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NBCUniversal Fined €14.3 Million as European Commission Completes Trilogy of Sales Restriction Cases

On 30 January 2020, the European Commission (the Commission) fined NBCUniversal and other companies within the Comcast group €14.3 million for imposing anticompetitive restrictions on the sale of licensed merchandise in the European Union (EU). This was the third in a series of cases that the Commission opened following its sector inquiry into online sales, following fines imposed on Nike and Sanrio in 2019.

NBCUniversal's Conduct

NBCUniversal controls intellectual property (IP) relating to movie franchises such as Jurassic Park, the Minions and Shrek. It had granted licensing agreements that permitted the use of its IP on a range of products, from clothing to toys and household goods. The Commission's investigation found that, between 2013 and 2019, NBCUniversal used a range of restrictions to limit the territories in which, and customers to whom, its licensees could sell merchandise. These included:

- Restricting out-of-territory sales through explicit prohibitions; obligations to notify out-of-territory sales to NBCUniversal; obligations to pay NBCUniversal any revenues generated from out-of-territory sales; and limits on the languages used on merchandise.
- Restricting sales outside allocated customers or customer groups.
- Restricting online sales, including clauses prohibiting all online sales, clauses prohibiting out-of-territory online sales or clauses only allowing online sales on the websites of specific retailers.
- Obliging licensees to pass-on these sales restrictions to their customers, by requiring licensees not to supply their products to customers who could be selling them outside the licensees' allocated territories or customer groups.
- Implementing a series of measures to encourage compliance with its restrictions, such as carrying out audits and terminating or not renewing the contracts of licensees who breached its terms.

Notably, NBCUniversal's licensing agreements were non-exclusive – meaning that licensees should have been able to sell their goods without restriction – but the restrictions that it imposed had largely the same effect as allocating customers and territories exclusively.

The Commission found that these restrictions reduced choice for resellers and consumers, making it harder for them to buy potentially cheaper goods from other countries. In a statement, Commission Vice-President Margrethe Vestager gave the example of a Spanish department store that could not sell "ET pyjamas" made by a Belgian manufacturer because it was banned from selling into Spain.

The Importance of the Decision

The Commission's decision is especially significant for licensors and licensees of merchandise, and more generally for all traders active online. The EU's rules on restrictions in typical supply and distribution agreements, especially in the offline world, have been relatively clear for some time. However, the focus on restrictive terms in licensing agreements and online sales restrictions are more recent developments.

The licensed merchandise industry is large and growing rapidly. The market for apparel, toys and a vast range of other goods bearing the images of movies, TV shows, musicians and sports teams – to give just a few examples – was worth an estimated €50 billion last year in Europe, and €230 billion worldwide.

The Commission's interest in the sector is, therefore, unsurprising, and in 2017 it opened three parallel investigations into licensing agreements that included restrictive terms.

In March 2019, the Commission fined Nike €12.6 million for imposing territorial restrictions on the sale of licensed products such as football club merchandise. This was followed by a fine of €6.2 million in July 2019 on Sanrio – owner of the "Hello Kitty" characters – for similar restrictions, including clauses that required licensees to refer orders for out-of-territory sales back to Sanrio, and restrictions on the languages that each licensee could use. NBCUniversal was the third company that the Commission investigated, and has now fined.

In her statement, Vice-President Vestager also stressed that these decisions should be seen in the wider context of the Commission's efforts to reform online sales. Since launching an inquiry into e-commerce in 2015, the Commission has taken a series of steps to remove obstacles to cross-border online sales. As well as undertaking investigations and imposing fines, the Commission adopted specific legislation in the form of the 2018 Geo-blocking Regulation. This prohibited certain practices that discriminate between EU customers online to enforce national borders – for example, refusing to deliver products bought online to a customer in another EU country, or declining payment from a credit card registered abroad.

National competition authorities are showing an equal level of interest in online retail. On 21 January 2020, the English Court of Appeal upheld a finding that the golf club manufacturer Ping had breached competition law by preventing two authorised retailers from selling its goods online. The UK's Competition and Markets Authority (CMA) had imposed a fine of £1.45 million on Ping, who argued that the online sales ban was intended to promote its in-store club-fitting service. This followed earlier CMA sanctions on suppliers of bathroom fittings and fridges for limiting online sales.

In short, the rapidly evolving world of e-commerce is subject to increased scrutiny from regulators. Practices that might limit consumers' choice, or their access to cheaper goods, are especially at risk. As Vice-President Vestager stated, "…it's about consumers and businesses throughout Europe... [The] Commission is committed to making every effort, so that the single market… works better for us all."

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