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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

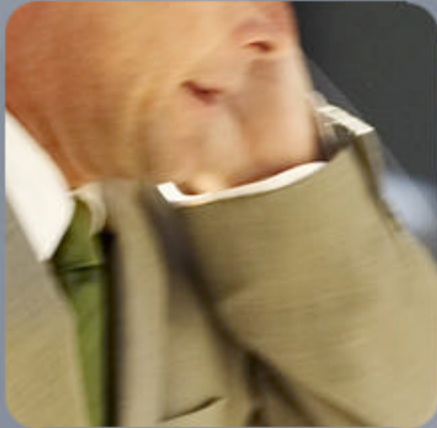
- **When do such territorial restrictions infringe article 81(1) EC-Treaty?**

- ***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!