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E-Commerce in Europe: A Look into Nike's Huge Antitrust Fines

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On March 25, the European Commission (EC) fined Nike €12.5 million for restricting cross-border and online sales of branded merchandise by its European licensees. In December last year, the EC fined Guess €40 million for imposing restrictions on the use of its brand by distributors online. In total in 2018, the EC imposed fines of over €150 million on suppliers of consumer goods in relation to online distribution practices. And there is more to come. Further cases against companies including Universal Studios and Sanrio (owner of the Hello Kitty brand) are ongoing.

This represents a huge change in the antitrust risk faced by suppliers distributing goods online in Europe. After 20 years of little or no formal enforcement in relation to vertical distribution issues, the EC has suddenly imposed a series of very large fines, focusing on online distribution. Indeed, it seems the EC launched its investigation of Nike on its own initiative rather than in response to a complaint.

All of this activity can be traced back to the EC's e-commerce sector inquiry, and the inquiry report published in May 2017.

What Did Nike Do?

Nike's fine relates to various measures it took to prevent its EEA licensees – and the customers of its licensees – from selling products bearing trademarks owned by Nike cross-border and online within the EU Single Market. Its licensing agreements included conditions designed to prevent out-of-territory sales by licensees and, in some cases, by the customers of its licensees. Nike also threatened to terminate licensees making out-of-territory sales and engaged in other practices to prevent such sales occurring.

Both the relevant license conditions and the related practices were clear and well-established, per se infringements of EU antitrust law. The EC and EU courts have always taken the view that, in addition to traditional antitrust goals, the purpose of EU antitrust rules is to actively promote a single, unified market across the EU/EEA (the so-called "single market objective"). As a result, contractual restrictions and behaviors that restrict imports and/or exports between EU/EEA countries have always been treated as per se infringements of EU antitrust law. Nike's actions fall squarely within that category.

The relevant practices included:

- License conditions that directly frustrated sales outside the licensed territory – such as obligations to refer out-of-territory orders to Nike or to pay double royalties for out-of-territory sales;
- License conditions prohibiting licensees from supplying products to customers that might make out out-of-territory sales;
- Other, non-contractual measures – such as threatening to terminate or refusing to supply "official product" holograms to licensees making out-of-territory sales (and carrying out licensee audits to ensure compliance);
- Requiring master licensees to impose restrictions on their sub-licensees prohibiting their sub-licensees from making out-of-territory sales within the EEA;
- Requiring licensees to impose restrictions on out-of-territory sales in their contracts with retailer customers; and
- Putting pressure on retailers to prevent them from purchasing products from Nike licensees based in other EEA territories (i.e. from outside the retailer's own country).

It is unclear whether Nike was badly advised, or simply chose to take the risk due to the lack of enforcement, but its practices had been in place for over 12 years.

Indeed, Nike was arguably fortunate – its fine would likely have been substantially higher but for the fact that:

- It cooperated extensively with the EC's investigation – earning a 40% fine reduction as a result;
- Its behaviour did not relate to its main "Nike" brand, but the brands of certain soccer clubs and national soccer federations (such as Manchester United, Barcelona, and the French national federation) that Nike controlled under license agreements; and
- The products involved – such as scarves, mugs and plastic bowls – were low value items generating limited revenues.

Finally, it is worth noting that Nike would likely have been able to impose some restrictions on out-of-territory sales – although not such extensive ones – if either (i) its licenses had been exclusive rather than non-exclusive or (ii) it had been licensing patents or know how as well as trademarks.

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