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The CNMC assesses, for the first time,
potential vertical restrictions on online sales

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1. Background

On 6 February 2020, Spain's competition authority, the National Markets and Competition Commission ("CNMC"), decided to formally terminate proceedings against Adidas without formally declaring the existence of an infringement or imposing sanctions. The CNMC decided to terminate the proceedings conditional on the implementation of specific commitments put forward by the company. The commitments include amendments to ensure that the contractual conditions are uniform among its distribution network's members and that updated versions of the distribution agreements are applied to (and known by) all distributors; they also clarify and amend some provisions of Adidas' distribution contracts.

Spanish competition authorities had not previously considered vertical restrictions a priority, taking the view that they were less harmful than horizontal restrictions and that, in most cases, competition concerns only arise if the parties enjoyed market power. As such, there were limited cases in which investigatory proceedings were initiated concerning restrictions on distribution contracts. Nevertheless, the rise of online commerce has attracted the attention of the competition authorities in the field, who seek to ensure that manufacturers do not improperly limit the ability of their distributors to sell online, a channel seen as offering significant benefits for consumers.

The current lax framework on online sales under Block Exemption Regulation no. 330/2010 on vertical agreements¹ and its corresponding implementing guidelines have raised numerous doubts regarding the limits of manufacturers' ability to control or condition the online sales of their distributors. The European Commission's current review of this regulatory framework is expected to establish more detailed provisions on online sales and clarify which restrictions should be considered acceptable in vertical relationships, particularly within the framework of selective distribution and franchising, where protecting brand image is essential for manufacturers.

¹ Regulation (EU) no. 330/2010 of 20 April 2010, concerning the application of Article 101 (3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices.

The cases that the European Commission and various European national authorities have assessed to date are highly diverse and have not always resulted in the uniform application of the corresponding provisions. One example is the *Coty* case, which resulted in a request for a preliminary ruling before the Court of Justice of the European Union by the German Supreme Court ([see our newsletter dated 7 june 2017](#)) that assessed whether manufacturers are allowed to prevent their selective distributors from selling through marketplaces.

More recently, the European Commission imposed sanctions on [NBC Universal](#) for restrictions on online sales as a result of provisions in its merchandising product-license agreements, which contained prohibitions on sales outside assigned territories or authorised to sell exclusively through websites of specific authorised distributors. The European Commission also fined [Nike](#) and [Sanrio](#) for geographically restricting passive sales and the [Meliá](#) hotel chain for including contractual clauses that required tour operators to charge customers different prices based on where they resided.

Prior to the *Adidas* case, the CNMC had never initiated any formal investigations in which it had assessed what conditions manufacturers are allowed to impose on online sales; this is the first case in which the Spanish competition authorities have taken a detailed position on the issue.

The CNMC analysed Adidas' contracts with its franchisees and selective distributors to verify whether the contracts complied with antitrust regulations, in general, and with regulations applicable to online sales, in particular.

2. Adida's general terms and conditions for online sales

In its analysis, the CNMC concluded that Adidas had gradually modified the terms and conditions for online sales applicable to its distributors and franchisees. Those amendments resulted, in part, from Adidas' experience in previous cases before French and German competition authorities, as well as from regular reviews carried out by the brand, which had gradually removed or softened the requirements related to online sales. This latter factor was indeed a positive element considered by the CNMC for deciding to close the proceedings with commitments.

2.1. THE MOST RECENT MODELS OF AGREEMENTS AND THOSE CURRENTLY IN FORCE

In general, and except for various minor clarifications Adidas provided to the CNMC on the use of its brand in the URLs of the websites of its selective distributors and franchisees (see 2.3(iii)), the most recent versions of Adidas' general conditions applicable to online sales did not raise competition concerns. These general conditions were set out in the annexes to the franchise agreements and the selective distribution agreements.

2.2. PERIODIC UPDATING SYSTEM OF THE GENERAL TERMS AND CONDITIONS APPLICABLE TO ONLINE SALES THROUGH THE ADIDAS' ORDERING PLATFORM

The CNMC found that, in a limited number of cases, the original distribution or franchise agreements signed with distributors and franchisees corresponded to old versions and did not include provisions on general conditions for online sales or, if they did, the version was not the most recent one. Within this context, the CNMC considered that there was a risk that distributors and franchisees might not be sufficiently certain of the conditions governing online sales in the case of old agreements.

Adidas made the most recent versions of the general terms and conditions on online sales available to all of its selective distributors and franchisees on the platform through which they placed their orders. In fact, the platform required a commitment on their part to accept and respect the general sales conditions to be able to place orders. However, the CNMC considered that this system, which did not individualise

or expressly update the general conditions on online sales, sufficiently ensured that older provisions were actually replaced by newer ones.

As a result, the CNMC decided to analyse not only the most recent version of Adidas' agreements, which as indicated, did not pose competition concerns (see point 2.1), but also older versions. Adidas proposed to the CNMC a commitment to be proactive in expressly making all members of its selective distributors and franchisees network aware of the conditions applicable every time it was necessary to update the templates in order to avoid any misunderstanding.

2.3. ADIDAS' "OLDER" AGREEMENTS

The CNMC identified various aspects concerning the general conditions of online sales and in Adidas' previous agreements that raised concerns regarding potential restrictive effects. Almost all of these aspects had been superseded by the most recent versions, and by commercial practices, of the affected distributors and franchisees. The CNMC found that indeed the distributors and franchisees carried out online sales on their own websites, through third-party marketplaces and through online advertising on search engines such as Google. Therefore, the CNMC realised that in practice any restrictions on online sales existed.

This factor, together with the fact that the number of old affected agreements was small and none of the consulted network members indicated that Adidas had limited or restricted online sales, led the CNMC to decide to terminate the case by means of a conventional termination procedure. As a result, the CNMC did not carry out an in-depth analysis of the potential restrictive effect of the most contentious provisions, since it did not need to reach a precise conclusion as to the existence of any infringement.

The decision nevertheless provides some very clear indicative guidance on the CNMC's position on online sales within a selective distribution system or a franchise network. In particular, the CNMC clarifies three main points.

- i. Firstly, the inclusion of contractual provisions exclusively allowing sales at the authorised "point of sale", without expressly stating that this includes both the physical and online channels of distributors could raise competition concerns. The CNMC understands that, even if the agreement does not expressly prohibit online sales, the fact that it does not expressly provide for (or regulate)

such sales could be considered a restriction equivalent to a prohibition of online sales. In that case, the online-sales prohibition would result in a hard-core restriction.

In the *Adidas* case, the CNMC takes the position that the distributors and the franchisees, who were allegedly bound by the provisions of Adidas' older agreements, were also active in online sales, and therefore the competitive risk did not materialise. Nevertheless, the CNMC's position seems to be clear: the agreement should provide for, and expressly authorise, online sales.

- ii. Secondly, the decision states that the restriction of online advertising through search engines can also be considered a hard-core restriction. Adopting the European Commission's understanding in the Guess case, the CNMC concluded that the prohibition of trademark use in online search engines would be tantamount to an unjustified restriction on online sales.

In the case of Adidas, the older versions of the general conditions on online sales established a requirement that prior approval be obtained from the manufacturer, which was superseded by subsequent versions that removed this requirement. It was again corroborated that Adidas' distributors and franchisees carried out this type of online advertising and, as such, the old provision would not have resulted in any appreciable anticompetitive effect on the market.

- iii. Thirdly, the CNMC found that establishing a requirement, in abstract and general terms, for prior authorisation of the manufacturer to launch the distributor's own website or to sell online, may constitute a hard-core restriction of competition.

In this case, the prior authorisation requirement referred exclusively to the use of the trademark "Adidas" on the internet domain name of the distributor or franchisee (i.e. the URL). The restriction did not involve having to obtain trademark authorisation to make online sales or create a website that does not use the "Adidas" domain name. The CNMC does not dispute that the manufacturer may decide to prohibit, for example, the use of its trademark on the first level of the distributor's URL, limiting its use to the second level of the network. The purpose of the measure is to ensure that the image of the brand is protected. This is consistent with other valid provisions on controlling the type of photographs or technical requirements of websites, which are considered lawful and justified in the context of a selective distribution or franchising network.

However, the decision considers that the prior authorisation requirement in connection with the distributor's domain name, without establishing a maximum and reasonable period of time to

answer the authorisation request, may not be proportionate. In fact, the CNMC states that this may result in the authorisation being unduly delayed in practice, which would entail a restriction on the distributors' opportunities concerning online sales.

In the *Adidas* case, the CNMC found that authorisation had never been requested by the distributors or refused, although they had been using the trademark name in their domain names. However, to address the CNMC's concern, Adidas committed to replace this prior authorisation requirement with a mere communication (ex-post) of the use of the domain name.

3. Considerations unrelated to online sales

The decision also assesses other potential restrictions in the distribution and franchise agreements that are unrelated to online sales.

- i. The CNMC assesses the inclusion in two old franchise agreements that were still in force, of a post-contractual non-compete clause that prevented the franchisee from selling competing products during one year after the termination of the franchise agreement. The possibility of including this type of clause is provided for in Regulation 330/2010 and is considered justified, provided that its duration does not exceed one year following termination of the contract and is limited to the points of sale from which the distributor or franchisee had previously operated.

In the *Adidas* case, the clause was considered to be excessively broad as it did not refer exclusively to the franchisee's former point of sale. The CNMC concluded that this prohibition would not be covered by the exemption in Regulation 330/2010. None of the remaining franchise agreements contained a similar provision and both cases identified by the CNMC involved agreements similar to an old standard form contract that was no longer used. Adidas committed to expressly inform the two franchisees about the changes to the non-compete obligations.

- ii. The CNMC assessed specific restrictions on the possibility of cross-sales being made between selective distributors and, on the other, between members of the franchise network. Regulation 330/2010 establishes that the supplier, within a selective distribution network, is entitled to select the distributors who are members of its network and may prohibit the sale of its products to third parties outside the network, except to final consumers. Sales between authorised members of the selective network must nevertheless be allowed.

In the case of Adidas, the wording of the clause of its selective distribution contracts limited sales to final consumers and prohibited sales to distributors who had not been admitted to the network as authorised distributors. However, it was not sufficiently clear that cross-selling between distributors who had been admitted to, and authorised as, members of the selective network was

not limited. The company committed to amend the wording of its sales conditions to clarify that cross sales between authorised distributors within the selective network were permitted and that only sales to unauthorised resellers were prohibited.

In relation to franchise agreements, the decision includes a novel approach as it compared these agreements to selective distribution agreements. The CNMC considers that an exclusive supply clause by the franchisor (a legitimate restriction according to the European Commission's Guidelines on Vertical Restraints) combined with a prohibition on sales to third parties other than final consumers, had the effect of prohibiting cross-selling between the members of the franchise network. Although Regulation 330/2010 refers to the prohibition of cross-selling between members of a "selective network" of distribution and does not expressly mention franchisees, the decision considers them comparable. In order to clarify the queries raised by CNMC, Adidas committed to amend its franchise agreements and expressly authorise cross-selling between franchisees.

4. Conclusions

This decision is important and novel for several reasons. On the one hand, it is a clear indication of the growing interest of the CNMC, in the same way as the European Commission and other national competition authorities, in investigating possible restrictions in the field of vertical relations and, in particular, in relation to online sales. Moreover, it provides highly useful practical indications as to what types of restrictions on online sales are allowed or not in the framework of selective distribution agreements. Finally, it introduces important nuances concerning how franchise agreements are treated in relation to restrictions on cross-selling between network members. To date, many of these nuances are not expressly dealt with in Regulation 330/2010 or in the European Commission's Guidelines on Vertical Restraints and thus they may be worth addressing and clarifying in the upcoming review of European regulations that is currently underway.

The decision makes it clear that companies must make sure that their distribution contracts comply with competition law. Not complying with these rules can have very negative consequences for companies, such as fines, contracts being declared null or even claims for damages. Given the growing number of proceedings initiated by the competition authorities in this area, it is advisable to periodically review contracts to make sure they are aligned with current legal developments.

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