

MME Compact: IP and Competition Law Switzerland

Restricting online sales in distribution agreements

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The competition rules applying on traditional "terrestrial" distribution models have been discussed over time in length. With ecommerce on its march, manufacturers - in particular of luxury products - now puzzle about to what extent they may constrain their distributors in promoting online sales. There is little Swiss case law addressing this issue. Time to give some guidance.

Competition rules on vertical agreements apply in the Internet

The Verticals Notice of 28 June 2010 issued by the Swiss Competition Commission ("WEKO"), even though of guiding nature only, leaves no doubt that the WEKO applies the rules on vertical agreements also in an online environment. The Vertical Notice was released shortly after the EU released the regulation on vertical agreements¹ with the aim to align Swiss rules to the ones applicable within the EU.

According to Swiss law, vertical agreements which harm competition are only prohibited, if (a) they substantially harm competition and may not be justified by economic efficiencies or (b) if they fully eliminate competition.

The Vertical Notice exempts vertical agreements from the application of the rules prohibiting anti-competitive agreements if the market shares of the involved parties does not exceed 30% and if the agreement does not contain any 'hardcore' restrictions (such as, for example, resale price maintenance).

Prohibition of internet sales qualifies as a restriction of passive sales

The Verticals Notice qualifies internet sales platforms principally as passive sale measures, unless the respective website specifically targets customers in an individual territory ('active sale'). Restrictions on passive sales are considered to be 'hardcore' restrictions of competition. Accordingly, **general prohibitions of online sales in distribution agreements are not legitimate.**²

But not only the prohibition of internet sales qualifies as an unlawful restriction on passive sales. The same applies to other contractual measures having a similar effect. Thus, the following constraints related to online sales are likely to be considered by the WEKO as unlawful "hard-core" restrictions:

- **Technical Blocking Measures:** Obligation of the distributor to make sure through technical means that its website may not be accessed by customers outside its territory.
- **Re-Routing:** Obligation of the distributor to implement a re-routing of certain customers to the website of the producer or of another distributor.
- **Customer restrictions:** Obligation of the distributor not to process sales where there are indi-

¹ Regulation (EG) 330/2010.

² See also order of WEKO re Elektrolux and V-Zug dated 11 July 2011.

cations (e.g. foreign credit cards) that the customer is located outside the distributor's territory.

- **No shipping information:** Prohibiting distributor to inform the customer on shipping costs / charges for deliveries outside its territory.
- **Currency restrictions:** Prohibiting distributor to provide the customer with pricing information in currencies from outside its territory.
- **Dual-Pricing:** Obligation of distributor to demand higher prices for products sold online.

Significant health- or safety considerations may justify prohibition of interne sales of specific products. Contrary to the EU regulations, the launch of a new product does not excuse restrictions on online sales for a limited period of time.

Nevertheless, the distributor may be subjected to certain restrictions related to the online sale of products. In particular, the following restrictions may, depending on factual circumstances, be compliant with competition rules:

- **Quality standards:** Obligation to make sure that the distributor's e-commerce site meets certain quality standards (designs, use of pictures, logos, trademarks, etc.). But quality standards may not effectively prohibit the sale via internet.
- **Language requirements:** Principally, the use of a language uncommon in the territory of the distributor could be considered as active sale and may be excluded.
- **Domain name:** The use of top-level-domains from other territories may be contractually prohibited.
- **Minimal turnover:** Distributor may be subject to minimal turnover requirements to be made with offline sales.

Selective distribution schemes

Selective distribution is a distribution method whereby a producer choses its distributors by reference to specific criteria. If these are objective qualitative criteria, necessitated by the characteristics of the products in questions, selective distribution schemes give a manufacturer more flexibility in limiting its distributors on online sales. Nevertheless, the above considerations principally also apply to selective distribution schemes: A **complete ban of online sales is principally considered as an - unlawful - prohibition of passive sales**. The same applies to contractual constraints having a similar effect (see list above).

However, due to the nature of selective distribution, a producer may set various requirements regarding the quality of the online shop to be met by a distributor. The concrete extent of allowed restrictions depends on the specific products in question. As a general guideline, the following sale limitations could be in compliance with competition rules:

- **Higher quality standards:** Manufacturers may subject the online sale of its distributor to higher quality standards than with regard to other distribution schemes
- **Quantity limitations:** Limitation as to the amount of goods sold online to an individual customers may be restricted
- **Website standards:** Producer may set quality standards regarding the presentation of the products on a website (e.g. re images, use of banners and advertisement, branding and CI of websites, technical specifications, assortment of goods, implementation of a service hotlines, etc.).
- **Domain name:** Producer may require that the domain name of the online shop contains the

name of the offline shop. Thereby, the producer may restrict the sale on online sale platforms of third parties (e.g. ebay, etc.).

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Please do not hesitate to contact us if you need further information. An examination of your distribution agreements will be customized to your particular needs and can be provided on a fixed price basis. We calculate with an average hourly rate of CHF 400.00.

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