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Summary Note

"On-line Practices and Competition Law: an overview of case law in France (open and closed eco-systems), UK (Google/Street Map case) and Germany (Adidas and Asics case)"

Introduction: Dr Frédéric Jenny

Frédéric explained that the webinar would cover the latest developments in relation to online practices in three major jurisdictions: Germany, the UK and France. He noted that the emergence of the digital economy has raised many challenges for the competition community.

The German "Adidas" and "Asics" cases: Dr Jörg Witting

Introduction

1. Jörg introduced his topic as concerning restrictions of online sales. He explained that the vertical aspects of distribution-related competition law have become much more important, in particular in relation to online distribution, and that competition authorities are currently in a stage of trial and error in relation to these developments.
2. Decisions taken by the FCO illustrate this. Jörg explained that he intended to focus on two cases in particular: the *adidas* and *Asics* decisions.

Relevant restrictions

3. There are three relevant categories of restrictions:
    a. Online advertising restrictions;
    b. Restrictions on price comparison engines; and
    c. Requirements not to use online marketplaces.
4. It has been decided that the first two restrictions are not exempted by the vertical block exemption regulation (**VBER**) and are therefore hardcore restrictions. The third restriction has not been decided upon.

The FCO's approach: Article 101 TFEU

5. The FCO considers that the requirements of Article 101 are fulfilled by these restrictions. Although in the CJEU *Metro* case it was held that there is no restriction of competition if there is qualitative selection and legitimate objectives, this do not apply here, as:
    a. The quality of distribution is not affected;
    b. There are other appropriate measures to address the issue than restricting activity altogether; and
    c. As held in *Pierre Fabre*, maintaining a prestigious brand image is not a legitimate aim. This reasoning applies both to complete bans on internet use and restrictions on internet use (although these restrictions must be 'significant').

Restrictions on online advertising

6. In order to assess a restriction on a brand's online advertising, you need to know the content of the restriction.
7. There are three types of online advertising restrictions:
    a. Restricting use of the brand in advertising on third party websites;
    b. Restricting use of the brand as a search engine keyword; and
    c. Restricting use of the brand in search engine optimization (in the context of 'backlinks', which are important to increase traffic to a distributor's website).
8. All of these are important marketing instruments, and may generate new clients and more clicks for businesses. This being the case, restricting a supplier's ability to engage in these activities will have a significant influence on their advertising.

Equivalence

9. The FCO has held that there is no exemption for these types of restrictions on the basis of equivalence to offline distribution,
10. Online and offline distribution are different worlds, and some restrictions will impact online distributors more than offline distributors. As such, online distributors should not be limited by formally 'similar' rules. At the same time, the justification for different rules must be the differences in the nature of the distribution.

Quality and the VBER

11. The FCO has also decided that restrictions on online advertising are not exempted on the basis of the VBER. This being the case, they are hard core restrictions, and so both active and passive restrictions are prohibited.
12. Under paragraph 54 of the VBER, a supplier can impose quality standards on online distributors. However, for hard core restrictions, you need true qualitative criteria, and it has been held that there are no such criteria in relation to these restrictions.

Price comparison engines

13. The same outcomes have been decided in relation to price comparison engines.
14. The output of price comparison engines does not result in an inappropriate presentation of products, but mainly in web links. Additionally presented elements are not problematic, as price comparison engines are not part of the sales process, and end customers are aware of this.
15. It has been held that there is no general negative impact on brand value as a result of reduced pricing, and no "return of investment" in brand value by reducing price competition.

Online marketplaces

16. The FCO's assessment in relation to online marketplaces is similar to its assessment on the other restrictions. However, the decision has been left open.
17. In addition, the FCO held that:

a. It is a legitimate objective to exclude private sales or sales by non-members of selective distribution systems. However, there cannot be a per se prohibition; and

b. A supplier may also require that the distributor's shop on the platform fulfils the requirements for its independent shop.

18. Jörg commented that the approach to Article 54 in relation to online marketplaces is not convincing. It was enacted prior to the final CJEU decision in *Pierre Fabre*, and Amazon and eBay have improved dramatically since 2010.

Conclusion

19. Overall, Jörg concluded that this area is still developing. An example of development is the recent decision of the Higher Regional Court of Frankfurt as to whether restrictions of online platforms are allowed, which has been referred to the CJEU.

20. It has also been recently indicated that where the luxury element of a product is more important, the decision might be different, as Asics and adidas are not true 'luxury' products. Questions then arise on what makes a product 'luxury'.

Questions

Jörg was asked whether an online distributor can be prevented from selling offline.

Jörg explained that you usually cannot restrict online sales, but you can oblige online sellers to have offline shops. It might be possible under the VBER to prevent online sellers from selling offline.

Jörg was asked whether there is any discussion about the threshold for luxury products in German case law, or any indication of how the Courts or the FCO might look at these.

Jörg answered that you have to be cautious in thinking that the distinction really will be decisive in relation to the relevant restrictions. The Higher Regional Court decisions show that there are no black and white distinctions. However, there has been reference to economic theories about the ability to display wealth and luxury to the outside world, and the impact on online advertising if it means that certain customers are no longer interested in buying products.

The Judgment in *Streetmap.EU Limited v Google Inc.*: Ruchit Patel

Introduction

1. Ruchit explained that the *Streetmap* case is an important case in the jurisprudence on the application of antitrust law on fast-moving technology companies.

Parties

2. The claimant in the case was Streetmap, a provider of online maps since 1997. Streetmap was licensed in 2000 to use mapping data from Ordnance Survey for its online maps service. However the company went into liquidation in 2009, and this case revolved around the reasons for that.

3. The defendant was Google, which started providing online maps in April 2005.

4. Ruchit noted that the case did not discuss the issue of dominance, dominance was presumed and the question of abuse was decided first, allowing for significant cost and time savings.

The Allegation

5. The allegation was based on the significant and steady decline of Streetmap's performance, in particular from 2007.
6. The format of Google's search results when a consumer made a geographic query (the "OneBox") changed in 2007. Prior to this, Google provided links to various online map services on which the consumer could click. However, in 2007 the format changed. The two main differences were that:
    a. When a consumer made a query, they did not see any links to map providers other than Google; and
    b. Google included a thumbnail of its own map in the results.
7. It was alleged that the decline in Streetmap's performance correlated with this change in format.

The Legal Standard

8. Streetmap argued that, as shown by royalty cases such as Post Danmark, so long as there was dominance and leverage of that dominance there was no de minimis threshold for infringements of Article 102.
9. In his judgment, Roth comprehensively rejected this. He stated that the mere possibility of foreclosure is not sufficient, and that harm to the competitive structure of the market must be reasonably likely. Roth also noted that otherwise, the rule would disrupt entry to the market, as almost any entry by a dominant company into a related market would be abusive.
10. Ruchit commented that this was not new jurisprudence, and that Roth's reasoning is entirely consistent with the Microsoft *Tying* judgment.

Analysis: The Intent behind new OneBoxes

11. As this was an action for damages, the analysis in the judgment was based on causation. However, per *Tomra*, Google's intent was considered relevant.
12. From the evidence, the Court held that it was clear that Google's intent in introducing the new style search results was pro-competitive, as Google intended to improve its search engine. The new format might lead to more traffic to Google, but this benefit was a consequence of the change, not the intent behind it.

Analysis: The Data

13. The Court allowed the expert witnesses (who were economists) to hot-tub (meaning that they concurrently discussed the matter together to try to come to a consistent analysis). The results were what some might think counter-intuitive.
14. The economic experts decided that there was no increase in traffic to Google Maps after the introduction of the new Onebox. In addition, there was no decrease in traffic to 'blue links'. Finally, they concluded that a very significant proportion of Streetmap's traffic came

from sources other than Google, and that the traffic from Google to Streetmap had stayed stable throughout the change.

15. Overall, the experts concluded that there was no evidence that the new OneBox had caused an adverse impact on Streetmap.

Analysis: Competition on the Merits

16. Whilst the Court had no real need to examine why Streetmap's performance had declined in the way it had, it did perform this evaluation by looking at the range of innovation that had developed over the time period, and how Google and Streetmap had performed in relation to that innovation.

17. The Court concluded that Google had innovated more throughout the time period, and this was why Google Maps had gained market share. Users were able to discern quality.

Analysis: Objective Justification

18. The Court accepted that the changes Google had made to the search results were an improvement to the service, and therefore had an objective justification.

19. The Court also considered whether Google could have adopted a less distortive alternative. Several options were considered, but it was concluded that all alternatives had technical, practical or costs difficulties. This being the case there was no obligation on Google to adopt alternatives that were impractical or overly burdensome.

Conclusion

20. Ruchit concluded that *per se* breaches of Article 102 and Chapter 2 remain rare, and not appropriate in cases like this one.

21. This case also illustrates that presumptions about user behaviour can be unsafe.

22. Finally, Ruchit commented that competition on the merits should be enabled. Courts and competition authorities should be slow to chill that conduct.

Questions

Ruchit was asked about the figures showing that there was no loss of Streetmap users when Google introduced its innovations. One possibility is that the innovations only attracted new customers, but surely some transfer of clientele would be expected.

Ruchit explained that the data was not designed to show who switched between providers, but the route that consumers took to Streetmap's website. The relative amount of users reaching Streetmap's website pre- and post-innovation did not change, and there was no causation between Google's innovation and Streetmap's loss.

Ruchit was asked whether the Court would likely have decided the case differently if it had found that Google's intent was to increase traffic to its own service, rather than improve the search engine.

Ruchit explained that intent is not dispositive of itself. The data is still very important, and whilst Google's intent provides an important atmospheric, the analysis of foreclosure should, in his opinion, have remained the same regardless of intent.

Competition between "open and closed ecosystems" in France: Olivier Fréget

Introduction

1. Olivier introduced his presentation by explaining that the 'ecosystem' is a new type of scheme which consists of economic integration or the cooperation of enterprises to assemble, bundle and distribute services to create a new market. This is not a fully new concept, and derives from the concept of a technological ecosystem in Internet Protocol.
2. There are two types of ecosystem:
    a. An 'open' ecosystem is one which is accessible to various component makers or system developers other than the system owner.
    b. A 'closed' ecosystem is a system in which each component will work only with selected other components. Closed ecosystems involve 'pure bundling', as they foreclose any opportunity to combine with other businesses.
3. The French competition authority has developed an important literature on these ecosystems, from behavioural decisions and, less frequently, merger decisions.

Opinion 09-A-42

4. Olivier explained that the term 'ecosystem' first appeared in the Opinion 09-A-42, in which the bundling between Orange media services and Orange ADSL services was described as a 'closed ecosystem'.
5. The decision related to Orange launching a football service, for which it bought the exclusive right to broadcast Saturday night football matches from the French *Ligue de Football*. Canal + obtained all the other rights. Orange then decided to reserve access to the Saturday night matches for subscribers to its ADSL service.
6. As Canal + was not able to withdraw the right to distribute its channels from Orange, this effectively meant that Orange subscribers were the only ones who could watch all the matches.
7. This created an issue for other internet access providers, as subscribers who were not willing to miss Saturday night football matches may be willing to change their ADSL service.

Closed or open ecosystem?

8. This was the first time that the debate regarding whether an open ecosystem is better than a closed ecosystem appeared before the competition authorities.
9. The situation created by Orange was viewed as a closed ecosystem, due to its double exclusivity mechanism. This double exclusivity was that:
    a. The matches were exclusively broadcast though Orange's ADSL services; and
    b. In order to access Orange's ADSL services, a consumer had to subscribe to an Orange triple play offer which would mean cancelling their own internet access provider.

10. On the other hand, Vivendi had been obliged in the context of the Canal +/TPS merger to create an open ecosystem. This meant that any internet access provider could access its TV channels.

Opinion 09-A-42: conclusion

11. Olivier concluded that the opinion of the FCA was balanced. It was obliged to recognise that Orange's behaviour was in line with the 'mixed business model' it wished to favour when it adopted the Canal +/TPS merger decision, in which internet access providers are able to climb the value chain by becoming media distributors, and reinforce competition.
12. However, the FCA was concerned that this kind of strategy would restrict consumer choice by obliging consumers to either change from their current internet access provider to Orange, or not to watch the Saturday night matches. The FCA was not in favour of silo-like competition, where consumer decisions would be based not on quality but on an 'all or nothing' logic relating to vertically integrated companies.
13. The same concerns appear in the older *Apple / Orange* decision, which stated that if all mobile operators execute exclusive distribution agreements, this may create silo-like competition.
14. These decisions directly address the question of open and closed eco-systems under Articles 101 and 102. They show the lack of appetite for silo-like competition caused by closed ecosystems, especially when implemented by dominant businesses of either of the markets included in an ecosystem.

FCA-CMA Report

15. There has been some evolution on this topic with the FCA-CMA report on closed/open ecosystems. This however is only an economic report, and so does not come to any conclusion on what could be an abuse in this context.
16. It concludes that it is not clear whether open or closed ecosystems are more beneficial for competition. A closed ecosystem can generate positive effects on competition, as the profitability of locked-in consumers can engender fierce competition, especially in the presence of significant network effects and switching costs. However the closure of the system may arise for anti-competitive reasons, such as for the protection of the core businesses of the system owner, or where control may allow the platform host to price-discriminate.
17. Overall, whether an open or closed ecosystem is more beneficial for competition is likely to depend on the switching costs between systems. Olivier also noted that it is also important to take into consideration whether or not a customer is singled-homed (i.e. only able to have access one provider at any one time, or multi-homed (e.g. able to access several providers through, for instance, social media networks).

Consistent application of analysis?

18. Olivier noted that this analysis is not being applied consistently. Two examples of this are the *Nespresso* and *Cogent* decisions.

19. The *Nespresso* decision was a stringent one, where Nespresso has been obliged to commit itself to keep its system fully interoperable to third party providers of coffee capsules.
20. On the other hand, the *Cogent* decision was far more lenient, as Orange has been authorised to bill independent transit providers used by content providers a price for accessing Orange fixed customers.

Questions

It was commented that recent hearings discussing open and closed ecosystems seem to approach the jurisprudence in a different way. Firstly, the distinction between open and closed ecosystems does not seem to be considered to be that important. There is a spectrum or continuum of approaches and the distinction is not as sharp as you would like to think. Second, there seems to be an increasing movement toward closed systems. This means there are more barriers to entry, as businesses must compete in 2 or more markets from the beginning.

Olivier commented further that it some ways there is more concern over open platforms, as dominance is more likely to form. Closed ecosystems are more likely to lead to investment and innovation.