

IMPACT OF COMPETITION LAW ON DISTRIBUTION CHANNELS

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ONLINE CHALLENGES AND COMPETITION LAW

- Restriction on cross-border trade, geo-blocking
- Pricing restrictions : RPM & price recommendations
- Ban on internet sales and marketplaces
- Ban of price comparison tools
- Advertisement ban

CROSS BORDER TRADE, ONLINE & OFFLINE

- **GABA** → general prohibition of exports in a production licence. Manufacturer CHF 4 million, distributor CHF 10'000. Opening of procedure 2006, COMCO decision 2009, confirmed FAC 2013, confirmed SSC 2016.
- **BMW** → export prohibition outside EEA. German distributor prohibits its dealers in Germany (and EEA) to sell cars to Swiss residents. CHF 156 million.
- **NIKON** → Exclusive sourcing in SDS, export bans. CHF 12 million.
- **Gym80** → exclusive sourcing in an exclusive distribution agreement. Procedure closed, no infringement.

CROSS BORDER TRADE, ONLINE & OFFLINE

- SSC of 29 June 2016, **2C_180/2014 GABA**, export restrictions in a production licence agreement. Austrian producer refuses to deliver product to Denner (Switzerland).

"GABI [Gaba International AG] verpflichtet sich, die Ausfuhr der Vertragsprodukte [Elmex Zahnpaste, Elmex Gelée, Elmex Fluid und Aronal forte Zahnpaste] nach Österreich mit allen ihr zu Gebote stehenden Mitteln zu verhindern und auch selbst weder direkt noch indirekt in Österreich zu vertreiben. Gebro verpflichtet sich ihrerseits, die Vertragsprodukte ausschliesslich in dem ihr vertraglich zustehenden Gebiet [Österreich] herzustellen und zu vertreiben und **weder direkt noch indirekt Exporte in andere Länder vorzunehmen.**"

*In English: "GABI [Gaba International AG] undertakes to prevent the export of the contract products [Elmex Toothpaste, Elmex Gelée, Elmex Fluid and Aronal Forte Toothpaste] to Austria with all means at its disposal and to distribute itself neither directly nor indirectly in Austria. For its part, Gebro undertakes to manufacture and sell the contractual products exclusively in the territory [Austria] which is its contractual right, and **not to export goods directly or indirectly to other countries.**"*

CROSS BORDER TRADE, ONLINE & OFFLINE

SSC of 29 June 2016, **2C_180/2014 GABA** take aways

- Broadened the extra-territorial application of the Swiss Cartel Act: any possible effect (read: a few sales) in Switzerland falls within the reach of Swiss Cartel Act
- Export prohibitions outside a given territory, which limit parallel trade or direct imports to Swiss distributors or consumers, are unlawful and subject to fines. Export bans are considered as prohibition of passive sales, even if Switzerland is not mentioned (nor targeted)
- The mere inclusion of an export prohibition clause is enough to trigger fines, no need to implement the agreement

CROSS BORDER TRADE, ONLINE & OFFLINE

- SSC of 27 October 2017, **2C_63/2016 BMW**, ban on sales to customers resident outside EEA/Switzerland. Fine of CHF 156'868'150.

"1.5 Export Dem Händler ist es weder gestattet, **unmittelbar oder über Dritte neue BMW Fahrzeuge und Original BMW Teile an Abnehmer in Länder ausserhalb des EWR zu liefern** noch Fahrzeuge für solche Zwecke umzurüsten."

Translation in English

*Export The dealer **is not permitted to deliver** new BMW vehicles and Genuine BMW parts **directly or through third parties to customers in countries outside the EEA** nor to convert/modify vehicles for such purposes.*

CROSS BORDER TRADE, ONLINE & OFFLINE

SSC of 27 October 2017, **2C_63/2016 BMW take-ways**

- Fines depend on sales in Switzerland, export bans can be costly
- All restrictions to imports in Switzerland are concerned – requests may come from dealers or individual consumers (direct imports)
- Dealers must remain free to sell to Swiss customers – no prohibition of passive sales

CROSS BORDER TRADE, ONLINE & OFFLINE

- FAT of 16 September 2016, **B-581/2012 NIKON**. CHF 12'537'907 fine.

Exclusive sourcing in selective distribution agreements between Nikon AG [Zurich] with Swiss wholesale distributors and other dealers (including professionals)

"Der Distributor und dessen Tochter- und Schwestergesellschaften dürfen die Vertragserzeugnisse **nur von Nikon oder einem anderen von Nikon autorisierten Distributor im Vertragsgebiet beziehen.**"

In English:

*The Distributor and its affiliates may **obtain the contract products only from Nikon or another Nikon Authorized Distributor in the Territory.***

CROSS BORDER TRADE, ONLINE & OFFLINE

- Export bans in selective distribution agreements between Nikon subsidiaries and wholesalers/general importers in Germany, Austria, Slovenia, Hungary and Greece

"Im Übrigen verpflichtet sich der Grosshändler bzw. der Vertragshändler, die Nikon[-]Produkte **ausserhalb des EWR nicht zu verkaufen.**"

"However, the [D]istrib[u]tor [Greece] may sell the products direc[tl]y or indirectly within any country of the European Community (EC), and[,] after its entry into force[,] [of] the European Economic Area (EEA), but the Distributor shall refrain, out-side the territory and in [the] relation to the Products, from **seeking customers**, from establishing any branch and from maintaining any distribution depot."

CROSS BORDER TRADE, ONLINE & OFFLINE

- Prohibition of sales outside USA in "Retail Dealer Sales Agreements" and "Internet Dealer Sales Agreements" between Nikon Inc. (USA) and various American retailers

"In no event shall customer [dealer] **directly or indirectly, transmit, send, or export any product outside the territory [USA].**"

CROSS BORDER TRADE, ONLINE & OFFLINE

- COMCO of 27 November 2017, **Gym80**
- Exclusive distribution, exclusive sourcing → no qualitative restriction of competition, not covered by presumption of Art. 5 (4) CartA
- Quantitative criterion → market share of under 10%, no substantial restriction of competition under Art. 5 (1) CartA
- Exclusive purchasing are justified therefore lawful for exclusive distribution agreements concluded by supplier having less than 30% market share
- **NB:** Applicable to exclusive agreements between supplier and wholesale/general importers. Not applicable to selective distribution agreements entered into by the wholesaler/general importer downstream

CROSS BORDER TRADE, ONLINE & OFFLINE

- **EU Commission.** Ongoing investigations following the e-Commerce sector enquiry:
 - **Video games** → Geo-blocking practices of PC video games, because of consumer location. Agreements between game distribution platform and video game publishers.
 - **Hotel price discriminations** → Discrimination of consumers based on their place of residence. Agreements between the largest tour operators and hotel chains.
 - **Merchandise licensing** → Restriction on the licensees' ability to sell merchandising products cross-border and online.
 - **Beer** → Limitation of parallel imports. Abuse of dominant position by AB InBev. Modification of packaging of Jupiler and Leffe beer cans. Limiting access of (neighbouring) retailers to key products and promotions.

CROSS BORDER TRADE, GEO-BLOCKING

- In distribution agreement → COMCO Explanatory note, §§ 18 and 20
- In presence of **qualifying circumstances**, the prohibitions or restrictions on Internet sales may amount to a vertical agreement on prices or on absolute territorial protection.
- The following would be considered as qualifying circumstances :
 - agreements providing that the distributor shall prevent end-customers located in Switzerland from visiting its website or automatically re-routing them to the websites of the manufacturer or other distributors in Switzerland;
 - agreements that require the distributor to terminate an online transaction when the customer's credit card information indicates that it is not established in its (contractual) territory.
- Case-by-case assessment based on the specific circumstances

CROSS BORDER TRADE, GEO-BLOCKING REGULATION

Geo-blocking Regulation 2018/302

- Applies as of 3 December 2018
- Applicable to Swiss companies that sell in the EU/EEA
- Not applicable to dealers that buy to resell
- Applicable only to sale to final consumers or professionals that buy for their own use (private or professional)

Supplier

Own website

Wholesale subsidiary

General importers

Third party platforms
Amazon
eBay

Independent distributors

Subsidiary

Own website

Sub. Retail

Independent Retailers

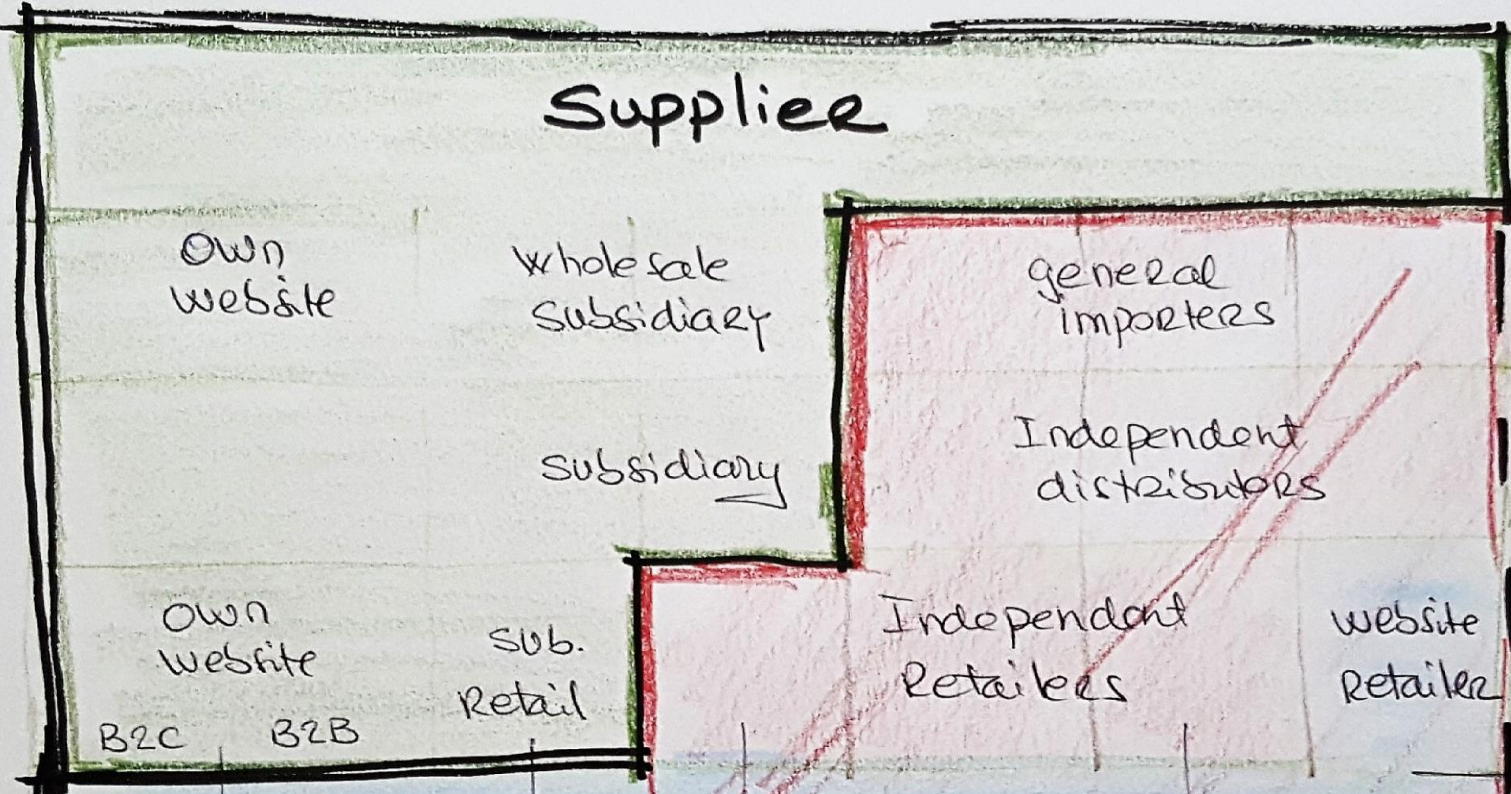
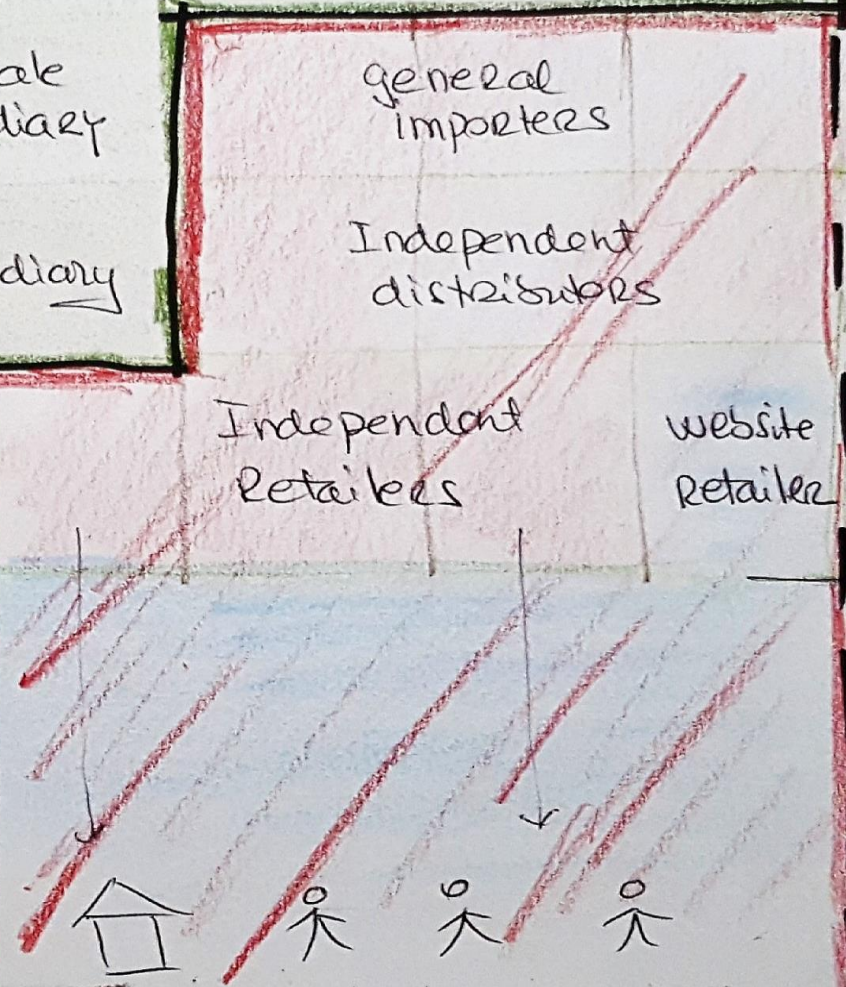
Website Retailer

101 TFEU
5 Cart A

B2C B2B



Geo-blocking Regulation



PRICING RESTRICTIONS – FAIR PRICE INITIATIVE

Indirect counter-project by Swiss Government (*free translation from French*)

Art. 4(2)bis CartA

An undertaking with relative market power is an undertaking of which other companies are dependent in relation to goods or services, because they lack sufficient and reasonable possibility to turn to other companies.

Art. 7a Cart A

Unlawful practices of companies with relative market power

The practices of an undertaking with relative market power are deemed unlawful when it abuses its position and thus hinders the access to competition or its exercise for undertakings which are dependent on it, by preventing them to obtain a good or a service abroad at prices and commercial terms applicable abroad, without reason.

PRICING RESTRICTIONS

- SSC of 18 mai 2018, **2C_101/2016 Altimum**, Price recommendations and RPM/maximum rebates
- Document interne intitulé "Conditions à la revente", qui énumérait les critères auxquels un revendeur devait répondre pour être agréé. Ce document prévoyait que:

"Politique de prix raisonnable et responsable : avoir une politique respectueuse du marché établi (attention ne peut être clairement cité)"

PRICING RESTRICTIONS, Altimum

- Internal emails

"Information importante. Commission de la concurrence. Au cas où quelqu'un vous téléphone pour demander des renseignements, ATTENTION de ne JAMAIS dire que nous cessons de livrer un magasin PARCE qu'il ne tient pas les prix"

*"Ne pas livrer [...], nouveau magasin de sport (à côté de B._____) il fait du rabais 20% à tous ses clients, B._____ est fâché!!! ce qui est normal!
Donc: NE PAS LIVRER, s'il vient demander, informer [...] de suite"*

PRICING RESTRICTIONS. Altimum

Take-aways

- Threats, **pressure** and **economic incentives** surrounding price recommendations amount to RPM → risk of fines!
- **Communication** on resale pricing and price recommendations → sensitive area. Internal & external communication.
- No *per se* restriction of competition if reversal of presumption. **Justification on efficiency grounds** → cautious opening of SSC. Raises the question of evidencing need for pre/after sales services and necessity of RPM (other restrictions)

PRICING RESTRICTIONS

- **EU Commission.** Consumer electronics. RPM, fixed, minimum online prices. Total fine of EUR 111 million for four companies
 - **Asus** → Requested price increases to retailers that did not respect price recommendations. EUR 63'522'000
 - **Denon & Marantz, Philips** → RPM. EUR 7'719'000. EUR 29'828'000
 - **Pioneer** → RPM. Restriction of cross-border sales to consumers. Blocking orders to retailers who sold cross-border. EUR 10'173'000
- **CMA, UK.** Several fines for online RPM. Open letter of June 2017
 - Minimum **advertised price** for online sales
 - Threats: use apparently legitimate policies (e.g. **image** licensing) to conceal RPM practices

BAN ON INTERNET SALES AND USE OF MARKETPLACES

- **Pierre Fabre** Dermo-Cosmétique SAS, Case C-439/09 (2011) A contractual clause requiring sales of cosmetics and personal care products to be made in a physical space, resulting in a ban on the use of the internet, amounts to a **restriction by object**
- CAT (UK) of 7 September 2018, **PING**. Ban on online sales of golf clubs to distributors is a restriction by object, even though custom fitting essential feature of the business model. Reduced fine of £ 1.25 million.
- **Take-ways**
 - Ban on distributor to sell contract products on its own website is a hardcore restriction
 - The agreement cannot be exempted. Ban unlawful and subject to fines

BAN ON USE OF MARKETPLACES

- **Coty Germany, case C 230/16** – deals with the use by distributors of third party platforms

Article 4 of Regulation 330/2010 must be interpreted as meaning that, in **circumstances** such as those at issue in the main proceedings, the prohibition imposed on the members of a **selective distribution system** for **luxury goods**, which operate as distributors at the retail level of trade, of making use, in a **discernible manner**, of **third-party undertakings for internet sales** does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.

BAN ON USE OF MARKETPLACES - HOW TO READ COTY

- **EU Commission** → not a hardcore restriction for all kind of brands and technical products and all kind of distribution formula. Discernible vs non-discernible not a condition
- **France Coty + Caudalie, 2017** → follows EU Commission, exemption possible, allows protection of the selective distribution systems and indemnification of the supplier by non-authorized dealers. Discernible vs non-discernible not relevant
- **Netherlands, 2017** → Nike is a luxury brand, therefore ban on marketplaces not a hardcore restriction
- **Bundeskartellamt** → no hardcore restriction only for luxury products, but hardcore for other products or non-visible use of third party platforms
- **COMCO** → no qualitative restriction only for luxury products and for visible use of third party platforms

BAN OF PRICE COMPARISON TOOLS

- **Germany, Bundeskartellamt/BGH**

- BGH of 12 December 2017, ASICS

- **Absolute** prohibition to participate in price comparison tools is a hardcore restriction

- **CMA (UK)**

- BMW stopped its dealers from listing BMW and MINI cars on online comparison tools

- BMW changes policy after intervention of CMA in January 2017

PROHIBITION TO ADVERTISE ON THIRD-PARTY WEBSITES

- **Bundeskartellamt 2015, ASICS** → de facto **absolute prohibition** to advertise on third-party websites using ASICS brands is a hardcore restriction
- Bundeskartellamt press release → “If manufacturers prohibit their authorized dealers from using price comparison engines and online sales platforms or from using the manufacturers' brand names in their own search engine advertisements, it will de facto no longer be possible for consumers to find the **smaller retailers**, in particular, in the internet. Many manufacturers of running shoes, as of recently including ASICS, have established their own online stores. They co-operate with large marketplaces such as Amazon. If these manufacturers simultaneously impose far-reaching online restrictions on their predominantly small retailers, the online business will ultimately be concentrated in the hands of the manufacturers themselves and a few large retailers or leading marketplaces.”

TAKE-AWAYS REGARDING ONLINE RESTRICTIONS

- Consensus that ban on use of third party platforms is not a restriction by object/hardcore, so negative effects depend on market share of supplier
- Type of product/brand matter, but no need to have luxury products/brands
- Type of distribution system not relevant, but there are more arguments to defend ban in SDS
- Circumstances of the case are important, particularly if online policy or contract includes other online restrictions (ban on price comparison tools or ban on online advertisement, or all of them)
- Ban on particular marketplaces or comparison tools less restrictive of competition than general/absolute bans
- **NB** → Tendency to formal assessment by some competition authorities



MONITORING OF ONLINE PRICES, EXCHANGE OF INFORMATION

- Use of algorithms
- Amazon probe by EU Commission



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