

Newsletter

Newsletter on EU Law

Geo-blocking and the use of trademarks in online search: towards the completion of the European digital single market

Introduction

By decision published on 25 January 2019 ("**Decision**"), the European Commission ("**Commission**") fined a US clothing manufacturer ("**Group**") 80 million Euro as it imposed to its own retailers, from 2014 to 2017, a number of restrictions allegedly hindering cross-border sales and allowing to maintain artificially higher prices for its products sold in certain Member States of Eastern and Central Europe (decision in case AT.40428).¹ The original amount of the fine has been reduced by half as the Group cooperated with the Commission.

In particular, the Group sells clothing and accessories under numerous trademarks, operating a **selective distribution** system, where authorised retailers are chosen on the basis of qualitative criteria. In this context, the concerned distribution agreements allegedly restricted authorised retailers from:

- (i) using the Group's brand names and trademarks for the purposes of online search advertising (so-called **trademark bidding**);
- (ii) selling to consumers located outside the authorised retailers' allocated territories, thus creating the so-called **geo-blocking**;
- (iii) selling online without a **prior specific authorisation** by the Group, which had full discretion for this authorisation;
- (iv) **cross-selling** among authorised wholesalers and retailers; and
- (v) independently deciding on the **retail price** at which they sell the Group's products.

¹ Commission decision of 17 December 2018, C(2018) 8455 final.

The Decision provides useful indications on certain practices relating to both online advertising and online sales.

Online advertising

With reference to online advertising, the Decision is particularly innovative as, for the first time, the Commission considered a prohibition of **trademark bidding** (i.e., the acquisition of the keywords relating to a trademark of a third party in order to get a preferential listing on the search engine paid referencing services) to be anticompetitive.

As anticipated, according to the Commission, the Group allegedly prohibited its authorised retailers to use certain trademarks as key-words for the purposes of online search advertising. According to the Commission, such ban was aimed at preventing the Group's official website from losing traffic to authorised online retailers. In this way, the Group limited the possibility for each retailer to reach a greater number of consumers, in particular those located in Member States different from the relevant allocated territory. In this respect, in its e-commerce sector inquiry, the Commission already observed that such restrictions may raise competitive concerns should they limit the possibility for retailers to direct consumers to their own websites.²

This being said, the issue is not an absolute novelty in the antitrust legal landscape. As early as 2015, indeed, the German Competition Authority (*Bundeskartellamt*)³ held a similar restriction to be in breach of both the national and the EU antitrust provisions. In particular, according to the *Bundeskartellamt*, the trademark bidding restriction could not be justified as such a restriction had no comparable offline equivalent, did not either ensure or improve distribution quality and could not be justified even with legal arguments relating to the use of trademarks. In this last respect, the *Bundeskartellamt* held that a per se prohibition of the use of trademarks use is disproportionate, since less invasive practices were available, such as laying down specific contractual requirements for the design of the online search advertisements, by means of which it would have been possible to exclude the possibility of any mistake on the part of consumers concerning the products' origin.

A similar conclusion was recently reached by the US Federal Trade Commission (FTC). In particular, by its decision of November 2018, the FTC considered that an agreement between an online retailer of contact lens and its competitors, by which the parties reciprocally prevented from bidding for keywords corresponding to the relevant trademarks to be associated to search engine result advertisements, was in breach of antitrust rules. According to the FTC, such agreement had harmful effects on competition, as it did not allow consumers to be informed that identical products provided by other lens' distributors were available at lower prices. In addition, by reducing the number of search advertising auction participants competing for

² "Given the importance of search engines for attracting customers to the retailers' website and improving the findability of their online offer, such restrictions could however raise concerns under Article 101 TFEU, should they restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website. Conversely, restrictions on the ability of retailers to use the trademark/brand name of the manufacturer in the retailer's own domain name rather help avoiding confusion with the manufacturer's website" (Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 632).

³ *Bundeskartellamt*, decision of 26 August 2015, confirmed by the German Federal Court on 12 December 2017.

relevant ads and the relevant price of ads paid by the auction winner, it reduced the revenue for search engines (like Google) holding the auction.⁴

Cross-border sales

According to the Commission, the Group prevented each authorised retailer from selling to consumers located outside its allocated territory. Such restrictions allegedly concerned both active sales (*i.e.*, those arising from customers' solicited orders) and **passive sales** (*i.e.*, those concerning individual clients' unsolicited orders).

In this last regard, as stressed by the Commission, the Decision "complements" the provisions of the Regulation (UE) 2018/302 on geo-blocking,⁵ applicable from 3 December 2018 (the "**Regulation**"), which, under certain conditions, forbids restrictions on *passive* cross-border sales imposed on a distributor.

The Regulation, which is part of the strategy for the European digital single market launched by the Commission in May 2015, introduces specific measures aimed at avoiding any **discrimination** based on nationality, place of residence or place of establishment, within the context of (both online and offline) **cross-border** transactions, between a **trader** (which can be either a natural or legal person) and a **customer** (which can be either a consumer or an undertaking acting for the sole purpose of end use), for the sale of goods or the supply of services within the EU.

The Regulation also provides that, from 23 March 2020, the provisions relating to passive sales and included in agreements concluded before 2 March 2018, aimed at forcing the traders to operate in breach of Articles 3, 4 and 5 of the Regulation, shall be considered void.⁶ This is, for instance, the case of a French supplier forbidding its own Italian retailer from selling to French clients which have autonomously accessed the retailer's (Italian) website and are willing to use that version of the website for their purchases.

Conclusions

The Decision stresses the importance for market operators to carefully review their own distribution systems to ensure full compliance with antitrust rules and, since last December, also with the Regulation.

In this respect, it is advisable to take into account the outcome of the **evaluation procedure** of Regulation (EU) No. 330/2010, started by the Commission in November 2018. In the context of such procedure, which is mainly aimed at verifying the suitability of the discipline on vertical

⁴ Further information is available at the following website: <<https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter>>.

⁵ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (OJ L 60I, 2 March 2018, p. 1).

⁶ On the contrary, the Regulation does not affect the application of competition law provisions, in particular articles 101 and 102 TFEU and is without prejudice to the agreements limiting active sales pursuant to Regulation (EU) No. 330/2010 or those concerning passive sales falling outside the scope of the prohibitions laid down in Articles 3, 4 and 5 of the Regulation.

agreements to regulate the ever-growing importance of e-commerce and digital platforms, the market participants are called to submit their observations during the **consultation phase** scheduled for the first quarter of 2019.

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