In its hotly anticipated ruling in the Coty case, the Court of Justice of the EU (CJEU) has held today that, in the context of a selective distribution system, a restriction imposed on an authorised retailer not to sell the goods through online third-party platforms does not infringe Article 101(1) TFEU provided that the following conditions are met: the objective of the restriction is to preserve the luxury image of the goods concerned, it is applied objectively and in a non-discriminatory manner and the restriction is proportionate and does not go further than necessary.
The CJEU therefore treats the ban on third-party online platforms as a qualitative restriction that is necessary to protect the image of the goods concerned, rather than as a restriction of the customers to whom authorised distributors can sell the luxury goods at issue or as a ban of passive sales to end users, which would be in breach of Article 101(1) TFEU and amount to a restriction of competition by object. According to the CJEU such a restriction is also not considered a "hardcore" restriction under the Vertical Block Exemption Regulation (VABER) and hence an agreement including such a restriction can benefit from the VABER if all other conditions are also met.

The ruling will be welcomed by suppliers of branded and luxury goods who have increasingly expressed concerns over the potential erosion of the image of their products as a result of the recent growth in online sales, in particular on third-party online platforms such as Amazon and eBay. In order to maintain a level of quality control over online sales of their products, suppliers of luxury goods are more frequently resorting to vertical integration and handle the distribution in-house. The Coty ruling now confirms that sales through third party distributors will allow suppliers the same level of quality control. Suppliers will still, however, need to show that their distribution system either meets the thresholds of the VABER or otherwise that their product is indeed a "luxury" or complex product which requires such a restriction to protect its image.

1. Background to the case
2. The CJEU ruling
3. Online sales restrictions under EU competition law
4. Comment
1. BACKGROUND TO THE CASE

Coty, one of the leading suppliers of luxury cosmetics in Germany, operates a selective distribution system in order to protect the luxury image of its brands. In order to become an authorised retailer the bricks and mortar store of a distributor needs to meet certain requirements which relate to the environment, decor and furnishing of the store. Authorised retailers are permitted to sell the products online, through an electronic shop window of the authorised store, which ensures that the luxury character of the products is also preserved for online sales.

When one of Coty's authorised retailers, Parfumerie Akzente, started to sell the products concerned through the online marketplace Amazon.de, Coty challenged its conduct before the German courts seeking an order to prevent Parfumerie Akzente from continuing its sales on Amazon.de. When the case reached the Higher Regional Court in Frankfurt, the court decided to put the question before the CJEU as to whether a ban on sales on online marketplaces, in the context of a selective distribution system, is legitimate under Article 101(1) TFEU.

Coty was not the first case on the issue of online marketplace bans, but the German competition authority and German courts have so far not applied a consistent approach to this type of restriction. Sportswear manufacturers ASICS and Adidas, and headphones manufacturer Sennheiser, have all been prohibited by the German Federal Cartel Office from restricting the ability of members of their respective selective distribution networks to sell on marketplaces such as Amazon Marketplace. In a case involving backpack manufacturer Deuter, the Frankfurt court on the other hand concluded that a restriction on sales via Amazon Marketplace was legal (see our e-bulletin here).

The judge in the Coty case therefore decided to seek clarification from the CJEU as to the correct approach to this type of restriction under the EU competition rules.

2. THE CJEU RULING

In response to the first question before the CJEU, whether a selective distribution system that is aimed at protecting the luxury image of the products concerned is compatible with Article 101(1) TFEU, the CJEU refers to its previous case law which confirms that a selective distribution system will not be caught under Article 101 TFEU provided the following conditions are met:

- Such a distribution system is justified by the nature of the products in question (which is not limited to material characteristics but can also include image and luxury feel aimed at distinguishing them from other similar goods)
- Distributors are selected on the basis of non-discriminatory qualitative criteria relating to the suitability of their premises or their technical ability to handle the goods
The CJEU also takes the opportunity to clarify its ruling in the Pierre Fabre case, which has been interpreted inconsistently by some national competition authorities and national courts. In paragraph 46 of that ruling the CJEU took the view that the need to preserve the prestigious image of the goods concerned could not in itself justify a restriction on competition. This was seen by some as a reversal by the Court of its previous case law on selective distribution under which such a distribution system was not caught under Article 101(1) TFEU provided a number of conditions were met. The CJEU makes it clear that this statement in paragraph 46 of Pierre Fabre must be seen 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.

On the second question, whether a restriction imposed on authorised retailers in a selective distribution system which prevents them from selling on third-party online platforms is caught under Article 101(1) TFEU, the CJEU refers to the requirements identified in its case law which must be met for a selective distribution system to fall outside the scope of Article 101 TFEU. Although it is ultimately up to the referring court to decide whether this particular restriction satisfies these requirements, the CJEU does go on to provide the referring court with guidance to assist with this assessment.

The CJEU accepts that this type of restriction is aimed at protecting the luxury image of the goods at issue. The restriction provides the supplier with the necessary guarantee that the goods will be exclusively associated with its authorised distributors. It also enables the supplier to check that the goods are sold in the right environment which complies with the qualitative criteria imposed on its authorised distributors.

On the issue of proportionality (whether the restriction is necessary to achieve this protection), the restriction does not impose a total ban on online sales. Authorised distributors are permitted to sell the goods online both via their own websites (provided the luxury character of the goods is preserved) and via third-party platforms where the use of such platform is not discernible to the consumer. It is also clear from the EU Commission's e-commerce sector inquiry that the main distribution channel in the context of online distribution remains the distributors' own online shops. On this basis the CJEU concludes that a restriction on sales via third-party online platforms does not go beyond what is necessary in order to protect the luxury image of the goods concerned.

The absence of any contractual relationship between the supplier and a third-party platform would in fact make it very difficult for the supplier to enforce the quality conditions imposed on its authorised distributors.
In the third and fourth questions the CJEU was asked whether the ban on third-party online platforms qualifies as a restriction of the customers to whom authorised distributors can sell the luxury goods at issue (within the meaning of Article 4(b) of VABER) or as a ban of passive sales to end users (within the meaning of Article 4(c) VABER), which are hardcore restrictions under EU competition law. The CJEU concludes this is not the case, as first of all the restriction does not impose an absolute ban on online sales and secondly, authorised distributors remain free (under certain conditions) to advertise via the internet on third-party platforms and to use online search engines, which means that customers are usually able to find the online offer of authorised distributors by using such engines.

3. ONLINE SALES RESTRICTIONS UNDER EU COMPETITION LAW

The EU Commission's vertical agreements guidelines (Guidelines) adopted in 2010 as part of the VABER for the first time addressed the issue of online sales restrictions. The Guidelines recognise the power of the internet "to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as sales restrictions". The starting point under the Guidelines is that in principle, every distributor must be allowed to use the internet to sell products, which is seen as a form of passive selling (as it is a reasonable way to allow customers to reach the distributor), and an absolute ban on which would therefore qualify as a hardcore restriction under Article 4(b) and 4(c) VABER.

Under paragraph 56 of the Guidelines any restriction on online sales in a selective distribution system is likely to be considered to be hard-core, unless it is equivalent to a 'bricks and mortar' restriction imposed on the distributors. Nonetheless, Paragraph 54 specifically covers a ban on sales via third party internet platforms and provides that a supplier may require quality standards for the use of the internet site to resell its goods, just as a supplier may require quality standards for a shop, which may be relevant in particular for selective distribution. It goes on to say that "a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributor's use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform".

The Commission has also considered restrictions on sales via online marketplaces in the context of its recent e-commerce sector inquiry which was completed in May 2017 (see our e-bulletin here). The aim of this sector inquiry was to examine prevailing market trends in the e-commerce sector and identify potential barriers to competition in e-commerce markets. The Commission concluded, based on the findings of its inquiry, that a marketplace sales ban does not amount to a de facto absolute ban on online sales and should not be seen as a hardcore restriction of competition. While it does not condone all marketplace bans the Commission takes the view that each restriction must be considered on its specific facts.
These principles have now also been confirmed by the CJEU in the Pierre Fabre case, where the CJEU held that an absolute ban on internet sales in the context of a selective distribution agreement has the object of restricting competition and will be in breach of Article 101(1) TFEU (unless it can be objectively justified), and by the CJEU in the Coty case in relation to restrictions on sales via online marketplaces imposed in the context of a selective distribution system.

4. COMMENT

The Coty ruling provides welcome clarification on the issue of third-party online platform bans, which has been considered at Member State level in a number of cases and has resulted in conflicting approaches. In Germany, where the use of third-party online platforms represent an important retail tool for small and medium sized companies, the competition authority has typically taken a more restrictive approach than that advocated by the Commission (and now the CJEU) in its Guidelines and viewed such a restriction to be equivalent to a hardcore restriction on passive sales, in breach of Article 101 TFEU. In April this year a German regional court held that Asics had acted in breach of competition rules, in restricting sales on third party platforms and through price comparison portals. In The Netherlands on the other hand, as recently as October 2017, a Dutch court found that Nike acted lawfully in terminating the distribution contract with an authorised retailer who sold products via Amazon.

The European Commission welcomed the ruling issuing a statement saying that "it will facilitate uniform application" of antitrust rules for online distribution. On the other hand Germany's head of competition commented that "the ruling will have only limited effects on our decisional practice" and that in his preliminary view suppliers of luxury products had not received carte blanche to impose blanket bans on selling via platforms.

It seems that, although the CJEU ruling in this case clarifies the position in respect of third-party online platform restrictions and contains guidance for the Member States on how to assess their compliance with Article 101 TFEU, there remains scope for national competition authorities and courts to come to different conclusions because the facts will be specific to each case and could influence the individual analysis on effects on competition in the specific market context. The role of online platforms is also likely to increase in future and their role and any restrictions imposed on their access can be expected to be kept under regular review.

It is also worth noting that the competition authorities remain vigilant in respect of other online sales restrictions. In the UK the Competition and Markets Authority (CMA) has adopted a series of infringement decisions relating to online RPM and a total ban on online sales. In the recent online bidding platforms investigation the CMA has accepted commitments which address concerns it had raised regarding exclusivity issues, online advertising restrictions and MFN clauses.
KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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