



EU, COMPETITION AND REGULATED MARKETS

The CJEU's Coty Ruling on Online Sale of Luxury Goods

by **Marco Hickey**

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The Court of Justice of the European Union (CJEU) delivered its judgment in the *Coty Germany GmbH v Parfümerie Akzente GmbH* case in December 2017. The case involved a reference from a German court on prohibiting authorised retailers in a selective distribution network from selling luxury goods on third-party platforms such as Amazon or eBay.

Background

The *Coty* case concerned the selective distribution system of Coty, the leading German supplier of luxury cosmetics. The selective distribution agreement between Coty Germany and Parfümerie Akzente, its distributor, stated that the nature of distribution is designed to preserve the luxury image attached to the Coty products, such that each point of sale must be approved by Coty. Further, the retailer was prohibited from selling Coty products through an unauthorised third party.

In March 2012, Coty amended its selective distribution agreement with Parfümerie Akzente, adding that Parfümerie Akzente was permitted to sell Coty products online provided that any sales were made through an approved "electronic shopfront" and that the luxury nature of the products was preserved. Furthermore, the amendment stated that it is forbidden for the authorised retailer to make discernible use of unauthorised third parties for internet sales of the contract goods.

Parfümerie Akzente refused to agree to these amendments and Coty brought an action before the Regional Tribunal of Frankfurt.

On 31 July 2014, the Tribunal held that the amendment infringed Article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101(1) of the TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Coty appealed to the Superior Regional Tribunal of Frankfurt, which stayed the proceedings and made a preliminary reference to the CJEU.

Precedent: *Pierre Fabre*

The lawfulness of such third-party platform bans has been the subject of numerous discussions and divergent court rulings. One reason for this was the CJEU's judgment from 2011 in the *Pierre Fabre* case (C-439/09). In *Pierre Fabre*, the CJEU stated that "the aim of maintaining a prestigious image is not a legitimate aim for restricting competition" (paragraph 46). The General Court also referred to this statement in its recent judgment of 23 October 2017 in the *Watch Repairers' Case - Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v European Commission* in support of the contention that such a restriction would constitute an infringement of Article 101(1) of the TFEU.

The CJEU's recent decision has removed much of the uncertainty. The CJEU makes it clear that this statement in paragraph 46 of *Pierre Fabre* must be considered in the context of the facts and circumstances of that particular case, where the restriction at issue was an absolute ban on online sales, and should not be

seen as a statement of principle according to which the protection of a luxury image can no longer justify a selective distribution system under the EU competition rules.

CJEU Judgment

The CJEU decided that selective distribution systems that are primarily designed to preserve the luxury image of those goods do not breach the competition rules to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary. Further, within the context of such a system, a ban on the use of third party platforms (such as online marketplaces) to sell the goods will not breach the competition rules provided these criteria are met.

While the German court which made the preliminary ruling to the CJEU must decide whether Coty's ban on third party platforms does in fact meet these conditions, the CJEU ventured to say that it does. It indicated that the restriction is proportionate. In the absence of a direct contractual relationship between supplier and third party platform, a ban on use of third party platforms by distributors is an effective means of ensuring that the online environment in which a supplier's products may be sold corresponds to the quality requirements the supplier imposes on its distributors.

The judgment further confirms that the third party platform ban is neither a restriction on customers nor a restriction on passive sales, and as such would not amount to a hardcore restriction under the block exemption for vertical agreements (EU Regulation 330/2010) (BER). As such, even if the agreement in Coty is said to infringe Article 101(1) of the TFEU, it may benefit from the BER, since according to the CJEU it does not restrict the territory into which the distributor can sell, nor does it prevent the distributor from selling to any particular customer group. The CJEU noted that the agreement does not ban all Internet sales and customers are able to purchase via the websites of authorised distributors. Absolute bans on Internet sales, however, continue to be unacceptable restrictions.

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