

Contracting with online platforms—from the perspective of the trader business

19/10/2018

Commercial analysis: Susan Singleton, solicitor at Singletons Solicitors, discusses the business-to-business relationship between traders and online platforms, including the legal issues and contractual terms that traders need to consider when engaging with an online platform.

What is an online platform and to what extent are (and should) lawyers acting on behalf of traders be involved when those traders engage with an online platform?

Online platforms such as Amazon, Uber and Airbnb are ways in which individual traders can find customers using a website or mobile app to help them. They are a way of introducing customers to suppliers. Sometimes the trader will sell the goods or services to the intermediary platform (a distribution model), and more often with this kind of arrangement the intermediary simply acts as a form of agent or introducer and is paid a fee or commission, but it not party to the transaction.

Solicitors ideally should be involved at the least to ensure that their client, the trader, understands the obligations under the platform's standard terms. For larger platforms there will not be much—if any—scope to change the terms offered by the bigger businesses, but the trade should know their rights and obligations and their legal advisers can help with that.

In situations where a new platform is being set up, it is vital that all parties involved know if the distribution or agency/introducer model is being set up and there will be more scope to negotiate and modify the terms.

To what extent do the contractual terms and legal structures put in place between traders and online platforms vary between or within sectors?

Taking an example first, manufacturers and retailers could choose to sell to Amazon, which then resells the goods, or they could use Amazon as their marketplace under Amazon Marketplace. In the latter case, the trader sells to their customers and Amazon is paid its commission fee. In the former situation, a manufacturer will sell goods to Amazon and Amazon has the contract of sale with the customer. So even on Amazon there are the two different models in operation.

It is more usually the case that the platforms decide one or other route, eg Airbnb users book a room via Airbnb with the person who has the room availability, and the same goes for Uber.

It is useful here to highlight some legal differences from the point of view of the trader using the platform.

Agency arrangement with commission fee payments such as Amazon Marketplace, Uber, Airbnb—platform is just an agent

- trader has direct contract with customer. If the service or goods are defective the trader is primarily liable
- trader can set its prices to its customers (where the relationship is one of genuine agency). This is not (save in very exceptional circumstances) permitted under the [Competition Act 1998 \(CA 1998\)](#) or EU competition law with the distribution model
- all the turnover from the sales is that of the trader (not just commission revenue), which can make it better for the trader in terms of raising finance and if it wishes to sell its business
- trader takes more commercial risks subject to the contract terms

With traditional agency in the EU, where an agency agreement is terminated the agent is often entitled to a large lump sum as indemnity or compensation under the Commercial Agents (Council Directive) Regulations 1993, [SI 1993/3053](#) (the Commercial Agents Regulations), but only where it relates to the sale of goods, not services. The Court of Appeal recently held, in *Computer Associates UK Ltd v Software Incubator Ltd* [\[2018\] EWCA Civ 518](#), [\[2018\] All ER](#)

[\(D\) 21 \(Apr\)](#), that electronically supplied software is not goods for the purposes of the Commercial Agents Regulations.

However, most online platforms are not, in my view, within the Commercial Agents Regulations, even where goods are sold given the other requirements for the regulations. Again, it is wise to take legal advice on case-by-case basis. This is because a commercial agent under the Commercial Agents Regulations must have 'continuing authority to negotiate' and a passive website with 'click through' revenue or pay per click is unlikely to meet that criteria compared with a salesman going round local stores with a bag of samples persuading people to buy the goods. Also the [government guidance](#) suggests a mere introduction agent lacking continuing authority to negotiate the sale or purchase of goods is not protected by the Commercial Agents Regulations.

Distribution model

- trader sells goods or services to platform, which then resells them (or licenses the copyright where the product is digital download). Sometimes sale will be on a sale or return basis
- trader is one stage removed from the customer compared with the agency model. Customer's primary recourse if the product is defective is to the platform as reseller (or sublicense where the product is digital). Trader may be less at risk of liability claims, although some claims such as for product liability and others where the contract says so may well still fall on the trader
- platform can be given a recommended resale price but this must not be fixed or controlled by the trader, otherwise [CA 1998](#) and EU competition law will be breached

There have been quite a few recent decisions where resale price maintenance and online selling has taken place. In July 2018, four electronics companies including Pioneer were fined by the European Commission for breach of [Article 101](#) of the Treaty on the Functioning of the European Union. The fines came to €111m. Asus, Denon & Marantz, Philips and Pioneer had engaged in so called 'fixed or minimum resale price maintenance (RPM)' by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products.

The Commission [said](#) that:

'The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.'

In addition to standard and illegal RPM, Pioneer also limited the ability of its retailers to sell cross-border to consumers in other Member States. The Commission [explained](#) that:

'...in order to sustain different resale prices in different Member States, for example by blocking orders of retailers who sold cross-border. Pioneer's conduct lasted from the beginning of 2011 to the end of 2013 and concerned 12 countries (Germany, France, Italy, the UK, Spain, Portugal, Sweden, Finland, Denmark, Belgium, the Netherlands and Norway).'

If, instead, a manufacturer just sells direct to customers via a platform using the agency model, then (assuming it is a genuine agency relationship) there are no intermediaries and thus no price fixing (unless they have agreed prices with competitors, which is less likely).

In terms of sectors more generally, most platforms use a variation of the agency model. The platform is usually safer going down this route. However, it can be quite hard to generalise. For example, music download websites such as iTunes and Spotify will contract with the customer–distribution model and have back-to-back contracts with music publishers and composers, under which they then pay the relevant royalties.

Indeed, some companies choose to keep their business off platforms entirely other than their own website, such as some insurance companies which refuse to allow their data to be used on aggregator sites such as comparison websites, and some airlines which only sell flights direct and refuse to allow their flights to go on sites such as Skyscanner.

What legal contracts and relationships would a trader engaging with an online platform (eg a business selling to Amazon or via Airbnb) typically need to negotiate/put in place?

There are vast number of issues in this business sector and lots of new legislation, from Regulation [2018/302](#) (Geo-Blocking Regulation), which applies from 3 December 2018 in the EU, to rights to cancel under consumer laws and other rights under various national and EU legislation.

Looking just at traders' issues, whether they sell to the website/platform which then resells/sublicenses or they sell direct to end users on the platform, if it is a well-established platform they usually are sent the standard terms and have to accept them, so not much negotiation goes on. In newer companies and platform start-ups, there is more scope for negotiation. Sometimes the terms are too onerous, such that the trader decides not to use that platform at all.

The issues contracts cover include liability, protection of IP rights, who the contract is with (agency or distribution model discussed above), indemnities in relation to breach of advertising legislation and use of photographs, any compulsory insurance a trader must have in place, dispute resolution and termination.

To what extent can a trader generally negotiate terms with the online platform?

In my experience, this is very rare unless the supplier has a lot of market power or the platform is small and new. That is why, if there is a chain of suppliers from manufacturer through to various retailers in the chain, the last of which contracts via the platform, the trader which contracts with the platform will want to have back-to-back contracts with other suppliers to it on similar terms to those on which it supplied to the platform. The extent to which that is feasible will depend on the circumstances and leverage of the relevant businesses.

What are the key legal issues the trader is likely to need to consider and/or negotiate?

Issues to consider include whether they want to be on a platform at all from a legal and business point of view, and if they do, the issues will include:

- distribution versus agency model—choosing a platform which fits how they want to operate if the platform prohibits other ways of selling, and if that breaches competition law or otherwise will affect their business. For example, in 2013 Amazon removed a most favoured customer clause (MFN clause) which said traders would not offer better prices elsewhere and which had ensured Amazon customers obtained the best price after it was [investigated by competition authorities](#).
- if the platform will damage the brand, eg many selective distribution agreement prohibit resale on Amazon, eBay Google shopping etc, and in *Coty Germany v Parfümerie Akzente* Case [C-230/16](#), the Court of Justice held that this was allowed provided it complied with certain requirements
- pricing issues and competition law—if a trader will sell cheaply online, its existing distributors may not be happy that they cannot compete with their own supplier who is undercutting them—again, take competition law advice on this area.
- price fixing is generally prohibited—even pricing algorithms online are being looked at by competition authorities in the EU and US at the moment, to see if they are having anti-competitive effects
- be careful to avoid unlawful restrictions on online selling—golf supplies manufacturer Ping was fined in the UK for restrictions on online selling with the fine upheld by the UK Competition Appeal Tribunal on 7 September 2018 (see *Ping Europe Ltd v CMA* [2018] CAT 13)

Susan Singleton has her own firm, Singletons Solicitors, and is a competition and IP/IT lawyer. Previously she was a solicitor at Slaughter and May and Bristows before founding her own niche firm. Author of 30 law books including 'Business, the Internet and the Law' and 'Commercial Agency Agreements—Law and Practice', she is editor of the

subscription newsletters IT Law Today and Data Protection Adviser. She brought the first competition damages case to reach a full trial in the English courts (Arkin v Borchard Lines) and regularly advises clients on internet selling and competition law.

Interviewed by Kate Beaumont.

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