

CASE CARD | 4 October 2021

Coty Germany (C-230/16)

Third-party platform ban

1. CASE SUMMARY

A. Summary of facts

Coty is a leading supplier of luxury cosmetics in Germany. Akzente is one of its authorized distributors. Coty employs a selective distribution system at the retail level of trade. It allows its selective distributors to sell the products through an electronic shop window of the distributor, but prohibits the use of a different business name as well as the visible involvement of a third-party undertaking which is not an authorized distributor. Coty therefore decides to undertake legal action when Akzente is engaging in the distribution of the products via the Amazon platform. Given the lack of certainty about the legitimacy of such restrictions to protect a 'luxury image', the Appeals Court in Frankfurt am Main decides to refer the case to the European Court of Justice ('ECJ'). On 6 December 2017, the ECJ rules in a preliminary ruling that suppliers of luxury goods can, under certain circumstances, prohibit their authorized distributors, in the context of a selective distribution system, from selling on a third-party internet platform.

B. Legal analysis

The ECJ confirmed the following:

(i) Selective distribution agreements necessarily affect competition in the internal market, but this does not necessarily imply that the agreements are covered by the prohibition of Article 101(1) TFEU. In this case, the luxury nature of the goods is accepted as an objective justification to remove the Coty selective system from the prohibition of Article 101(1) TFEU. In order to rely on this objective justification theory, resellers must be 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 the criteria laid down may not go beyond what is necessary. (§36)

(ii) The third-party platform ban appears under the circumstances to be lawful in relation to Article 101(1) TFEU. The ECJ arrives at this conclusion after confirming that:

- the ban is proportionate to the objective pursued (preserving the luxury image) taking into account the following reasoning:
 - the ban provides the supplier with a guarantee that goods will be exclusively associated with authorized

distributors, which is deemed coherent with the specific characteristics of a selective distribution system (§44-45);

- the absence of a contractual relationship between the supplier and third-party platforms entails that a supplier cannot contractually require compliance with the quality conditions, which is deemed to present risk of deterioration of the online presentation in turn harming the luxury image of the goods (§47-49);
- given that those platforms constitute a sales channel for goods of all kinds, the ban contributes to that luxury image and thus to the preservation of one of the main characteristics of the goods sought by consumers (§50); and
- the ban does not go beyond what is necessary to achieve that objective taking into account that the clause here at issue in these proceedings does not contain an absolute prohibition imposed on authorized distributors to sell the contract goods online. (§53)

While the ECJ gives the above clear pointers as to the framework of analysis, the ECJ leaves it to the referring German Court to apply these criteria.

(iii) A third-party platform ban does not amount to a customer restriction or a restriction of passive sales within the meaning of Articles 4(b) and (c) of Regulation 330/2010 and is therefore not excluded from the benefit of the block exemption contained in that Regulation. The ECJ refers, *inter alia*, to the fact that it is not possible to define or identify a group of third-party platform customers within the group of online purchasers. It is noted furthermore that online search engines enable customers to find their way to the online offer of the authorized distributors. (§68-69)

2. QUOTES

"[...] Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with that provision 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." (§36)

"With regard, in the first place, to the appropriateness of the prohibition at issue in the main proceedings in the light of the objective pursued, it must be observed, first, that the obligation imposed on authorised distributors to sell the contract goods online solely through their own online shops and the prohibition on those distributors of using a different business name, as well as the use of third-party platforms in a discernible manner, provide the supplier with a guarantee, from the outset, in the context of electronic commerce, that those goods will be

exclusively associated with the authorised distributors." (§44)

"Since such an association is precisely one of the objectives sought when recourse is had to such a system, it appears that the prohibition at issue in the main proceedings includes a limitation which is coherent in the light of the specific characteristics of the selective distribution system." (§45)

"Non-compliance by a distributor with the quality conditions set by the supplier allows that supplier to take action against that distributor, on the basis of the contractual link existing between those two parties. The absence of a contractual relationship between the supplier and third-party platforms is, however, an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorised distributors." (§48)

"Third, given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers." (§50)

"With regard, in the second place, to the question of whether the prohibition at issue in the main proceedings goes beyond what is necessary for the attainment of the objective pursued, it must be noted, first, that, in contrast to the clause referred to in the case which gave rise to the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C-439/09, EU:C:2011:649), the clause here at issue in the main proceedings does not contain an absolute prohibition imposed on authorised distributors to sell the contract goods online. Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers." (§52)

"[...] Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court." (§58)

"In those circumstances, even if it restricts a specific kind of internet sale, a prohibition such as that at issue in the main proceedings does not amount to a restriction of the customers of distributors, within the meaning of Article 4(b) of Regulation No 330/2010, or a restriction of authorised distributors' passive sales to end users, within the meaning of Article 4(c) of that regulation. [...] Article 4 of Regulation No 330/2010 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the prohibition imposed on the members of



a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation." (§68-69)

"Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with that provision 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." (§1 of the operative part)

"Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court." (§2 of the operative part)

"Article 4 of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation." (§3 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 330/2010
- Vertical Guidelines

4. RELEVANT LITERATURE

On restrictions to sell via online marketplaces, see [F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018](#), §9.248 – 9.252.

5. PRACTICAL SIGNIFICANCE

This judgment has considerable practical significance:

- It puts an end to the ongoing debate between the European Commission and some Member State courts and competition authorities on the treatment of third-party platform bans. These national courts and competition authorities considered limitations on the use of such third-party platforms an appreciable restriction of competition. The ECJ does not follow this line of reasoning and adopts the approach proposed by the European Commission.
- It confirms that the objective justification theory is essentially linked to the nature of the goods or services at hand. This may seem straightforward, but a review of the case law and the literature shows that aspects of the ancillary restraints doctrine and the objective justification theory are being confused. One striking difference between these two escape routes is that the former applies only if the main transaction is not restrictive of competition, while the objective justification theory is available even if the main transaction restricts competition.
- It underscores, particularly for the purposes of Regulation 330/2010, the importance of the 'where', 'to whom' and 'how' questions in relation to restrictions imposed on distributors. The black list of Article 4 of Regulation 330/2010 concerns the 'where' and 'to whom' question; it does not deal with the 'how' question.
- It confirms implicitly that, as a third-party platform ban is not a hardcore restriction within the meaning of Regulation 330/2010 (blacklisted customer restrictions), the benefit of the block exemption applies irrespective of the nature of the product. As a result, the 'luxury or not luxury' dilemma will be largely irrelevant in practice if the vertical agreement can benefit from the block exemption.

6. OTHER COMMENTS

In the *Pierre Fabre* judgment (C-439/09), the ECJ linked selective distribution in the absence of an objective justification to the category of object restrictions and then stated that the preservation of a luxury image cannot serve as such a justification. In the *Coty* judgment, the ECJ sets the record straight by confirming that these observations must be read and interpreted in the specific context of the *Pierre Fabre* case. This case concerned



an absolute ban on internet sales, which was not the case in Coty.