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Banning Advocaten

CASE CARD | 23 December 2022

Action Sport v Nike (200.231.764/01)

Third-party platform ban

1. CASE SUMMARY

A. Summary of facts

Nike European Operations Netherlands ('Nike') terminated its distribution agreement with Action Sport, a distributor based in Italy. Action Sport offered Nike products on the online platform Amazon, which was not an authorised seller of Nike products. Pursuant to Nike's 'Selective Retailer Distribution Policy ('Policy'), which was introduced in 2013, distributors were only allowed to sell products online through their own website or through authorised resellers and authorised third-party platforms. Action Sport thus breached its distribution agreement. Despite several notices from Nike, Action Sport continued selling through Amazon. Nike therefore terminated the distribution agreement and subsequently denied access to its platform, preventing Action Sport from placing orders. As of the date of termination, Nike also refused to deliver any more orders (regardless of whether these were pending on the date of termination or placed afterwards).

Action Sport objected to the termination. It argued that the selective distribution system of Nike did not meet the *Metro* criteria. The nature of the products did not require selectivity, as they are not luxury products, so the prohibition for authorised distributors to sell Nike products through unauthorised (online) sellers violated Article 6 of the Dutch Competition Act (the cartel prohibition). Accordingly, Nike's selective distribution system violated competition law, the termination of Action Sport was illegal, as well as the fact that Nike refused to supply (pending) orders to Action Sport and denying it access to its order platform.

In first instance, the Court concluded as follows:

- The conditions set out in Nike's Policy are objective qualitative criteria, relating to the professional competence of the distributor, its personnel, and the organisation of its business. These criteria are applied uniformly and without discrimination. With reference to the conclusion of Advocate General Wahl in *Coty*, the Court held that Nike's products are luxury products, and that the Policy served to maintain the image of the Nike brand.
- A prohibition for authorised distributors to sell through unauthorised third-party platforms cannot generally be considered a restriction on internet sales that is disproportionate in relation to the objective pursued: Nike has no control over sales through unauthorised third-party platforms, whilst it can exercise such control in the context of a selective distribution system, in the online sales environment established by its

authorised distributors. Nike's Policy was therefore permissible under the cartel prohibition, and Nike was entitled to terminate Action Sport due to its breach of the Policy.

- Nike was ordered to pay damages for not delivering pending orders (i.e., orders placed and accepted before the date of termination). Each accepted order is an agreement between the parties, separate from the (terminated) distribution agreement.

B. Legal analysis

The judgment in first instance was confirmed and clarified by the judgment on appeal, which was rendered after the European Court of Justice's ('ECJ') *Coty* judgment.

On appeal, Action Sport claimed that Nike's products are not luxury products, and that the prohibition to sell through unauthorised third-party platforms constitutes a hardcore restriction, enabling Nike to expand its online sales at the expense of its distributors.

The Court of Appeal rules on this that the Policy does not generally prohibit the use of the internet to market Nike products, but only prohibits a specific type of online sales. Customers continue to have access to Nike products online, through online shops of authorised resellers, which include various online platforms. The Court of Appeal held that such restriction – under the aforementioned circumstances – is not a hardcore restriction, with reference to *Coty* (§68):

'*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.*'

The Court of Appeal also clarified, as the ECJ did in *Coty*, that the selective distribution exemption under the VBER is not limited to luxury products. Nike's distribution system is covered by the VBER, provided the system meets the VBER conditions, irrespective of the nature of the products. That *Coty* concerned luxury goods was a mere circumstance and not a deciding factor in that regard.

2. QUOTES

"*[…] The ECJ has ruled in par. 68 of the Coty judgment:* '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.' *The*

circumstances to which the ECJ refers, and which it expands on in para. 65-67, see that the use of the internet is not prohibited […], that it is apparently not possible within the group of online buyers to identify the customers of third-party platforms […] and that the distribution agreement allows distributors to advertise on the Internet under certain conditions, so that the customer has access to the products offered on the Internet by the authorized distributor. The luxurious nature of the products to which the Coty case related is not mentioned and it also makes no difference to the circumstances referred to by the ECJ; apparently the ECJ did not consider that luxury character important for this judgment." (free translation of §3.7.7)

3. RELEVANT LEGISLATION

- Dutch Competition Act (Article 6)
- Article 101 TFEU
- Regulation 330/2010

4. PRACTICAL SIGNIFICANCE

In *Coty*, the ECJ ruled, first, that purely qualitative selective distribution is outside the scope of Article 101(1) TFEU when a ban on sales via third-party platforms is a proportionate means to protect the image of luxury goods. In this respect, the nature of the products – i.e., whether it concerns luxury products or not – is relevant, as the ECJ observed in Coty: "*a prohibition, such as the prohibition […] imposed on […] authorised distributors, on using, in a discernible manner, third-party platforms for the internet sale of luxury goods does not go beyond what is necessary in order to preserve the luxury image of those goods*". Second, under the VBER, the ECJ confirmed that a prohibition to use third-party platforms and hence an obligation to have an own electronic shop window is not a hardcore customer restriction or restriction on passive sales to end users.

The judgments discussed here are an example of the correct application at the national level of these principles.