

Parallel imports

Parallel imports : An overview of EU and national case law

Anticompetitive practices, Selective distribution, Parallel imports, Economic efficiency, Foreword, Distribution/Retail, Pharmaceutical

Note from the Editors : Although the e-Competitions editors are doing their best efforts to build a comprehensive set of the most important antitrust cases, the completeness of the database can not be guaranteed. The present foreword provides readers with a fair view of the existing trends based on cases reported in e-Competitions. As this article draws a comparison between European Union law and EU member States national case law, therefore excluding analysis from non-EU member States case law, the editors have included in this special issue such foreign case law in order to broaden the scope. Readers are welcome to bring to the editors knowledge of any other relevant cases.

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Introduction

Since the last special edition of e-Competitions on restrictions of parallel trade, there have been a number of national competition authority cases in the good old familiar sectors – for example the automotive or fast moving consumer goods sectors. Where the foreword to the last special edition remarked that national authorities seemed at times to be taking a permissive approach to limitations to parallel trade by the standards of the European Commission, enforcement in recent years has shown a more stringent approach towards restrictions on parallel imports.

However, issues surrounding restrictions of parallel trade have recently risen to the forefront of the EU Commission's agenda tackling the challenges posed by the increasing importance of digital commerce. And it would seem only appropriate to say a few words on those in what has been one of the first digital EU competition law magazines...

Decision highlights from the last few years

In the first Swiss decision we look at relating to Article 5(4) of the Swiss Cartel Act, *Gaba International AG, Gebro Pharma GmbH, 19 December 2013* [1], the Federal Appellate Administrative Court upheld a finding by the Swiss competition authority ("**ComCo**") that the limitation of parallel imports, specifically passive sales, was to be considered an unlawful territorial restraint under Article 5(4), regardless of the effects on competition in Switzerland. Gaba International had restricted passive sales by its Austrian licensee of its toothpaste products to Swiss customers. The Court held that proof of a certain level of intensity of effects on competition in the Swiss market was not required ; the likelihood of "some effects" on competition was enough to trigger the application of the Act. The decision shows a departure from the established principle that only those agreements

that trigger at least a qualitatively and quantitatively significant restraint on competition can be considered unlawful, underscoring a more stringent assessment by ComCo of trade restrictions affecting sales into Switzerland.

Another ComCo case, *BMW*, 7 May 2012 [2] concerned fines levied against BMW Munich for selective distribution agreements aimed at preventing EEA based authorised dealers from selling BMWs (or parts) to resellers outside of the EEA. ComCo concluded that this behaviour significantly restrained competition in Switzerland. The presence of strong inter- and intra-brand competition was not enough to rebut the presumption under Article 5(4) of the Swiss Cartel Act that the selective distribution agreements suppressed "efficient competition".

The decision by ComCo rested on a contractual provision, contained in selective distribution agreements between BMW in Germany and its agents in the territory of the EEA, that specified that agents were not to sell, directly or indirectly, new cars or original spare parts to resellers outside of the EEA. While therefore not impacting trade within the EU, the provision was nevertheless deemed restrictive by ComCo as preventing imports into Switzerland. The decision raises an interesting question as to the extent to which companies can effectively introduce a selective or other distribution system to be limited to the EEA territory, even when they respect the principles of EU competition law on trade restrictions within the EEA.

The final Swiss decision we address here, *Nikon*, 15 December 2011 [3], concerned a EUR 10 million fine levied on the Swiss subsidiary of Nikon on the basis of alleged restrictions of parallel imports of Nikon imaging products. Nikon prohibited its Swiss dealers from purchasing Nikon products outside of Switzerland and Liechtenstein. ComCo concluded that the effect of the contractual restrictions was to reduce competition by a significant extent.

The Danish competition authorities have recently addressed restrictions of parallel trade both as restrictive agreements, and as abuses of dominance. As reported in e-Competitions, the Danish Competition and Consumer Authority ("**DCCA**") imposed a EUR 200,000 fine on BSH Denmark, a white goods marketer, for infringing section 6 of the Danish Competition Act : *BSH Hvidevarer A/S*, 24 April 2013 [4]. BSH Denmark entered into agreements with internet dealers which inter alia prohibited parallel imports of products from a wholesaler based in Germany. Similarly in another case *Miele*, 25 July 2013 [5] the DCCA fined white goods manufacturer Miele A/S EUR 161,000 for entering into agreements with its dealers preventing parallel imports from Germany.

In an abuse of dominance case, *Deutz AG*, 9 December 2013 [6], the Danish Competition Appeals Tribunal ("**DCAT**") held that Deutz, a manufacturer of industrial engines, and its exclusive dealer in Scandinavia Diesel Motor Nordic A/S ("**DMN**") had abused their dominance by refusing to supply spare parts and by hindering parallel trade of Deutz spare parts. The Danish train operating company DSB had entered into an agreement with a consortium of companies to carry out maintenance and renovation works on its Deutz engines. However, the consortium experienced significant difficulties obtaining spare parts for the engines. The DCCA found that Deutz had abused its dominant position by refusing to supply its unique spare parts and by hindering parallel trade of its spare parts.

Two recent cases concern trademark exhaustion. Following a request from a Greek Court Monomeles Protodikeio Athinon, a preliminary ruling from the ECJ confirmed that European trade

mark law does not allow Member States to provide for international trade mark exhaustion, restricting trade mark owners from the possibility to exercise their rights to stop parallel trade in goods featuring their brands and originating outside the EEA [7]. The Greek Court's inquiry arose in relation to the use by Honda of its trademarks to prevent the importation of Honda spare parts from Thailand. The ECJ confirmed that Articles 101 and 102 of the TFEU do not prevent a trade mark holder from objecting to the importation of parallel traded goods.

Similarly, in *Oracle America Inc (formerly Sun Microsystems Inc) v M-Tech Data Limited*, [8] the UK Supreme Court rejected the use of the "Euro defence" in a case involving trade mark rights. M-Tech had imported and tried to sell Sun trademarked goods without Sun's consent, and argued in its defence that Sun's attempt to enforce its trade mark rights was part of a broader scheme to partition the EEA market contrary to Articles 34 to 36 TFEU. The Supreme Court held however that a trade mark proprietor's right to prevent the initial entry of trademarked goods onto the EEA market does not engage the principle of free movement of goods.

Returning to Greece and restrictive vertical agreements, the Athens Administrative Court of Appeals annulled a fine imposed by the Hellenic Competition Commission ("**HCC**") on Unilever Hellas [9] for engaging in conduct that restricted parallel imports. The HCC found that a clause in the agreements Unilever concluded with supermarkets explicitly prohibited supermarkets from purchasing products offered by Unilever from third-party importers. The Athens Administrative Court of Appeals ruled that Unilever had infringed Article 101 TFEU. In doing so, it considered it irrelevant that Unilever did not take any monitoring measures, that the clause did not restrict parallel imports generally but only certain supply sources, or whether the clause did in effect restrict imports. The Court annulled the fine imposed taking into account the nature, type and gravity of the infringement, its limited duration, the fact that the disputed term was not included in all the agreements concluded at the same time, the fact that the intended result had not been reached, the time interval between the commission and detection of the infringement, the fact that Unilever had independently ceased to include the disputed clause in its agreements since 2001, and the fact that Unilever had not in the past committed a similar infringement.

A new spotlight on parallel trade restrictions

Recent developments show that issues surrounding restrictions on parallel trade carry over into the digital economy where similar restrictions, more fashionably labeled as geo-blocking, implement barriers to consumers consuming digital content when they cross borders within Europe.

Commissioner Vestager pointed out that while 1 in 2 European consumers use internet shopping, only around 1 in 7 use it to shop cross-border. A sector inquiry was opened on May 6 to examine restrictions on cross border ecommerce, as part of EU digital chief Andrus Ansip's proposals for a "digital single market". Commissioner Vestager's plans are considered to form a key part of the EU digital market initiative, aimed at reducing barriers to shopping online and accessing films, music and books outside of a consumer's home territory.

Commissioner Vestager anticipates that the results of the sector inquiry will be available in early 2017. The Commission reportedly intends to seek answers from websites, platforms (such as Google or Amazon), content owners, and broadcasters to identify limits on competition. The enquiry will focus on private and in particular contractual barriers to cross-border e-commerce in digital content

and goods. In its own words, the Commission wants to understand whether companies are taking measures to restrict cross-border e-commerce. If the Commission identifies competition concerns, it has vowed to open case investigations to ensure compliance with Articles 101 and 102. Hence "artificial barriers" – geo-blocking and clauses in distribution contracts – will be investigated.

The Commission's objective is to extend to online markets the "opportunities created by [the] internal market for goods and services". Just as the development of the internal market has been driven over the decades by the case law on restrictions of parallel trade in physical goods, so the Commission now turns its attention to restrictions on data flowing across borders in the form of services such as entertainment, or physical goods being bought online by consumers based in one Member State shopping through the website of a retailer based in another.

Importantly, the Commissioner's concern with restrictions of ecommerce has a basis in earlier investigations and has not remained an abstract inquiry. In the online retail of physical goods, the Commission has been pursuing investigations of restrictions to pricing and cross-border trade of consumer electronic products over the internet, since December 2013. The Commission conducted surprise visits at manufacturers and online retailers in various Member States, including raids at businesses Media-Saturn, Royal Philips, Samsung and more recently with German online electronic goods retailer and distributor Redcoon.

Moreover, the Commission has identified the impact of geographic restrictions in digital content in one of its ongoing investigations. In January 2014 the Commission opened a formal investigation involving major US film studios 20th Century Fox, Warner Bros, Sony Pictures, NBC Universal and Viacom's Paramount Pictures and large European broadcasters British Sky Broadcasting Group PLC, Société d'Édition de Canal Plus, Sky Italia, Sky Deutschland AG and Distribuidora de Televisión Digital SA. [10] The Commission is reportedly reviewing contractual clauses in licensing contracts that allegedly prevent existing and new subscribers from accessing satellite and online pay-tv when they are outside the area covered by the license, through the use of geo-blocking. The Commission is looking at arrangements, covered by the Block Exemption Regulation and the Guidelines on Vertical Restraints, included in contracts between manufacturers and content owners on the one hand and their distributors on the other.

Most recently, in March 2015, the Commission announced that it is investigating potential location-based restrictions to video games sold online. The Commission reportedly has concerns that sellers are carving up markets along national lines by using geo-blocking to prevent consumers in one country buying online games from another.

But arguments have been raised that the restrictions of cross border trade in ecommerce are legitimately based on delivery and language issues, as well as differences in consumer and copy right laws. These differences may make EU-wide ecommerce sales unviable or simply too costly. The concerns are reminiscent to some extent of the issues raised in relation to EU-wide parallel trade in pharmaceuticals, where the intended effects of national laws may be impacted. As the Court suggested in the Glaxo Spanish Pricing judgment, the Commission would be well advised to "conduct an appropriate assessment of the facts and evidence" in order to "be able to carry out the complex assessment necessary to weigh up the advantages and the disadvantages" of cross border restrictions.

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- [1] **Dominique Guex**, [The Swiss Federal Administrative Court upholds fines imposed by the Competition Commission to a Swiss toothpaste manufacturer and licensor and its Austrian distributor and licensee for prohibiting parallel imports from Austria to Switzerland \(Gaba International\)](#), 19 December 2013, [Bulletin e-Competitions December 2013](#), Art. N° 64200.
- [2] **Pierre Kobel**, [The Swiss Competition Commission fines car manufacturer for preventing parallel imports by prohibiting its authorised dealers within the EEA from selling new cars to customers located in Switzerland \(BMW\)](#), 7 May 2012, [Bulletin e-Competitions May 2012](#), Art. N° 49633.
- [3] **Patrick Krauskopf, Fabio Babey**, [The Swiss Competition Commission fines leading camera manufacturer a total of 12.5 million CHF because of the restrictions on parallel imports of the company's imaging products \(Nikon\)](#), 15 December 2011, [Bulletin e-Competitions December 2011](#), Art. N° 45012 and **Andrzej Kmiecik**, [The Swiss Competition Authority fines a manufacturer € 10 million for restricting parallel imports of imaging products \(Nikon\)](#), 15 December 2011, [Bulletin e-Competitions December 2011](#), Art. N° 58863.
- [4] **Jacob Borum**, [The Danish Public Prosecutor for Serious Economic and International Crime enters into a settlement with a white goods manufacturer in a resale price maintenance case \(BSH Hvidevarer\)](#), 24 April 2013, [Bulletin e-Competitions April 2013](#), Art. N° 52526, **Danish Competition Authority**, [The Danish Public Prosecutor settles charges of of resale price maintenance to some of the company's dealers and the prevention of parallel imports and passive sales \(Witt Hvidevarer\)](#), 9 July 2014, [e-Competitions Bulletin July 2014](#), Art. N° 68232 and **Danish Competition Authority**, [The Danish Public Prosecutor settles charges on a violation of cartel law by imposing of resale price maintenance, prevention of parallel imports and passive sales \(Witt Hvidevarer\)](#), 10 July 2014, [Bulletin e-Competitions July 2014](#), Art. N° 68540.
- [5] **Peter Møllgaard**, [The Danish Public Prosecutor for Serious and International Crime cracks down on resale price maintenance \(Miele\)](#), 18 July 2013, [Bulletin e-Competitions July 2013](#), Art. N° 56421, **Danish Competition Authority**, [The Danish Public Prosecutor for Serious Economic and International Crime settles with a cartel participant, major player in the market for white goods \(Miele\)](#), 18 July 2013, [Bulletin e-Competitions July 2013](#), Art. N° 64085 and **Andrzej Kmiecik**, [The Danish Competition and Consumer Authority announces that a white goods manufacturer has accepted to pay a fine of € 161,000 for having entered into illegal price maintenance agreements with its dealers and for having prevented parallel imports \(Miele\)](#), 25 July 2013, [Bulletin e-Competitions July 2013](#), Art. N° 58939.
- [6] **Article from European Competition Network Brief**, [The Danish Competition Council finds refusal to supply and restrictions to parallel trade in railway spare parts sector \(Deutz, Diesel Motor Nordic\)](#), 12 June 2013, [Bulletin e-Competitions June 2013](#), Art. N° 53276, **Jacob Borum, Marie Løvbjerg**, [The Danish Competition Council issues an order to stop refusal of supply and restrictions to parallel trade within the railway engine spare part sector \(Deutz\)](#), 12 June 2013, [Bulletin e-Competitions June 2013](#), Art. N° 60081, **Jacob Borum**, [The Danish Competition Appeals Tribunal confirms decision concerning refusal of supply and restrictions to parallel trade within the railway engine spare part sector \(Deutz\)](#), 9 December 2013, [Bulletin e-Competitions December 2013](#), Art. N° 66390 and **Danish Competition Authority**, [The Danish Competition and Consumer Authority reports a German engine manufacturer and its local distributor for preventing the supply of spare parts for the IC3-trains \(Deutz\)](#), 10 December 2013, [Bulletin e-Competitions December 2013](#), Art.

[N° 62963](#).

[7] [Porter Elliott](#), The Court of Justice of the European Union answers a request for a preliminary ruling about use trademarks to prevent the importation of spare parts (Honda), 17 July 2014, [Bulletin e-Competitions July 2014](#), Art. N° 68918.

[8] [Tristan Jones](#), The UK Supreme Court rejects the respondent's arguments that enforcement of the plaintiff's trade marks could lead to infringements of EU law (Oracle America/M-Tech Data), 27 June 2012, [Bulletin e-Competitions June 2012](#), Art. N° 58042, [Peter L'Ecluse](#), The English High Court rejects competition defence in a trademark infringement case (Sun Microsystems), 25 November 2009, [Bulletin e-Competitions November 2009](#), Art. N° 41681 and [Gabriele Accardo](#), The England Court of Appeal grants permission to appeal and proceed to a full trial on defence against trademark infringement allegations (Oracle / M-Tech), 24 August 2010, [Bulletin e-Competitions August 2010](#), Art. N° 62386.

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[10] [Tom Richards](#), The European Commission initiates a formal investigation into potentially anti-competitive restrictions in pay-TV licensing arrangements, 24 November 2013, [Bulletin e-Competitions November 2013](#), Art. N° 66610 and [Tom Richards](#), The EU Commission issues a statement on opening of investigation into pay-TV services (Sky / Canal+), 13 January 2014, [Bulletin e-Competitions March 2014](#), Art. N° 62353.

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