smelling is not possible, a customer is limited in judgment when he or she compares products. This

[5] *Id*. ¶121.

[6] The main obstacles for online commerce are counterfeit products, online fraud, payment insecurities, and a general lack of consumer confidence in the internet as a distribution channel for certain products.

is even truer for luxury products as the high quality and the overall shopping experience is difficult to replicate on a website. Second, suppliers are concerned about the brand image of their products since low quality online presentation of products risks damaging the brand itself. For these reasons certain suppliers generally limit online sales of their products, require their authorized distributor to have a brick and mortar presence, or at least set high standards for websites. These requirements are equally intended to counter free-riding both of consumers and distributors on investments made by authorized distributors in their physical outlets.

III. THE ONGOING REVISION WORK OF THE EUROPEAN COMMISSION AND STAKEHOLDERS' POSITIONS

The public debate on the revision of the vertical restraints regime was kicked off in summer 2008 when eBay went public with its comprehensive policy paper on online commerce, the "Call for Action."[7] Next to an overhaul of intellectual property exhaustion rules and EC services and consumer provisions, eBay suggested changes to distribution rules—namely to the vBER. In a nutshell, the proposed amendments would limit companies' recourse to the safe harbor provisions by returning to a case-by-case approach for online commerce clauses with the suppliers having to justify their requirements. This said, the ultimate goal would be to prohibit clauses that exclude distribution by pure players and distribution via online auction platforms.

At first sight, the proposed modifications seem to be favorable for the consumer as they would mean, above all, lower prices. However, at the same time, these changes

[7] eBay, *Empowering Consumers by Promoting Access to the 21st Century Market—A Call for Action*, accessible at http://ec.europa.eu/competition/sectors/media/ebay_call_for_action.pdf, last visited on February 24, 2009.

threaten to undermine selective distribution as such, which could have negative consequences for the overall consumer welfare. Apart from the preservation of the brand image, an important reason for selective distribution is the avoidance of free-riding. An online shop that does not invest in a physical outlet, in the training of its personnel, and in additional exclusive services naturally has lower costs that might result in lower consumer prices. As a result, consumers use the advice and services offered in physical stores to make their choices and order online afterwards.

This, however, decreases the motivation for distributors with a brick and mortar presence to undertake investments in the above mentioned areas. As a result, European high streets would dramatically change their face since shops would have to reduce their service quality or disappear completely as any additional investment would not pay off. It makes sense for consumers to buy a book or a CD online as only little advice or after-sales service is needed, but for more complex or high quality products these are essential and part of the shopping experience as such. In the extreme you might ask whether the consumer's interest is best served if he spends less but risks buying the wrong product or one that does not appeal to him, not to speak of abandoned city centers and consequential job losses in retailing.

Of course, other stakeholders, namely the brands and luxury industries, have opposed these suggested changes. In their view, such a comprehensive overhaul of the current rules risks distorting a legal framework that works well and has, to date, been able to balance consumer and industry interests. Still, the revision provides the opportunity for clarifications in the current rules, not least regarding the handling of online commerce.

For instance, the Guidelines consider internet sales as passive sales as long as web presences do not expressly target consumers inside another distributor's territory.[8] This definition might require reconsidering as new technologies make it ever more possible for consumers to find online stores outside their country. Today's internet is much less passive than it used to be 10 years ago.

In any case, the Commission should seek to clarify the current rules rather than introducing new terms that might lead to more legal uncertainty and that could even potentially hinder the development of the online distribution channel. The debates, for example, suggest a sameness between physical store requirements and online shop requirements. It escapes anyone acquainted with selective distribution contracts what such a concept should look like and how it should work in practice. Of course, criteria for online shops should have the same aim as the ones for brick and mortar outlets but, in the end, the distribution channels are too different and therefore naturally require a different set of criteria.

The same goes for the introduction of a prohibition of discrimination against the use of online distribution. Needless to say, a supplier has no interest in ignoring a potential distribution channel and therefore would not impose too strict quality requirements that would make its use economically unviable. However, it needs to be acknowledged that today the internet might not be a suitable distribution channel for every product or, at least, only if high quality standards are met. Providing an opportunity for complaints on grounds of discrimination could open a Pandora's Box of legal proceedings which, as a consequence, might even make certain suppliers completely

[8] Guidelines on Vertical Restraints ¶51.

avoid the internet for distribution of their products—a result that would be neither in the consumers' nor e-retailers' interest.

IV. CONCLUSION

The European Commission faces tough choices in its preparation of the next vBER. As seen above, the stakes for all stakeholders are high and therefore many issues remain controversial. It needs to be stressed that antitrust rules should not favor a certain distribution channel to the detriment of another but should rather take a neutral stance. Furthermore, medium- and long-term consumer welfare—particularly in economically challenging times—should not be traded for short-term gains. It is paramount that the Commission carefully analyze the potential impacts of the new rules, taking into account all effects on the economy as a whole. The overall aim should be to allow for an effective interlink between high street shops and the online world, to make it possible to offer quality services with online and offline channels complementing each other to the advantage of the customer. In any case, the coming years will see further debates in this field as technological and legal developments constantly occur and consumer perceptions might equally evolve.