

Distribution Networks and On-line Sales

By

Yann Dietrich
IP/Licencing legal counsel
France Telecom R&D

yann.dietrich@ties.itu.int

Alexandre Menais
Lawyer
IP/IT Department
Lovells, Paris
alexandre@menais.com

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"38 years were needed so that 50 million Americans could access the radio, 13 years for the television, 16 for the computer and only 4 years for the Internet."¹

Introduction

This simple data clearly shows the speed of the Internet's growth and with it E-business. The new economic actors are rapidly taking full advantage of this evolving mode of communication. Companies will therefore have to manage the risk of being overthrown by newcomers by assuming ownership of this new distribution mode. At first most of them had a respite by prohibiting on-line sales and by blocking their traditional distribution networks. As M. Erkki LIKANEN, a member of the European Commission, underlies, barriers to the entry of the electronic market are, in the United States mainly practical, whereas in Europe, they are still abstract and often lie in a misunderstanding of the new economic models.

Tensions between some suppliers' "conservatism" and their distributors desire to use new methods opened by the Internet, found its first judicial application in 1999, in the "*Fabre case*"². Indeed, it seems that the fact of forbidding sales on the Internet by authorized dealers within the framework of a distribution network could not, from an economic and legal point of view, go on much longer. The importance of this new means of distribution is illustrated by the reform of European exemption rules concerning vertical restraint. The Commission has adopted rules that will now recognize disputes between suppliers and distributors. Guidelines³ following the EC regulation regarding vertical agreements n°2790/ 1999 of December 22 1999 have just been modified⁴.

This new text attempts to raise all the principal obstacles in the integration of the Internet into distributive networks, but fails to settle concrete problems in the organization of such networks and notably issues arising out of competition between real and virtual networks. For example in the formal proceeding of the Commission against B&W Loudspeakers on December 12 2000⁵, the Commission warned B&W that its distribution system hindered the development of modern distribution methods such as e-commerce. Even though the Commission has made no formal decision, it clearly shows that the new regulation will be strictly applied to allow consumers "to obtain the delivery of products by the means they prefer" as explained by Mario Monti, a member of the Commission.

Regarding the problems relating to Internet sales today, we propose to:

Study how the supplier can integrate on-line sales into traditional distribution networks.

Examine, from an economic and legal point of view, the new means of distribution of products on the Internet by considering in the absolute that "*there are no a priori licit marketing rules. There are only those that aim to guarantee a sale in conditions favorable to the consumers*"⁶.

I. The Prohibition of on-line sales in distribution networks

Internet sale prohibition within distribution networks should be appreciated on the one hand within selective distribution networks and on the other hand within exclusive distribution networks.

A. In selective distribution

"*Selective distribution as technique of distribution is not new; however mutations affecting distribution tend to give it a renewal of actuality in a context which is often of conflicting nature.*"⁷ Is this a case of history repeating itself? This quotation dating back more than 20 years is still manifestly relevant nowadays. Indeed as selective distribution within the Internet arouses many questions, as our commentary illustrates, then the context of conflict will endure as illustrated by the perfumer's dispute.

The domain of selective distribution, an authorised exception in competition law, seems to be disturbed by the Internet. Following a wise evolution of case law, competition within a network remains an authorized practice if it maintains a variety of modes of distribution to the benefit of the user. Selection in order to organize distribution inevitably leads the supplier to refuse to supply distributors that are not selected. The EC regulation of December 22, 1999 defines this type of network as a distribution system " *where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorized distributors*".

The application of these qualitative criteria in relation to sales on the Internet within a distribution network was firstly examined in the Fabre case. In this case, the Versailles Court of Appeal ruled on the compatibility of distribution through the Internet where the supplier had imposed sales conditions because of the selective nature of its network.

In the past, we have evoked the possibility of admitting such compatibility notably with the evolutions of outputs on the Internet, which will allow a real interactivity between vendors and buyers with the use of video-conferencing solutions. Indeed, the Internet network is far from being in its ultimate development stage and a number of solutions using high bandwidth networks have evolved and are still or are going to make their appearance⁸.

However, without rejecting this evolution, the Court of Appeal refused to consider that on-line sales such as those practiced by the distributor in this case are incompatible with the requirements of the selective distribution established by Pierre Fabre. The Court in this case mainly relied on the fact that the distributor site could not generate personalized advice in a satisfactory context and that it did not establish a "virtual shop window" allowing a sufficient presentation of products. We can gather from this that the issue of the Internet's conformity with the requirements of selective distribution, notably for para-pharmacy products, does not seem to be settled. Concerning the duty to advise the consumer, the Court criticized this web site for not enabling interactive dialogue with the customer due to the delay in replies. *A contrario*, if the advice were to be generated by video-conferencing or instant messaging instead of by an exchange of e-mails, then this would be a convenient solution in accordance with the requirements of selective distribution. In addition, concerning the homogeneous presentation of products, it would be advisable to adopt a look & feel approach corresponding to the image of the product and the presentation of all the products as well as their packaging.

But, the Court of Appeal points out that, "*in the future this new distribution mode could become integrated into a selective distribution network, with qualitative criteria to define*".

Where the conditions of restriction or prohibition of on-line sales by its retailers are limited, they should be inspired by case law about distance selling. French law considers that a prohibition clause of distance selling would not be restrained by competition if the nature of the product justifies it⁹. So, such a restraint can only be justified if the use or quality of the product imposes it. In other words, to what degree can criteria reconciling the supplier inhibit the justification of selective distribution? A discretionary prohibition of any kind of distribution mode would neither stand up to French nor EU law,

since it " would have for only effect to protect the existing competition forms of business of the new operators and would not be in keeping with the article 85 § 1"¹⁰.

The European Commission specified, in the last version of its guidelines, that 'an outright ban on Internet or catalogue selling is only possible if there is an objective justification".

B. In exclusive distribution

The analysis concerning exclusive distribution is quite different. Indeed, such networks are not based on the retailer "quality" but its territorial field. EC regulation n° 2790/1999 of December 22 1999 resumes the classic solution prohibiting passive sales restrictions. Thus, article 4 considers as a black clause restriction, the selling territory or clientele of the distributor. On the other hand, active sales will be allowed in an exclusive territory or clientele reserved to the supplier or conceded by the supplier to another distributor.

Therefore it must be determined where on-line sales fit within the classic distinction between active sales and passive sales?

The European Commission presents a first response in its guidelines. Thus, in paragraph 42, it considers that "*the use of the Internet for advertising purpose or sales of products or services is generally considered as a kind of passive sale, as far as a site is not clearly conceived so as to reach all customers that are inside a territory or inside a clientele group of exclusively admitted to another distributor, for example by using advertising banners or links in pages specifically aiming the admitted clientele. On the other hand, an unsolicited message transferred by e-mail to individual customers is considered as an active sale*". So on-line sales would be considered as passive sales.

Nevertheless, the absence of guidelines determining the passive-active nature already raises some difficulties, for instance concerning data protection¹¹. In order to determine a web site's territorial target one would have to look at technical data.

According to the guidelines, web sites should not have to be conceived so as to reach customers that are inside a territory or inside a group of clientele exclusively conceded to another distributor. Due to the Internet's inability to manage the territoriality concept, this definition would not allow distributors to access the Internet's commercial tools.

Referencing on the Internet will be a delicate issue for distributors. So, it will be necessary to indicate those that are authorized, in the sense that they do not constitute an active approach intended for non-conceded territories, especially concerning international browsers. Indeed, their reaction to single language will not allow the precise filtering sites. Admittedly, if it seems normal that the distributor only indicates his site with meta-names in his language, this criteria will not be sufficient.

Concerning the issue of links, given that price comparison sites are quickly developing, distributors will find themselves in an uncomfortable situation. If they maintain low prices, they run the risk of being quickly referenced by those sites outside their contractual territories. If the supplier obliges him to withdraw, the distributor could be in a material impossibility to sell on-line. However, to be qualified as active behavior, the distributor will have had to take the initiative to ask for the establishment of these links.

Finally, regarding the language presentation obligations, it would be normal to expect that the distributor can only present his site in his original language. However, some could complain, considering that others among them profit on the Internet from a wider field because of the simple fact that some languages are understood by a greater number of consumers in.

In conclusion, the principal Commission statement will probably open up distribution networks to on-line sales. Meanwhile, a modified version of guidelines that was adopted on May 24th, 2000 clarified the notion of a passive sale on the Internet. So, "*If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered*

passive selling". In other words, for a lack of active behavior from the distributor, any of his sales to any territory or group of clientele will be considered as a passive sale. In addition, the Commission clarifies that "*the language used on the web site, or in the communication normally plays no role in that respect*". However, beyond this Commission principal assertion, some technical constraints evoked above remain.

As we saw, it will be difficult for producers to restrict on-line sales within their distribution network. The first reflex, at the moment, is for producers to reserve for themselves this type of sale. It is therefore necessary to examine the legality of such a reservation, as well as to analyze the situation of supplier-distributor competition that would result from it.

II. The legality of the reservation by a supplier

Even though a reservation by a producer seems natural within a selective distribution framework¹², it does raise many legal difficulties, attached to the specific nature of these networks and, in addition regarding the coexistence of distribution networks that would be instituted. It is in this spirit that the Commission has just asserted that " In any case, the supplier cannot reserve to itself sales and/or advertising over the Internet ".

A. In the case of the selective distribution

Selective distribution privileges are a very particular role of the network head which, in obliging itself to deliver only to selected distributors according to objective criteria, finds itself invested as the guarantor of its commercial network's integrity. However, if the producer can prohibit on-line sales by its distributors, can he practice such sales himself?

Indeed, the producer still remains free to organize his product distribution as he likes and in particular directly with the consumers. This is an immediate circuit that the Internet from now on makes possible under innovative conditions unlike traditional distance sales. However, the specific nature of selective distribution is the range of the commitment of the supplier which, as defined in the 1st article of the Rules 2790/1999, "*promises to sell the contractual goods or services, directly or indirectly, only with distributors selected on the basis of defined criteria*". Consequently, on-line sales by the producer himself hardly seem possible, for two reasons.

On one hand, the producer himself guarantees network integrity. He has to prevent any violation of the ban on resale outside the network. An author¹³ wondered about a violation of the resale ban outside the network by a distributor that commercialized contractual products on the Internet. According to him, the distributor would not be able to control his sales so as to avoid any dishonest order of non licensed distributors. However, we share Alain Ronzano's surprise¹⁴ that the author has not raised the question of the infringement of the network integrity which the supplier would commit by selling on the Internet. It will be difficult, in these conditions, for a producer that opens an Internet site allowing on-line purchase, to guarantee the network integrity.

On the other hand, the producer obliges its distributors to respect objective marketing conditions imposed by the nature of the product. If, as judged by the Court of Appeal of Versailles, selling on the Internet does not seem compatible with the respect of these conditions, it does not seem conceivable that the producer can make it himself in the respect of the nature of its products. How can one consider that the same products would be subjected to two different regimes, one of sales emanating from the distributor and one from the producer? The supplier would expose himself to claims against the legitimacy of objective selling conditions of these products that, as we remember, have to be imposed by the nature of products.

In conclusion, a way remains open to suppliers: the adaptation of their marketing criteria to the specificity of the Internet, which would allow their distributors to sell on the Internet. Recently, the Competition Directorate -General of the European Commission has decided not to raise any objections to the selective distribution system of Yves Saint Laurent Parfums, which authorises approved retailers to sell via the Internet as well¹⁵.

B. In the case of exclusive distribution

As we first said, the supplier remains free of his mode of distribution. However, whether it is within the framework of a pre-existing network or of a future network, can the supplier, if he chooses an exclusive network, contractually reserve for himself sales on the Internet? An affirmative answer does not seem to be so clear.

Indeed, European competition rules prohibit in a general way any exclusion of the passive sales made by distributors. Would not a reservation of on-line sales by a supplier end indirectly in such a prohibition? Since the European Commission considers that "*the use of the Internet for advertising purpose or for products or services selling is generally considered as a kind of passive sale*" and as far as the distributor respects the conditions of this passivity, it does not seem legally possible that the producer can forbid this kind of selling to its distributors. Such prohibition would fall under the blow of article 4 of the exemption rules of December 22nd, 1999, in the sense that it would constitute an indirect limitation of the passive sales.

Besides, such a limitation will not be based on the nature of products because rule n° 27/90 prohibits accumulation of exclusive and selective networks. Consequently any limitation regarding the nature of products would fall under the blow of these rules.

C. The coexistence of distribution networks

If we admit that the producer can reserve on-line sales for itself, the management of this coexistence of distribution networks seems more delicate such as for the fixation of his retail price on his electronic business site and in his relationships with the distributors.

The fixation of the price

One of the problems that we were able to clearly identify is connected to the distributor's freedom of resale price fixation. Indeed, this is an essential element of competition law as stated in Article 4 of Community Regulation n° 2790/1999 of December 22nd, 1999. Accordingly any limitation of the purchaser's capacity to determine his retail price, will be considered as a black clause, without prejudice to the possibility for the supplier to impose a maximum retail price or to recommend a retail price, provided the latter do not amount to a fixed or minimum retail price as a result of pressure exercised by one of the parties or the incentives taken by it. Regarding the prohibition on minimum retail price, the producer, by fixing its retail price on the Internet, will only indicate a maximum or recommended price.

However, producers should be prudent in the determination of their resale price on the Internet regarding loyal competition principles with their own distributors. A decision of the French Supreme Court on November 3rd, 1992¹⁶ has considered that the producer should not place distributors in the situation where it is impossible to maintain a price level allowing him to face competition. This case can be widened to the competition of producers themselves and the fixation of their own resale price. So a producer fixing too low a resale price, can destroy his own distribution network and if its resale price is too high, his web site will not sell any products.

Distributors - suppliers relationships

In fact, the producer by reserving direct on-line sales to himself is going to have to manage more than a situation of competition, namely a real questioning of the principles of cooperation in its contractual relationships with distributors.

The producer could object that the multiplicity of electronic business sites selling his products would damage his commercial policy. However, the distributors could themselves consider that the reservation by the supplier of the sales on the Internet and this new source of competition arises from a modification of their contract and of its balance in the economy. Consequently, such practice could

be considered by the distributors as questioning the underlying principle of cooperation in any contract of commercial concession.

A similar case concerned the competition of a producer with his distributors by reselling to hypermarkets¹⁷. Canadian justice made an interesting application of this notion of good faith. The Court considered that the producer did not have to refrain himself from the exercise of any competition with his distributors while for him *"the constant adaptation of the commercial techniques to market fluctuations and to the tastes of the public is a question of economical life or death"*. However, the Court ruled that the producer was not all that free to question his relationships with the distributors according to his good will and that he had *"with their agreement, to create a commercial retort allowing these last ones to minimize their losses and to reposition in a market in evolution"*. In France, an identical application of good faith can be found in the jurisprudence relative to the abuse of the right to cancel these same contracts. So, when the Paris Court of Appeal decided that the head of a distributive network had *"to loyally oversee whether these sub contractors can leave without losing the fruit of their participation in a common effort, the counterpart of their commitment within the network"*, it can not be different from the situation where this same network head modifies the balance in the economy of the commercial concession contract in establishing a direct competition.

Recently, an arbitration panel¹⁸ stopped the Drug Emporium from selling to its franchisee customers via the Internet. The franchisees claimed that the Drug Emporium could not sell directly to customers within their territories without breaching its contractual obligations. The arbitrators considered that a virtual drug store is like a drug store. Consequently, they *"ordered Drug Emporium not to sell to any potential customers physically within the franchisees' territories and to place a notice on the Web site that products cannot be shipped to such customers"*.

Another case concerns distributors themselves. The Federal Trade Commission¹⁹ had to rule on the practices of a group of Chrysler retailers in the United States. The Chrysler retailers threatened to limit their services and to no longer sell some models if Chrysler did not limit the number of cars assigned to e-retailers. Indeed, the traditional system was based on the sales of the retailers which required that the number of vehicles assigned to each of them were indexed to the size of their contractual territory, which reduced in a considerable way the capacity to sell on the Internet. The Commission considered this agreement as a violation of the FTC Act because it restricted competition amongst cars retailers and risked depriving the consumers of local access to some models and to services.

To conclude, the emergence of the electronic business in distribution networks will only be possible, in our opinion, by respecting frictionless principle sharing the fruits in the interests of each partner.

III. The new modes of broadcasting

Now, the Internet appears as the motor of the exchange reorganization and distribution of concepts. It is, beyond the financial dimension, the real cultural revolution, a technological cluster carrying within it an incalculable number of potential progress, as clarifies it Steve Ballmer, Vice-president of Microsoft: *"We have only just begun to scratch the surfaces of what is possible"*. That is why, we suggest to first appreciate this impact by demystifying the Internet, and secondly to deduct new alternate networks organization modes.

A. The principles of the new economy

To resume a current idea in economic circles, according to J. Schumpeter, the process of destructive creation is an essential part of capitalism. Thus, if the Internet does not question the principles of the current economic model, exchanges and relations among the economical actors will have to be reorganized around this new technological tool.

A new organization of exchanges

It is true that the downstream placing of individualized relationships with the final consumer implies, eventually, an upstream evolution of production models and much more, of the distribution. Now, it is

established that it is advisable to "shape" the company by and for the customer. Especially since the consumer in the B to C (ie supplier - consumer), should benefit from a new organization of relationships with storekeepers because now the customer can use Internet facilities "to open up" various offers answering their needs or to benefit from new services.

This reorganization is possible today due to the Internet. Indeed, during the last century, companies integrated their circuits in front of considerable risks and high costs rather than deal with others; now, everything is only "intermediation" (e.g. middleman) and agreement²⁰. So, the low costs of collaboration and interaction allow a real destruction of their networks. Another simple rule can be: if you do not have market experience for something, buy it but do not make it. For example, the site garden.com arranges a stock representing only 3% of the range of products that it proposes. Most of the products are directly forwarded by the producer to the consumer. On the other hand, this site proposes a whole range of new services, such as the simulation of your garden.

Nature of the sale on the Internet

E-business allows us to forget a number of current sale constraints. The phenomenon of depersonalized sales on the Internet must not be underestimated. Studies show that, notably within the framework of car sales, the freedom of choice and especially the fact of not being directed and bothered by a salesman is a determining factor in the decision in an electronic mode of sale.

Finally, if price is a determining factor in sales referred to as real, on the Internet, the added value to the act of sale allows the maintenance of strong attractiveness although prices are not necessarily lower. For example there are various costs regarding the creation and maintenance of sites, the price for their commercial existence on the net with the principle that everything can be bought on the net and more particularly the traffic! Moreover, commercial attraction must pass through a credible salesman or service provider, in other words who is behind this offer? What will be called "the offer approval" by the consumer. The "careful Internet user" before becoming a customer will search if the Web site contains reliable wages. Now, this trust has a price and the tendency of the seal of quality or trust of sites will only increase spending directed towards "e-trust". However, price is not necessarily the determining element that brings the Internet user to buy on the Internet, as we saw it with the phenomenon of depersonalization. So, according to two economists from MIT²¹, based on other studies, consumer price sensibility on the Internet can be less than in the traditional circuits. The authors quote, for example, a study establishing that, in the Internet wine business, the quantity of information given to the consumers could affect price competition and increase their loyalty.

A real integration of the Internet dimension

It has not yet been demonstrated, that a customer who browses in a big Parisian department store would represent its main turnover! Indeed, many European sites correspond to a simple activity of marketing and not of electronic business. Now, it is often forgotten that it is a capitalist world of classic companies strong of stereotypical hierarchical models that pushes technological news. So, the models of the automobile industry such as Ford or GM are seen to enclose the Internet relationship in the implemented or more flexible production techniques notably by a very hierarchical informative integration as well as within the relationship of company suppliers and distributors. As underlines Mr. Richard Melnicoff, E-commerce is an inevitable opportunity for traditional businesses which have, with its experience, a jump on electronic business, and the know-how to keep it up.

B. The alternate modes of distribution bound to the Internet

In June, Mr. Erkki Liikanen, member of the Commission, in charge of companies and the IT society, asserted that only companies that adapt themselves to new conditions will survive. So, The Commission encourages small and medium-sized companies adopting successful commercial models to integrate electronic business between companies. Moreover, the Commission reminds us that in spite of the necessity of protecting dynamism linked to e-business, it is advisable to be inspired by the traditional model or to create commercial models; and this position must be achievable according to the specificity of the Internet. A contrario, the "E-pessimists" consider that companies, notably many

top groups, must not fall in the stumbling block of the "fatal attraction" for the Internet. As underlines CEO of IBM, Louis Gerstener²², the haste of some companies to be present and to communicate on the Internet, is closer to a desire to look "in" or be "up to date" in front of financial markets, than a real will to develop an e-business project. It is true that a catalogue could have already been established for companies' errors or mistakes. However successful they are in the real world, they do not know how to land intelligent marketing on the Internet. These reasons above have more or less been tackled. But, institutional companies have manifestly succeeded, notably in questioning their traditional distribution channels.

The first of them is unmistakably DELL²³, the leader of direct selling without a distributive network. DELL is a pioneer who unmistakably understood the revolution of the Net economy. Its sales through the Internet now represent 50% of their turnover that allows them to save 15% of margins with regard to its competitors. DELL's peculiarity is simply to sell its products set directly.

Indeed, the supplier is going to sell the goods he manufactures, without using a classic distribution network for the sale, but by allocating to his network another mission, notably to supply services, which will be "secondary" to the sale. From now on, through electronic business, the supplier can disregard geographic constraints. He reaches his customers in a completely transparent way, without a need for intermediaries. It is evident that this direct sale, on an economic level, will reduce the supplier's goods cost price. Even though in practice, it remains that the supplier will perceive an increase in value. The distribution cost reduction does not imply that the latter will try to sell his product less expensively. It is in fact the opposite.

While the distribution network has often been blamed for being exclusively content with selling and with underestimating the services or at least partially, the hypothesis of a supplier selling directly to the consumer opens manifestly the possibility of secondary performance development. Effectively, this seems inevitable in light of the expectations of the Internet users-customers. At the same time, constraints, notably legal, on the sale reservation on the net by the supplier, leads them to develop and to set up a real e-business platform for their product distribution.

Direct selling with a change to the network role

The consequences of the devotion of the B to B or B to C in the product distribution process has changed the allocation of distribution network missions. The supplier sells his products directly to the consumer, and then the network supports all the secondary performances in the product's sale. Naturally, if the distribution network role is modified, it remains that the nature of relationship among the suppliers and his distributors is unchanged both in a selective report and in an exclusive report. In other words, secondary services are also subjected to competition rules such as we evoked for the sale. Therefore, the supplier should particularly respect rules relating to the freedom of the distributors to fix the price and the suppliers could therefore find themselves incapable of making a global offer to the Internet user from the time of sale.

Manifestly, this proposition of a distributive network organization does not appear to constitute an optimal solution for the supplier. If the supplier wants to reserve for himself the sale of his goods on the Internet and meanwhile develop the sale of services, he must be able to do so, without substituting himself for his distributor by integrating the latter into his offer on the Internet. Objectively it is really to strengthen the relation from B to C. That is why, in the rapport with the consumer, it will be a question of developing a global proposition which would include secondary services in products distributed on the Internet. The distributor appears then as a unique subcontractor of the supplier, because he preserves the production mastery for the direct sale. Involving secondary services, he can from now make them appear as if they are enclosed in his offer and that allows him to master the contents of the service. Relationships with the customer are completely transparent in so far as he has a unique interlocutor who is the producer. The burden is on the latter to honor the offer by resorting to a subcontractor for the execution of services. Finally, the supplier preserves a total control on the price because he simply re-charges his distributors for their mission execution.

The redefining of the role of the distributor, on the legal level will entail the termination of contracts binding the supplier to his distributors. Nevertheless, we do not consider that this dissolution can constitute an abuse of law from the supplier to the distributor. The distributor, in spite of the change of his role and the reorganization of links within the network, is able to maintain his distribution activity by means of the subcontracting. It will be important for the supplier to allow the distributors to harvest the justifiable counterpart of their investments.

If this solution seems at least more acceptable for the supplier, a much more progressive model of distributive network organization was set up in IT, a sectorized market, by Compaq²⁴.

Compaq's objective is to sell at a unique price, an Internet price. Compaq hopes to be able to operate by a reducing of the margins of its retailers. The good which is sold at a unique price corresponds to a raw machine which will be completed by appendix services supplied by the retailers whereas before those services were offered by Compaq. In other words, in order to increase its own margins on the sale, Compaq will only transfer the role handed to his distributors by decreasing the number of logistic retailers so as to increase that of the commercial retailers. (In any event this company's service missions only represented 30% of its turnover). But Compaq considers that the builder will always need fitters and "contact people" to guarantee his customers satisfaction. Therefore, and this is the reason why we linger on this example, relationships with distributors are going to change their orientations, so as to become business contribution contracts by this new organization. They are intended to manage the retailers towards new missions that consist in recruiting the customers who order with Compaq. Meanwhile, all difficulties will lie in the determination of the commissioning of the commercial effort so supplied by the retailers.

This new conception of the organization of goods sales on Internet that we evoke has its limits. Among these, one questions the consequences provoked by fiscal disparities between countries and notably taxes on sales. Will the maintenance of a unique price survive?

One could notice that indeed there is, as a result of the Internet, vertical destruction within distribution networks. The taking charge of the distribution networks by the producer seems inconceivable in a general way for a group of activities.

The setting of an e-business platform as distributive networks

From the integration of his distribution network, the idea of a supplier dedicating an Internet site to the exclusive sale of his goods inevitably seems attractive. For all that, some legal obstacles must not be underestimated.

Above all, a first reminder is necessary. The fact of dedicating an Internet site to the sale of goods that directs buyers to distributors, is not going to prevent the distributors from selling on the Internet. We are thinking more precisely, about exclusive distribution agreements which as we have explained, do not authorize the supplier to reserve the sales to his profit, without legally risking notably in managing the situation of competition between the supplier and his distributors.

The American idea and by application of the principle "be frictionless" will be to offer to his own distributors a platform of on-line sales administered by the supplier himself. The distributors will reference their product sale offer with the supplier who will only play an intermediary role in the sale between the Internet user and the distributor himself. This solution, which is soon going to be implemented by Renault, allows the supplier to open up electronic business, without questioning the principles, which stimulate his products distribution policy. So, he will not have the inconvenience of fixing a unique price for a wide geographic territory or the opening of various national sites to sector his price offers. In addition, while maintaining control of his products distribution, it allows him to share the fruits of the electronic business with his distributors and to avoid the legal and economic dangers which can arise from a situation of competition with the latter. Finally, he will be able to quickly set up a distribution of the products on the Internet while mastering a homogeneous presentation of them.

However, from a legal point of view, the management of this platform should necessarily respect competition rules and notably those concerning the limitations of parallel imports. Therefore, the filtering of consumers during their entrance on the site could turn out to be extremely delicate. Indeed, such a platform should not forbid the distributors from answering a non requested order emanating from a customer placed outside of their contractual territory. We understand early on that the supplier could only oblige the consumer (but with difficulty) to indicate his geographic origin from his entrance to the site and then indicate the offers of the corresponding distributor. In the same way, it seems dangerous to us to limit the right for distributors to sell, by means of the platform, to a demand of customers placed outside of their contractual territories. Similarly, the supplier should determine the methods of sorting the offers of his distributors and, if possible, according to prices indicated by the latter. Certainly, it could be objected that passive sales remain possible from this platform, the supplier could forbid such practices only on this last one. But this argument does not seem to favor the Commission direction which has a respite to raise barriers in the integration of the European market. However, for many products - and we naturally think of motor vehicles - the statutory barriers bound to imports will be sufficient in a lot of cases to avoid such passive sales.

Finally, in such a hypothesis, the contractual obligation for the distributor to adhere to such platforms seems obviously more justifiable than the reserving of Internet sales for the supplier, while allowing a non-conflicting management of this new distribution.

Y.D. & A.M.

Notes

¹ Mr. William Burrington, vice-president of AOL INC, Seminar Trades electronic and development, World Organisation Mondiale du Commerce, February 19, 1999, <<http://www.wto.org>>.

² TC Pontoise, in April 15, 1999: Juriscom.net, <<http://www.juriscom.net/txt/jurisfr/ce/tcpontoise19990415.htm>>. Court of Appeal of Versailles, in December 2, 1999: Juriscom.net, <<http://www.juriscom.net/txt/jurisfr/ce/caversailles19991202.htm>>. For comments, see: Alexandre Menais and Yann Dietrich, " La distribution sélective à l'épreuve du commerce électronique ", Cahiers Lamy droit de l'informatique et des réseaux n° 114, May, 1999, also available on Juriscom.net, <<http://www.juriscom.net/pro/1/ce19990301.htm>>; Cédric Manara, " Web et distribution sélective ", Dalloz 1999, n°44, p. 725; in a lesser measure: Alexandre Nappey, " la distribution sélective à l'épreuve de l'Internet ", Estimates, n°237, in May, 2000, p. 150.

³ JOCE C-270 in September, 24, 1999, <http://www.europa.eu.int/comm/dg04/antitrust/others/vertical_restraints/reform/consultation/index.htm>.

⁴ JOCE L 336, 29/12/1999 p21-25, <http://europa.eu.int/eur-lex/en/lif/dat/1999/en_399R2790.html>.

⁵ European Commission, " Commission opens proceedings against the distribution practices of B&W Loudspeakers", <http://europa.eu.int/rapid/start/cgi/questen.ksh?p_action.gettxt=gt&doc=IP/00/1418|0|RAPID&lg=EN>.

⁶ Lamy Droit économique n° 4113, Dec n° 76 / 159/CEE of the Commission), in December 15, 1975, SABA JOCE in February 3, 1976, n° L 28, p. 19, pt 29.

⁷ Jean-jacques Burst & Robert Kovar, «La distribution sélective et le droit communautaire de la concurrence», Rev. Tr. dr. com., 1978, p. 459.

⁸ Report « Internet du futur », Conseil Général des technologies de l'information, <<http://www.telecom.gouv.fr/mrt>>.

⁹ See Yves Saint Laurent Parfums cases Dec n°99 / 33/ of the EEC commission, in December 16, 1991, JOCE in December 18, 1991, n° L 12, p 24 and also CA Paris, in February 23, 1995, RJDA 6/95 n° 706. But also: Conseil de la concurrence, décision n°96-D-76 November 26, 1996, AUTODESK. The Council estimates that a clause excluding the mail-order selling in a contract of selective distribution of software decreased competition by prices among retailers.

¹⁰ Cases of December 12, 1996, TPICE: Yves Saint-Laurent (T-19 / 92), Givenchy (T-88 / 92), Rec CJCE, II p. 1851 and f. and M.L.Vogel's note, Contrats, Conc., Consom. 1997, n°1, p. 13.

¹¹ Patrick Thieffry, " Le commerce électronique et les réseaux de distribution ", Les Echos, november, 2, 1999.

¹² Cédric Manara, " Web et distribution sélective : réseau contre réseau ? ", Dalloz on 1999, n° 44, p. 725.

¹³ see infra 12.

¹⁴ see CREDA list archive , CREDA, <<http://www.ccip.fr/CREDA>>.

¹⁵ <http://www.europa.eu.int/rapid/start/cgi/questen.ksh?p_action.gettxt=gt&doc=IP/01/713|0|RAPID&lg=EN>.

¹⁶ Cass Com, in November 3, 1992, Bull Civ n° 338.

¹⁷ Supermarket A.R.G. Inc. and supermarket Frontenac Inc c. Proviso Distribution Inc. [1995] R.J.Q. 464 (CSQ); [1998] R.J.Q 47 (CA).

¹⁸ Emporium Drug Smart Inc., American Arbitration Association, Texas, September 2, 2000 available on the website Juriscom.net <<http://www.juriscom.net/txt/jurusus/ce/aaa20000902.htm>> , see also Pierre-Emmanuel Moysse, " Le commerce électronique en toute franchise ? ", Juriscom.net, 10 janvier 2001, <<http://www.juriscom.net/chr/2/qc20010110.htm>>.

¹⁹ Fair allocation system, Inc., C – 3832 (October 31, 1998) quoted by David A. Balto in " Emerging antitrust in Electronic Trades ", November 12, 1999, <<http://www.ftc.gov>>.

²⁰ Richard Melnicof, " The eEconomy : it's later than you think", Outlook 1999, n°21, <http://www.ac.com/ecommerce/ecom_outlook.html>.

²¹ Erik Brynjolfs son & Michael D. Smith, " Frictionless commerce? a comparison of Internet and conventional retailers ", revised 20 march 2000, <<http://ecommerce.mit.edu/papers/friction.html>>.

²² L. Gerstener, Tribune libre, *Business week*, March, 27 2000.

²³ C.Ja, " Le constructeur Dell ne séduit plus les marchés financier ", *Le Monde*, February, 12, 2000.

²⁴ Alexandre Bissé, " Négociations Compaq et ses distributeurs : le Chêne et le roseau... ", *Le Journal Informatique*, February, 10, 2000.