

Conférence du Jeune Barreau
12 February 2009

Competition Issues in Online Retail

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- **Legal Framework**
- **Internet Sales and Territory Allocation**
- **Internet Sales & Selective Distribution**
- **Online music sales**
- **Future Outlook**

*« Market integration is an additional goal of EC competition policy. Market integration enhances competition in the Community. **Companies should not be allowed to recreate private barriers between Member States when State barriers have been successfully abolished** »*

(Guidelines on Vertical Restraints, para 7)

- **Basic Structure**

- » Vertical agreements
- » Between non-competitors
- » Safe harbour: Supplier's market share (or buyer's market share in case of exclusive supply obligations) does not exceed **30 %**
- » No hard-core restrictions

- **Relevant Hardcore Restriction :**
 - » Restrictions of the territory into which, or the customers to whom, the reseller may sell
 - ⇒ No outright ban on internet sales except with objective justification (health & safety)

- **Exception :**
 - » Restriction of active sales in territories or customer groups exclusively allocated to another distributor

Active v. Passive Sales



Exclusive
Territory
Dealer C

Exclusive Territory
Dealer A

Non Exclusive
Territory
Dealer B

- Internet sales are “*in general*” considered passive sales
 - » Language used is not relevant as long as website/communication is not specifically targeted at customers in another sales territory
 - » Specific targeting :
 - Use of banners or links in pages of providers specifically available to exclusively allocated customers
 - Unsolicited e-mails to customers in allocated territory is active selling
 - » Unlawful restriction : requiring distributor to inform supplier prior to making internet sale (*Yamaha, 2003*)

Internet Sales and Selective Distribution

- **Relevant Hardcore Restrictions :**
 - » Restrictions of the territory into which, or the customers to whom, the distributor may sell
 - » Restrictions on active or passive sales to end users by the members of a selective distribution system operating at the retail level
- **Exceptions :**
 - » Restriction of active and passive sales to non authorized dealers by members of a selective distribution system
 - » Prohibitions for members of the system from operating out of an unauthorized place of establishment

- **Outright ban on internet sales by authorized dealers is hardcore restriction**
 - » *Yves Saint Laurent (2001)*
 - » *B & W (2002)*
 - » *Pierre Fabre Dermo-consmétique (2008)*
 - » *But : Cass. 10 October 2002*

- **Possibility to impose quality standards for internet sales**

- **Legitimate requirements :**
 - » Quality of website : e.g.,
 - requirement to create separate webpage,
 - requirements as to presentation of products on the webpage, ...
 - Requirements as to quality of translations
 - » Availability of hotline for personal advice

- **Exclusion of “pure players” to avoid free-riding**
 - ⇒ Restrict internet sales to authorized retailers with brick and mortar point of sale (*Festina, 2006*)
 - ⇒ Minimum one year of “brick & mortar” activity prior to internet sales (*PMC Distribution, 2008*)

- Digital sales : 15% of global music market (11% in 2006 – 0% in 2003)
- 500 legitimate digital music services
- 6 millions tracks
- New product offerings : downloads, streaming

- **Recital 29 of directive 2001/29/EC :**
 - » No copyright exhaustion in respect of online services
 - ⇒ Licensors can (and do) impose territorial restrictions in their licensing agreements

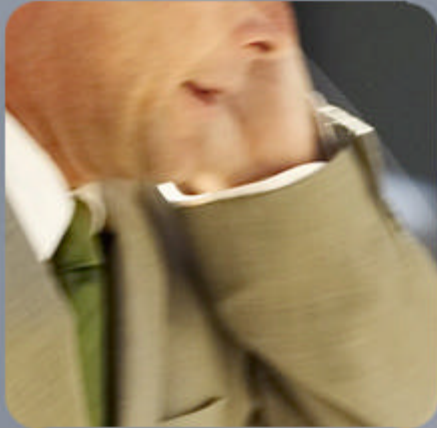
- **When do such territorial restrictions infringe article 81(1) EC-Treaty?**

- ***I-Tunes (2007) : Commission sent Statement of Objections to 4 major record companies and Apple :***
 - » Suspicion of agreements according to which consumers would only be entitled to purchase music from the iTunes store in their own country
 - ⇒ Different consumer pricing in the UK

- *ECJ, Tournier & Lucazeau*
- **CISAC (2008)** : territorial restrictions and exclusivity provisions in reciprocal representation agreements between collecting societies preventing them from offering licenses to commercial online users outside their domestic territory infringe article 81 (1) EC-Treaty.
 - » No justification for technical solutions allow remote monitoring of licensees even in other territories

- ***Simulcasting & webcasting (2003) :***
broadcasters can obtain multi-territory license from any collecting society in EEA

- **Review of Block Exemption Regulation & Vertical Guidelines (2010)**
 - » Clarification of the active v. passive sales distinction in the online world
 - When are internet sales « active »?
 - » Clarification of the application of selective distribution in the online world
 - Quid exclusion of the pure players?
- **How to foster EEA-wide licensing of content rights and how to apply the concept of exhaustion of IP rights in the online world?**



Thank You!