

Case Note

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of competition and regulation. If you are interested in contributing, please contact the Case Notes Editor, Dimitris Vallindas, at dvallindas@sheppard-mullin.com.

Luxury Goods and Third-Party Online Platforms: The ECJ's Judgment in the *Coty* Case

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Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH, Court of Justice of the European Union (First Chamber), 6 December 2017, ECLI:EU:C:2017:941.

Reference for a preliminary ruling — Competition — Agreements, decisions and concerted practices — Article 101(1) TFEU — Selective distribution of luxury cosmetics products — Clause prohibiting distributors from making use of a non-authorised third party in the context of internet sales — Regulation (EU) No 330/2010 — Article 4(b) and (c)

I. Introduction

On 6 December 2017, the European Court of Justice (ECJ) delivered its much-awaited judgment on whether it is compatible with Article 101(1) TFEU to prohibit the sale of luxury products via third-party online platforms or whether such a practice amounts to a restriction 'by object' within the meaning of the same article. The case attracted the immediate attention of media and legal scholars primarily because it has practical implications for brand manufacturers, resellers, mobile consumers using their smartphones and tablets to make purchases as well as for the Digital Single Market at large. Addi-

tionally, the *Coty* judgment clarifies the scope of an older ECJ ruling - the *Pierre Fabre* case¹, according to which any clause in a selective distribution contract by which the authorised distributors are completely prohibited to sell products to the consumers via the internet is a restriction of competition by object.

II. Facts

Coty Germany GmbH (Coty Germany) is a leading supplier of luxury cosmetics in Germany. It sells specific luxury cosmetic brands via a selective distribution network in virtue of a distribution contract employed in a uniform way throughout Europe, 'in order to support the luxury image of its brands'.² Selective distribution is supposed to be an efficient distribution arrangement either for complex technical products, such as cars, or for products whose purchase is closely related to a particular brand image, such as cosmetics, perfumes and luxury goods in general.³ In this way, it is assured that the retail store will provide the consumer with a shopping experience consistent with the product's brand and reputation.⁴ In the context of its distribution network contracts, Coty Ger-

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1 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'économie, de l'industrie et de l'emploi* [2011] ECR I- 9419.

2 Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941, para 10.

3 Paolo Buccirossi, 'Vertical Restraints on E-Commerce and Selective Distribution' (2015) 11(3) JCLE 762.

4 *ibid.*

many included a new clause [Clause I(1)(3)] which contemplated that its authorised retailers were entitled to offer and sell the products on the internet only via their own internet sites/online stores and not by making use of third-party platforms in a discernible manner. In this way, the use of a different business name as well as the recognisable engagement of a third-party undertaking was forbidden.

Parfümerie Akzente GmbH ('Parfümerie Akzente'), an authorised retailer of Coty Germany's products for many years, which was making internet sales partly through its own online store and partly via the platform 'amazon.de', decided not to sign the amendments to the selective distribution contract and disapprove the new clause. As a result, Coty Germany brought an action before the competent National Court of First Instance in order to prevent the former from distributing the latter's products via the platform <amazon.de>, in accordance with Clause I(1)(3).

The National Court of First Instance dismissed Coty Germany's action on the ground that the clause at issue was contrary to Article 101(1) TFEU as well as to Paragraph 1 of the German Law against restrictions of competition. It was held that such a clause constitutes a hardcore restriction under Article 4(c) of the Vertical Agreements Block Exemption Regulation No 330/2010 and that it cannot be justified even for the sake of the brand's prestigious image. The relevant court drew this conclusion based on the judgment of 13 October 2011 in the *Pierre Fabre* case. Moreover, the clause at issue could not benefit from an individual exemption since Coty Germany had not managed to prove that the overall prohibition on internet sales via third-party platforms could bring efficiency gains that would outweigh the competition disadvantages in the market. After all, such a general prohibition could not pass the proportionality test, as there were other means, equally appropriate and less restrictive of competition that Coty Germany could take, like the application of specific quality criteria for the use of third-party platforms.

Coty Germany appealed against the decision of the First Instance court before the Higher Regional Court, Frankfurt am Main, Germany. The relevant Court of Appeal decided to stay the proceedings and ask the ECJ for a preliminary ruling, uncertain as it was about whether the contractual arrangement existing between both parties to the dispute was lawful under EU competition law.

III. Judgment

The ECJ confirmed the legality of selective distribution systems, to the extent that resellers, such as Parfümerie Akzente, are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and are applied in a non-discriminatory fashion, without going beyond what is necessary.⁵ It also restated that in case of luxury goods, the characteristics and conditions of a selective distribution network preserve and ensure the aura of luxury that such goods have apart from their high-quality material characteristics.⁶ Therefore, as long as the aforementioned criteria are met, the adoption of a selective distribution network for luxury goods is absolutely in line with Article 101(1) TFEU and this cannot be doubted by the assertion included in Paragraph 46 of the *Pierre Fabre* judgment. That assertion should be read and interpreted only in relation to the context of that particular judgment.⁷

Regarding contractual clauses such as the one at issue, the ECJ held that they are not precluded either under Article 101(1) TFEU, since they are designed to preserve the luxury image of goods in the context of a selective distribution system which was held to be completely lawful under Article 101(1) TFEU. However, similarly to selective distribution systems, in order to be lawful, a contractual clause, such as that at issue, should meet the criteria mentioned above. This means that 1) it should have the objective of preserving the luxury image of goods, 2) it should be laid down uniformly and it should not be applied in a discriminatory fashion, 3) it should be proportionate in the light of the objective pursued.

Further, the ECJ clarified that a clause, such as that at issue, does not constitute a restriction of customers, within the meaning of Article 4(b) of the Vertical Agreements Block Exemption Regulation No 330/2010 nor does it restrict passive sales to end users within the meaning of Article 4(c) of the same Regulation. This is so because the clause at issue does not prohibit the use of the internet as a means of mar-

5 C-230/16 *Coty Germany* (n 2) para 24; C-439/09 *Pierre Fabre* (n 1) para 41; Case C-26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875, para 20.

6 Case C-59/08 *Copad SA v Christian Dior couture SA and Others* [2009] ECR I-3421, paras 24-26, 29.

7 C-230/16 *Coty Germany* (n 2) para 31.

keting the contract goods.⁸ Additionally, the selective distribution contract at issue allows, under certain conditions, authorised distributors to advertise via the internet on third-party platforms and to use online search engines.⁹ As a result, customers are still able to find the online offer of authorised distributors by using such engines.

IV. Comments

The ECJ saw in the preliminary questions submitted by the Higher Regional Court a great opportunity to clarify the rather vague point made in the *Pierre Fabre* case, Paragraph 46 of the judgment. According to that paragraph,

the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

The ECJ underlined that the above assertion must be read and interpreted in the light of that particular judgment's context and so it is related solely to the goods at issue, meaning cosmetic and hygiene goods. Therefore, it does not apply to luxury goods. The differentiation made by the ECJ and the limitation of the *Pierre Fabre* case to the very specific internet ban situation has brought clarity and legal certainty to market participants like the members of selective distribution systems. It also put an end to highly divergent interpretations.


For the first time the ECJ referred to the *visibility* of third-party online platforms and it underlined that the authorised retailers were prohibited to offer and sell the products only on *visible* third-party platforms. This means that authorised distributors are still permitted to sell the luxury goods online via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer. It is understood that the reason for such a distinction between

discernible and indiscernible third-party online platforms, is that the former can detract from the luxury image of luxury goods. Yet, what is not understood, nor explained by the ECJ is how an unnoticeable third-party online platform is able to correspond to specific qualitative conditions better than recognisable and well-known platforms, such as Amazon and eBay, which are huge players in online sales. It is believed that this is an unequal treatment of third-party online platforms which opens the door to grey marketers that will take advantage of the situation by trying to take the place of the discernible third-party platforms in the market. Such an approach is also quite contradictory to the priority that the suppliers and authorised distributors of luxury goods say they have, ie to secure the online sale of their products in an environment that corresponds to certain qualitative conditions. In addition to this, the ECJ enabled the advertisement of luxury products via the internet on third-party platforms as well as the use of online search engines so that customers may find the online offer of authorised distributors by using such engines. In this way, the ECJ avoided an absolute online platform ban as such a thing would make it difficult for retailers to access the mobile customer base. This would be a great problem, especially for small retailers that become visible and sell products through third-party platforms without having to make great investments and efforts.

Despite the two aforementioned remarkable points made by the ECJ in the *Coty* case, still there is residual uncertainty regarding particular issues. The first issue is the definition of 'luxury goods'. Since the judgment was limited to luxury brand owners, leaving out of its scope other brand owners, it would be expected from the ECJ to set clear criteria about what amounts to 'luxurious products' and what does not. To everyone's great disappointment, this was not done, while the ECJ could have easily avoided such vagueness if it had weighed in by adopting or explicitly rejecting the approach of the Advocate General Wahl who referred to 'high-quality consumer goods' and 'brands' apart from luxury brands as the ECJ did.¹⁰ As a result of this open question, it remains unclear which products are supposed to be outside the luxury industry and what applies to them, since each EU Member State may have a different point of view about what is luxury and what is not, depending on its standard of living. There are also concerns that many manufacturers will try to abuse this uncertain-

⁸ *ibid*, para 65.

⁹ *ibid*, para 67.

¹⁰  C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941, Opinion of AG Wahl, paras 43, 46, 69 and 70. For a more detailed analysis of AG Wahl's Opinion, see Dimitris Vallindas, 'Selective Distribution Systems Relating to Luxury and Prestige Products: Advocate General Wahl's Opinion in the *Coty* Case' (2017) 1(4) CoRe 361 – 366.

ty by presenting and promoting their products as luxurious ones, though actually they are not luxurious. This may happen for the sake of getting extra leeway in the competition rules and in order to take advantage of the selective distribution systems.¹¹ This is particularly true if we take into account the fact that selective distribution systems are very widespread in the EU over the last ten years and they are used by a large number of manufacturers, not only for a particular category of goods.¹² Leaving open the issue of what 'luxurious product' means is tantamount to enabling brand owners and large retailers to use methods that may circumvent the application of selective distribution systems, just in order to exclude from distribution networks pure online players, such as Amazon and eBay as well as smaller retailers that tend to realise a large proportion of their sales via these online platforms. Practically speaking, this means that selective distribution systems may turn out to be used even in cases of fast moving/day-to-day consumer goods, such as clothes, sports shoes or electrical household appliances, as long as they are branded as luxurious. Such a thing may put mobile consumers in danger of not having any more the possibility to immediately obtain and compare product and price information online as well as to switch quickly from one online channel to another.

The second issue regards the proportionality test which was missed by the ECJ. The ECJ has not adequately explained why it opted for an absolute restriction of using in a discernible manner third-party platforms for the internet sale of luxury goods. The Court could have found a less restrictive means in order to fulfil the same objective, which is to preserve the luxury image of those goods. The ECJ also refers to the Higher Regional Court (ie the referring court) to assess the proportionality test and make the relevant enquiries.¹³ Our disagreement with the approach that the ECJ adopted regarding the proportionality test is further strengthened by the fact that the defendants made an alternative suggestion which was rejected by the Court without adequate justification.¹⁴ The suggestion concerned the contract concluded between the brand owner and the authorised reseller, which could include a list of qualitative criteria that should be fulfilled by the third-party platform on which the authorised reseller may want to sell. According to this suggestion, anytime the platform would not fulfil through its structure or presen-

tation these qualitative criteria, the brand owner could ask for the cancellation of the contract. However, the Court persisted in a measure which is situated at the end of the competition restrictions' spectrum.

The third aspect of the *Coty* case which remains rather unclear is what will happen after this judgment - both to the 31% of retailers who sell partly via their online shops and partly on marketplaces, and to the 4% of retailers who sell online only via marketplaces.¹⁵ Since the use of third-party platforms has increased over time, there will surely be retailers across the EU who either have no other way to sell their products on the internet or face financial problems by having to avoid the use of discernible third-party platforms for the online sale of luxury goods. The uncertainty is exasperated by the remaining lack of clarity about the definition of luxury goods. This is particularly true in EU Member States where third-party platforms play a really important role. In Germany, for instance, 62% of retailers use marketplaces, while in the United Kingdom the share is 43% and in Poland 36%.¹⁶ Furthermore, it is small and medium-sized retailers that mostly use third-party platforms as a sales channel¹⁷, therefore the risk of not being able to bear the cost of such a prohibition is imminent. In view of these parameters, it is argued that there may be cases in certain EU Member States where the third-party platform ban, even under the conditions set by the ECJ, will amount to a hardcore restriction according to the Vertical Agreements Block Exemption Regulation No 330/2010.

In conclusion, the *Coty* case could be characterised as a pyrrhic victory for the ECJ. On the one hand, it managed to fill the interpretative gaps of the *Pierre Fabre* case, but on the other hand, it has raised a lot of issues which remain unsolved and uncertain.

11 Stefan Krawczyk, 'The Day after *Coty*: Implications for Online Distribution of Brands in Europe' (Stephoe & Johnson LLP conference, Brussels, December 2017).

12 C-30/16 *Coty Germany*, Opinion of AG Wahl (n 10) fn 4; See also Commission, 'Final Report on the E-commerce Sector Inquiry' COM (2017) 229 final, para 15(ii) ('Report on the E-commerce Sector Inquiry').

13 C-230/16 *Coty Germany* (n 2) paras 55-57.

14 *ibid*, para 56.

15 Report on the E-commerce Sector Inquiry (n 12) para 39(i).

16 *ibid*, para 39 (ii).

17 *ibid*, para 39 (iii).