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EU Competition Law: Vertical Agreements

EU Court of Justice Allows Luxury Goods Manufacturers to Prohibit Online Sales

SUMMARY

In a judgment on 6 December 2017¹, the Court of Justice of the European Union (the “**CJEU**”) ruled that, in the context of a selective distribution network for luxury goods, suppliers can contractually prohibit their distributors from selling the goods on third-party internet platforms visible to the public. The Court found that such a restriction is justified to preserve the luxury image and “aura” of the goods.

The judgment provides welcome clarity on the conditions under which EU competition law permits online sales to be contractually limited in selective distribution contracts for luxury goods. However, the judgment does not apply to industries other than luxury goods.

BACKGROUND

Coty Germany is a leading supplier of luxury cosmetics in Germany. It sells its products *via* a selective distribution network throughout Europe.

Parfümerie Akzente distributed Coty Germany’s products as one of Coty Germany’s authorised resellers, both online and *via* a brick-and-mortar store. Its internet sales were made through its own website and through the third-party platform amazon.de.

The distribution agreement between Coty Germany and Parfümerie Akzente initially provided that “the character of Coty Prestige’s brands requires selective distribution to support the luxury image of these brands.” The agreement provided, with regard to internet sales, that “the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised.”

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Coty Germany proposed to revise its selective distribution agreements to give the distributors the right to sell Coty products online. This right was subject to the internet sales being conducted through an “electronic shop window” owned by the distributor, and “the luxury character of the products [being] preserved.” The agreement prohibited distributors from using a different business name and engaging a recognisable third-party website which is not an authorised Coty distributor. In other words, the agreement banned the distributors from using third-party platforms in a way that is visible to potential purchasers of Coty products.

Parfümerie Akzente refused to accept these amendments to its distribution agreement. Coty Germany brought an action before a court of first instance in Frankfurt seeking an order prohibiting Parfümerie Akzente from selling Coty goods on amazon.de. By a judgment of 31 July 2014, the *Landgericht Frankfurt am Main* dismissed the application on the ground that the contractual provisions at issue infringed EU Competition law (Article 101(1) TFEU) and German competition law. The court considered the provisions to be hardcore restrictions (*i.e.*, restrictions “by object”).

On appeal by Coty Germany, the court of appeal stayed its proceedings and requested a preliminary ruling from the CJEU on whether, in the context of a selective distribution system for luxury goods, prohibiting sales on online marketplaces discernible to the public infringes Article 101(1) TFEU.

In a judgment on 6 December 2017, the CJEU ruled that, in order to preserve the luxury image and “aura” attached to their products, luxury goods suppliers can contractually prohibit their distributors from selling the goods on third-party internet platforms “in a discernible manner,” provided that:

- (i) The relevant contractual provisions have the objective of preserving the luxury image of the goods;
- (ii) The provisions are applied uniformly and not in a discriminatory manner between the members of the distribution network; and
- (iii) The provisions are proportionate in the light of the objective they pursue.

The CJEU noted that the quality of luxury goods is not simply the result of their physical characteristics, but also of the allure and prestigious image which confers on them “an aura of luxury.” That aura is an essential aspect of the nature of these goods, which enables customers to identify them and distinguish them from other goods. Consequently, any impairment of the aura of luxury could affect the quality of the goods.

In addition, although the final assessment will be conducted by the German court of appeal, the CJEU indicated that Coty’s contractual provisions appeared to comply with Article 101(1) TFEU. The CJEU concluded, from the evidence submitted to it by the German court, that the provisions are objective and apply without discrimination to all Coty distributors.

The CJEU also found that the provisions did not appear to go beyond what is necessary to preserve the luxury image of Coty's products, given the absence of any contractual relationship between the Coty distributor and the third-party platforms. The CJEU indicated that allowing distributors to use such platforms subject to their compliance with contractually specified quality conditions would not be as effective as the prohibition in Coty Germany's distribution agreements. In addition, the CJEU found that selling luxury goods on third-party platforms in a discernible way – which are a channel of sale for all types of products – could affect the luxury nature of the goods. The fact that luxury goods are not available on such third-party platforms contributes to their luxury image from the consumers' viewpoint.

Finally, the CJEU found that if the national court considered the provisions at issue to be contrary to Article 101(1) TFEU, the provisions should not be regarded as hardcore restrictions. It would be possible for the provisions to benefit from block exemption under Regulation (EU) No 330/2010.

COMMENT

The *Coty* case provides further clarity on the limitations of online sales that may be permissible under EU competition law in the selective distribution of luxury goods.

Online sales are generally considered to stimulate competition, and therefore contractual limitations on online sales in selective distribution systems are usually difficult to justify under EU competition law.² The Commission and the EU Courts have historically considered obligations which dissuade distributors from using the internet to reach a greater number and variety of customers (by imposing criteria for online sales which are not equivalent to the criteria imposed for sales from brick-and-mortar shops) as hardcore restrictions of competition.³

The *Coty* case provides greater protection for luxury goods suppliers by finding that the ban on authorised distributors using third-party platforms is objectively justified, and therefore does not violate Article 101(1) TFEU. The CJEU therefore supports the development of individual "online stores" for each authorised distributor instead of using third-party platforms, which could increase the costs incurred by distributors in marketing their products.

It is to be hoped that the *Coty* judgment will help to harmonise the (inconsistent) treatment by national competition authorities and courts in the EU Member States of third-party platform bans in selective distribution systems. For example, in Germany, the authorities and courts have generally taken a strict approach towards such clauses.⁴

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It should be noted that the *Coty* case seems to apply only to luxury goods. Therefore, a ban on using third-party platforms may not be permissible under EU competition law in other industries in which selective distribution is used (such as sports articles). The *Coty* judgment also highlights the difficulty in assessing vertical restraints under EU law and the need for a careful, case-by-case analysis.

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ENDNOTES

- ¹ Case C-230/16 – *Coty Germany GmbH v Parfümerie Akzente GmbH*.
- ² Paragraph 52 of the EU Commission’s Guidelines on vertical restraints recognises the internet as “a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions.”
- ³ In Case C-439/09 – *Pierre Fabre Dermo-Cosmétique*, the CJEU confirmed that an absolute restriction on selling products online violates Article 101(1) TFEU and is a hardcore restriction of competition. Such restrictions prevent the selective distribution agreement in which they are contained from benefiting from the block exemption in Regulation (EU) No 330/2010. However such restrictions may benefit, on an case-by-case basis, from individual exemption under Article 101(3) TFEU.
- ⁴ In April 2017, a German court considered that the sports brand Asics violated competition law by prohibiting sales by its distributors on third-party platforms and price comparison websites.

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