

## EU SELECTIVE DISTRIBUTION UPDATE: RECENT DEVELOPMENTS REGARDING MARKETPLACE BANS AND THE REQUIREMENT FOR A PHYSICAL POINT OF SALE

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### Antitrust, Competition and Trade Alert

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This alert considers two interesting recent developments relevant to manufacturers distributing their products through a selective distribution system in European territories.

First - manufacturers will welcome confirmation by the European Commission (Commission) that in its view the *Coty* case on marketplace bans applies regardless of the nature of the products concerned. Second - to date, it has generally been commonly accepted that manufacturers can exclude "pure" online players from their selective distribution networks. However, a lawsuit recently brought before the UK High Court may potentially call into question whether manufacturers can always require online resellers to have some form of physical presence.

### (1) COMMISSION CONFIRMS NON-LUXURY BRANDS CAN IMPOSE MARKETPLACE BANS

The decision of the Court of Justice of the European Union (CJEU) in the *Coty* case seemed on its face to be solely concerned with the protection of luxury brands, such that most of the commentary on the case focused on luxury brand owners' rights to ban third party platform sales. As a result, many "non-luxury" brand owners assumed this landmark decision was of limited or no value to them.

However, we opined in our previous alert that *Coty* was likely to be relevant to all sorts of products -including non-luxury products. This has now helpfully been confirmed by the Commission, which earlier this month published a Competition Policy Brief (1/2018) to provide stakeholders with DG Competition's view on the legality of marketplace bans in light of the *Coty judgment*.

The Commission welcomes the *Coty judgment* "as it provides more clarity and legal certainty to market participants." As we have previously outlined, the CJEU concluded that a marketplace ban will escape the application of EU competition law altogether if it pursues a legitimate objective and is laid down uniformly and is not applied in a discriminatory fashion; and it is proportionate in the light of the objective pursued (the so-called "Metro-criteria"). But even where the Metro-criteria are not met, the ban is likely to benefit from an automatic exemption under the Vertical Block Exemption Regulation if the parties' market shares are less than 30%. This is because the *Coty* case confirmed that a marketplace ban does not constitute a "hardcore restriction" of

competition.

Helpfully, the Commission has now expressly indicated that the *Coty* principles apply "irrespective of the product category concerned ... and are equally applicable to non-luxury products" and that the restrictions on sale "can logically not depend on the nature of the product concerned."

The Commission explains that a block exemption's purpose is to secure legal certainty for parties as regards the validity of their agreement. Therefore, the assessment of hardcore restrictions should not depend on the particular market conditions or on the restrictive effects in an individual case, on a particular (national) market or for certain categories of products (as the German competition authority had suggested). Additionally, the Commission explains how the CJEU's technical reasoning precludes a conclusion that the case should be limited to certain product categories.

Finally, even above a 30% market share, a marketplace ban might still be justified by pro-competitive efficiencies under the exemption provided by Article 101(3) TFEU, though the legal risk is of course higher. The Commission notes that *Coty* does not address whether a marketplace ban that does not comply with the Metro-criteria is (i) a restriction of competition "by object" (one of the most serious kinds of restrictions, where the authority does not need to analyse the effects of the restriction on competition in detail and which normally does not meet the requirements for exemption under Article 101(3) TFEU) or (ii) a restriction of competition "by effect" (which requires appreciable effects on competition to be shown and will normally be more capable of justification). However, the Commission expresses the view that the CJEU's reasoning suggests that a marketplace ban cannot be qualified as a "passive sales" or "customer group" restriction of competition "by object".

The Commission's statements will thus be welcomed by businesses selling products online in Europe, as they provide considerable comfort that brand owners are likely to enjoy a wide degree of latitude and minimal legal risk when it comes to designing online marketplace strategies and restrictions.

## **(2) SELECTIVE DISTRIBUTION SYSTEM REQUIRING PHYSICAL POINT OF SALE COMES UNDER SCRUTINY IN UK**

Beauty Bay, an online retailer of hair-care, skin-care and cosmetics, has filed a lawsuit against L'Oréal in the UK High Court, challenging (among others) the term in L'Oréal's selective distribution agreement which requires all authorised online resellers to have at least one approved physical point of sale.

Beauty Bay is seeking an order that the requirement infringes EU and UK competition law on the basis that, in its view, it does not satisfy the Metro-criteria considered above (specifically Beauty Bay alleges that the requirement is not objectively justified, necessary or uniformly applied as between potential resellers).

The requirement for a physical presence - essentially, an exclusion of "pure" online players from an authorised dealer network- is currently commonplace in selective distribution systems across Europe. Indeed, the Commission's Vertical Guidelines expressly confirm that under the Vertical Block Exemption Regulation, a

manufacturer may require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. The Guidelines further provide that a manufacturer can require online resellers to sell a certain absolute amount (in value or volume) of products offline to be authorised. This can be the same for all resellers, or determined individually on the basis of objective criteria, such as the reseller's size in the network or its geographic location.

Nonetheless, in its findings of the e-Commerce sector inquiry published in May 2017, the Commission indicated that - whilst generally covered by the Vertical Block Exemption Regulation - such a requirement may need "further assessment in individual cases" when used for certain product categories or certain lines of products which pure online retailers might potentially be equally qualified to sell. The Commission noted that a large majority of the supplier respondents to the sector inquiry using selective distribution exclude pure online players from their selective distribution networks for at least part of their products. However, it suggested that in some cases this restriction might possibly go beyond what is necessary for the purpose of ensuring high quality distribution.

Another interesting aspect of the *Beauty Bay / L'Oréal* case is a challenge against a provision in L'Oréal's terms which provides that, in order to avoid affecting the launch of a new product in the case of staggered launch campaign, authorised distributors must refrain from active selling in respect of any new product which has not yet been launched in their territory for one year from the date it is first launched in another EEA Member State or Switzerland. Beauty Bay is arguing that this has the object or effect of restricting cross-border competition between distributors, restricting consumer groups to whom a distributor may sell, or partitioning the internal market.

Product manufacturers are therefore likely to follow the *Beauty Bay / L'Oréal* case with interest, to assess the potential legal impact (if any) on their own distribution criteria and models. Our team will keep abreast of this and other pertinent developments and provide further updates as these progress.

## **WHAT K&L GATES CAN DO FOR YOUR BUSINESS**

Our Global Antitrust, Competition and Trade Regulation team has extensive experience advising suppliers of branded products on optimising, implementing and enforcing their international distribution models. We would be happy to discuss your company's goals and tailored distribution solutions to meet them.

## KEY CONTACTS



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