Kluwer Competition Law Blog

Online search advertising restrictions and competition law: some recent lessons

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Introduction

The growth of e-commerce over the last decade has had a significant impact on most if not all retail markets. Trends like the increased importance of online sales, price transparency and the emergence of new market players such as online platforms significantly affected the distribution and pricing strategies of both manufacturers and retailers, not only in relation to inter-brand but also intra-brand competition. It translated into novel forms of restrictions, such as bidding restrictions in online search advertising. For example, distributors are restricted in the use of brand names and trademarks of its suppliers or competitors agree with each to no longer bid on each other's brand names. From a business perceptive, it might seem legitimate to agree upon such restrictions, e.g. to lower the advertisement costs. However, recent developments show that such restrictions might be anti-competitive and thus illegal under EU (and Dutch) competition law. In this blog, we discuss some of those developments.

Why restricting online search advertising in the first place?

A prime example of an online search advertising service is Google AdWords. Google AdWords is the largest and most widely used online search advertising service. The service allows undertakings, by reserving or bidding on one or more keywords, to obtain the placing of an advertising link to their website whenever an internet user enters one or more of those words as a request in the Google search engine. The advertising link typically appears on Google's general search results pages above the so-called generic search results.

Google selects the advertisers that will be displayed in AdWords by means of a keywords auction which then determines the position of each advertisement and each advertiser's cost per click. Advertisers pay when users click on the advertisement.

As online advertising is a very useful tool to generate or increase traffic to a website, it is of utmost importance for an undertaking to "win" the keyword in the bidding process. However, undertakings (e.g. suppliers) might be hindered in gaining such traffic to their websites through online search advertising for example by their own distributors or resellers. Distributors and/or resellers may compete for the same keywords to generate traffic for selling the same brand products. Or, for example, competitors may bid for keywords relating to a competitor's

product/service to appear in the search results when an internet user is looking for a competing product or service. A logical consequence is that, because of the competition in the form of multiple bids for a specific keyword, the cost per click increases, hence the overall advertisement cost of an undertaking.

Therefore, what we have seen in the last couple of years is that suppliers impose or would like to impose restrictions on their distributors regarding the use of their brand names and trademarks in online search advertising. Also, we have seen situations in which competitors would like to agree with each other to no longer bid on each other's brand names. The important question is of course whether it is allowed to make such an agreement.

Guess-decision: restriction by object

One example of a supplier that imposed such a restriction on its distributors is *Guess*, a manufacturer of clothing apparel and accessories. Guess prohibited its distributors, amongst others, to bid on Guess' brand name in sponsored search auctions and received a heavy fine from the European Commission (2018). According to the Commission, the online search advertising restriction had as its *object* to reduce the ability of authorised retailers to advertise and ultimately to sell the contract products to customers. Guess, thereby, sought to maximise traffic to its own website at the expense of the independent Guess distributors and to minimise its own advertisement costs.[1]

Some might have wondered why the European Commission decided that this was a restriction by object. Especially since Guess retailers were – subject to the authorisation requirement – in principle able to sell online. However, by restricting the use of this advertising tool, Guess' retailers were considered to be deprived of the ability to effectively generate traffic to their own websites by means of online search advertising. According to the Commission, this restricted their ability to sell the contractual products to customers. In other words, Guess limited the "findability" and ultimately the viability of retailers selling its products online according to the Commission. We, therefore, believe the European Commission considers online search advertising to be a necessary means of online selling. After all, if your website cannot be found, you are also not able to sell online. Consequently, the prohibition to use Guess brand names and trademarks for the purposes of online search advertising via search engines relates more to the Pierre Fabre case than to the Coty case, where distributors were only deprived from selling via one sales channel.

The Dutch competition authority indicated in its renewed vertical restraints guidelines that online search advertising prohibitions are (indeed) considered as hardcore restrictions. However, if a distributor is only not allowed to bid on certain keywords in certain jurisdictions, this could be a form of an active sales restriction, which might be allowed under certain circumstances. This in contrast to a passive sales restriction which is in principle not allowed. In case of a passive sales restriction, one should also be aware or the Geo-Blocking Regulation which declares such restrictions automatically void.

***1-800 Contacts* case and trademark law**

As set out above, undertakings might not only have an incentive to impose advertising restrictions on their own distributors, but also on their competitors as advertising costs are getting sky-high.

That was probably why *1-800 Contacts*, the biggest U.S. retailer of contact lenses, felt that this should stop and entered into agreements with fourteen of its competitors. The undertakings agreed

not to bid for paid links in case the user's search phrase contained a competitor's brand name. Competitors of 1-800 Contacts thus agreed not to participate in ad auctions when consumers use keywords containing the brand "1-800 Contacts" and vice versa. The U.S. Federal trade Commission, however, found that 1-800 Contacts violated Section 5 of the FTC Act by entering into an agreement of this kind with its competitors. The agreements prevented online contact lens retailers from bidding for search engine result ads that would inform consumers that identical products are available at lower prices. The Commission Opinion held that the agreements harm competition in bidding for search engine key words, artificially reducing the prices that 1-800 Contacts pays, as well as the quality of search engine results delivered to consumers.

1-800 Contacts argued that the agreements should be seen in the context of settlements, which ended disputes over trademark rights. The European Commission also goes into this aspect (i.e. the interference with trademark law) in its Guess-decision. According to the European Commission, one cannot rely on trademark law if, in short, there is no violation of any trademark laws, e.g. if it is not liable to have an adverse effect on one of the function of a trade mark. See also the Google France (2010) and Interflora (2011) cases in that regard.

Minimising advertisement costs: justification under Article 101(3) TFEU?

A frequently heard argument is that there are also benefits to agreeing upon an online advertising restriction as it (significantly) lowers the advertisement costs. Interestingly enough, just recently the Dutch ACM published a working paper (in English) on price effects of such agreements in the Dutch hotel sector. In the Netherlands many hotel chains make arrangements with booking websites not to advertise on search results for their brand names. The analysis of ACM shows that non-brand bidding arrangements increase the price on hotel websites relative to the price on the booking websites. Therefore, their conclusion is that advertising restrictions are likely to lead to higher prices on hotel websites, and that potential ad spend savings are not passed on to consumers in the form of lower prices.[2]

Main take-away

All in all online search advertising restrictions are an interesting development to keep a close eye on and be careful with. Thomas Kramler, DG Comp, said that there are "quite some [bidding restrictions] out there in the market". Currently, the hotel sector in the U.S. is already under investigation for violation of the antitrust laws by manipulation of search advertising on Google. Perhaps with the ACM working paper in mind, the Netherlands hotel sector is the next to follow?

[1] See also a previous blog on this website about the Guess-case here

[2] ACM has worked closely with the CMA (UK) on this issue. Interestingly, the UK has just recently launched a study into the digital advertising market

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This entry was posted on Monday, July 15th, 2019 at 11:00 am and is filed under Competition law, E-commerce, Keyword bidding, Online advertising restrictions
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