

HIGHEST EU COURT CONFIRMS THAT LUXURY GOODS MANUFACTURERS CAN STOP SALES ON ONLINE RESALE PLATFORMS

Date: 8 December 2017

Antitrust, Competition & Trade Regulation Alert

By: Jennifer P.M. Marsh, Francesco Carloni, Michal Kocon, Neil Baylis

In a judgment rendered on 6 December 2017, the Court of Justice of the EU ("CJEU") stressed that selective distribution systems for luxury goods which are designed to preserve the luxury image of those goods are generally compatible with EU competition law. The highest court of the EU also concluded that suppliers operating such selective distribution systems may, subject to certain conditions, prohibit their authorised retailers from selling the goods on third party platforms.

BACKGROUND

Coty is a leading supplier of luxury cosmetic goods in Germany and markets some of its brands via a selective distribution network. Authorised retailers are allowed to sell Coty's luxury goods online. However, they are expressly banned from selling the goods online via third party platforms which operate in a discernible manner towards consumers.

The dispute in question arose when, in accordance with its selective distribution conditions, Coty sought to prevent one of its retailers, Parfümerie Akzente, from distributing Coty goods online via a major third party platform.

RULING

The CJEU was asked to assess whether such a restriction imposed on an authorised distributor not to sell the goods through third party platforms is compatible with Article 101(1) of the Treaty on the Functioning of the EU (TFEU) which prohibits anticompetitive agreements.

The judgment reiterates that a restriction imposed by a supplier operating a selective distribution system is presumptively lawful under Article 101 TFEU provided that the following conditions are met:

The selective distribution system is designed to preserve the luxury image of the goods;

Authorised resellers are selected on the basis of objective criteria which are applied in a non-discriminatory fashion; and

The conditions are required to preserve the quality of the products and their proper use and they do not go beyond what is necessary.

The CJEU ruled in favour of Coty, holding that a selective distribution system which satisfies the above conditions is able to impose a ban on its retailers from selling products via online resale platforms. The court clarified that such a prohibition would not amount to a hardcore restriction under EU competition law, for example when authorised retailers are not prevented from selling goods online through other distribution channels (e.g. through the retailers' own websites). This line of reasoning is supported by the European Commission's findings in its sector inquiry into e-commerce (see our previous alert) which revealed that, despite the increasing importance of online resale platforms in the marketing of goods, the main online distribution channel is still constituted by distributors' own online shops.

The inclusion of an online marketplace ban in a supply and distribution agreement does not therefore prevent that agreement from benefitting from the safe harbour contained in the vertical agreements block exemption regulation.

Importantly, the CJEU referred to an older case of *Pierre Fabre* (Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09)), which argued that maintaining a prestigious product brand image was not a legitimate reason for imposing a term restricting competition. The judgment in *Coty* relaxes this approach and confines *Pierre Fabre* to its own unique facts, without ruling out the possibility that the nature of certain products may indeed be such as to justify an online sales ban.

CONCLUDING REMARKS

The *Coty* judgment has a number of particularly important practical implications for suppliers operating a selective distribution network.

It contains useful guidance for brands on how they can control their brand image in the online environment without breaching EU competition law. In particular, the judgment clarifies how companies, in the context of a selective distribution system, are able to protect their intellectual property and goodwill in the brand when dealing with third parties online:

For luxury brand owners, the *Coty* judgment establishes a presumption that imposing a restriction (based on objective criteria of a qualitative nature, laid down uniformly and not applied in a discriminatory fashion) on authorised retailers against selling via certain online platforms is lawful;

For non-luxury brand owners, the ruling clarifies that banning sales on certain online sales channels will not amount to a hardcore, "by object" restriction of EU competition law, hence requiring national competition authorities and courts to assess the effects of the agreements on a case by case basis.

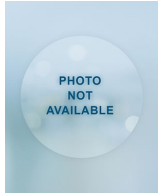
Companies are therefore encouraged to review their supply and distribution frameworks and to consider restructuring them in order to gain greater control as to whom and how their products are being sold via the internet.

Questions remain as to when products are "luxury" and whether there will be any divergence between EU member states in this respect. For example, in Germany, which has traditionally taken the strictest approach towards online sales restrictions, the President of the Federal Cartel Office ("FCO") has commented on the judgment saying that it will not have a significant impact on the FCO's decisional practice and he preliminarily

interprets the ruling as being limited to "genuinely prestigious products". In practice, the scope for Germany to continue its more aggressive stance here seems to be greatly limited.

Case reference: Judgment of 6 December 2017, Coty Germany (C-230/16)

KEY CONTACTS



JENNIFER MARSH
PARTNER
LONDON
+44.(0)20.7360.8223
JENNIFER.MARSH@KLGATES.COM



FRANCESCO CARLONI
PARTNER
BRUSSELS, MILAN
+32.(0)2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



MICHAL KOCON
SENIOR ASSOCIATE
LONDON
+44.(0)20.7360.8240
MICHAL.KOCON@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.