

ANTITRUST BRIEFING: Special Edition

The ruling of the Court of Justice of the European Union (CJEU) in the Coty case: Resolving the uncertainties regarding permissibility of online sales bans in selective distribution.

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A. Overview

In its long-awaited judgment of 6 December 2017 in the Coty case (C-230/16), the CJEU held that suppliers of luxury cosmetic products may prohibit their authorised distributors from making use of non-authorised third-party internet platforms for their online sales, provided that:

1. the restriction has been laid down to preserve the luxury image of the goods concerned;
2. it is applied uniformly and in a non-discriminatory fashion; and
3. the restriction is proportionate and does not go beyond what is necessary.

The CJEU has therefore taken the view that such third-party platform bans are a qualitative restriction that is appropriate to preserve the luxury image of the goods concerned, as opposed to a restriction of customers to whom the authorised retailers may sell the luxury goods, or a restriction of passive sales to end-users, which would be prohibited. Absolute bans on internet sales continue to be treated as non-permissible restrictions.

B. Case Background

Coty Germany GmbH (Coty) sells luxury cosmetics in Germany. In order to preserve their luxury image, Coty markets certain of its brands via a selective distribution network, in the context of which Coty authorised distributors may offer the products online but are banned from selling via discernible third-party platforms.

Coty brought proceedings before the German courts against one of its authorised distributors, seeking an order prohibiting it from distributing Coty goods via the Amazon Germany platform, amazon.de. When the case reached the Higher Regional Court in Frankfurt, the German Court referred the matter to the CJEU for a preliminary ruling under EU competition rules, due to inconsistent approaches adopted with regard to the matter of online sales bans in Germany.

C. CJEU Ruling

1. Compatibility of Selective Distribution Systems

The CJEU dealt first with the question of whether selective distribution systems which aim to protect the luxury image of the goods concerned are compatible with Article 101 TFEU. In response to this question, the CJEU confirmed that a selective distribution system designed primarily to preserve the luxury image of those goods, is compatible with EU competition rules provided that:

- a. distributors are selected on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential distributors and not applied in a discriminatory manner;
- b. the characteristics of the goods necessitate such a network to preserve their quality and ensure their proper use; and
- c. these criteria do not go beyond what is necessary.

2. Lawfulness of a Contractual Clause Prohibiting the Use of Third-Party Platforms

On the second question brought before it, as to whether a contractual clause whereby authorised distributors in a selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods, are prohibited from using, in a discernible manner, third-party platforms for their internet sales is caught under Article 101 TFEU, the CJEU found such clause to be lawful, on condition that:

- a. it has the objective of preserving the luxury image of those goods;

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- b. it is laid down uniformly and not applied in a discriminatory way; and
- c. it is proportionate to the objective pursued.

According to the CJEU, the obligation imposed on authorised distributors to sell the contract goods online through their own online shops and the prohibition to use 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.

Such restriction also enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions imposed on its authorised distributors. In contrast, the internet sale of luxury goods via platforms outside the selective distribution network, in the context of which the supplier is unable to check the conditions in which those goods are sold, involves a risk of deterioration of the online presentation of those goods, which is liable to harm their luxury image and, thus, their very character.

As such, the CJEU concluded that the said prohibition is appropriate to preserve the luxury image of those goods.

In addition, the CJEU found that the restriction involved in Coty did not contain a total ban on online sales. On the contrary, authorised distributors remain free to sell online both via their own websites (so long as the luxury character of the goods is preserved) and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer.

Based on the above, the CJEU concluded that a prohibition on sales via third-party platforms does not go beyond what is necessary in order to preserve the luxury image of the goods concerned. Given the absence of any contractual relationship between the supplier and the third-party platforms, enabling the supplier to require those platforms to comply with the pre-defined quality conditions imposed on its authorised network,

allowing its distributors to use such platforms subject to their compliance with pre-defined quality conditions, could not be as effective as the prohibition at issue.

3. Nature of Third-Party Platform Bans

On the third and the fourth questions, in particular, if the said prohibition constitutes a restriction of customers or a restriction of passive sales to end users, the CJEU held that the restriction at issue did not impose an absolute ban on online sales and therefore, even if restricting a specific kind of internet sales, it did not amount to a restriction of customers of the distributors or a restriction of passive sales to end-users.

The CJEU took into account that third party platform customers could not be identified as a particular customer group within the group of online purchasers and therefore a third party platform ban, such as the one in question, does not result in a restriction on the customers to whom authorised distributors may sell. It is not a passive sales restriction either since authorised distributors are free to advertise via the internet and through online search engines, with the result that users are able to find their online offers.

D. Comments

The decision of the CJEU in Coty has been welcomed, considering that it will facilitate the uniform application of antitrust rules in the online distribution framework. Indeed, the CJEU ruling resolves the uncertainties raised by its previous case-law and provides guidance to EU Member States on how to assess third-party online platform restrictions in the context of selective distribution. However, the CJEU judgment in Coty deals only with selective distribution networks for luxury goods. Thus, it remains to be seen what will be the implications of the judgment on selective distribution systems involving other types of goods (eg non-luxury goods). A definitive answer on this last point may require a further ruling of the CJEU.

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