In the long-awaited Coty ruling, the Court of Justice of the European Union has confirmed that luxury brands may restrict distributors in a selective distribution network from selling their goods through third-party online platforms such as Amazon and eBay, provided that this is necessary to preserve the luxury image of their goods.

1. Introduction

Online sales through third-party online platforms have been a thorn in the side of luxury brands trying to reconcile the qualitative distribution of their goods with competition laws. The structure and business models of third-party online platforms such as Amazon or eBay are generally seen as incompatible with brands’ desired selective distribution models for the resale of their products.

Until now, luxury brands have relied on the European Commission (EC) Guidelines on Vertical Restraints to limit distributors’ use of third-party online platforms, which provide that:

“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” (paragraph 54).

Luxury brands claim the branding of third-party online platforms diminishes the luxury image of their products. However, national case law on this point varies, with the German Federal Cartel Office taking a particularly strong approach in the Adidas case, considering that a third-party online platform ban may constitute an illegal hardcore restriction. In a highly anticipated judgment, the Court of Justice of the European Union (CJEU) has now confirmed that under certain conditions, luxury brands can restrict distributors’ discernible use of third-party online platforms in a selective distribution network.

2. Background

Coty owns leading brands of luxury cosmetic products. Coty products are distributed in Europe via a selective distribution network under uniform distribution terms. Coty requires authorised distributors to meet certain qualitative criteria, including the requirement to sell only through an “electronic shop window” of the authorised store. Coty’s authorised distributors must not retail online using a different business name or through a third party website where the third party is not an authorised retailer of Coty Prestige products if recognizable. In practice, this prohibits the sale of Coty’s selective products through online platforms such as Amazon or eBay.

Authorised Coty distributor, Parfümerie Akzente, refused to comply with this requirement and sold Coty products through Amazon. Coty launched a case in Germany to prevent Parfümerie Akzente from selling Coty products via Amazon. The Court of First Instance (Landgericht Frankfurt am Main) refused on the grounds that Coty’s selective
distribution network was unjustified and that the specific restrictions on online sales constituted a hardcore restriction which could not benefit from the EC’s Vertical Agreements Block Exemption Regulation (330/2010) (VABE) or from an individual exemption. Coty Germany subsequently appealed to the Higher Regional Court (the Oberlandesgericht Frankfurt am Main) which referred the question to the CJEU.

3. The CJEU Judgment

In its ruling, the CJEU broadly agreed with Advocate-General Nils Wahl's Opinion that luxury brands may prohibit authorised distributors in a selective distribution system from using in a discernable manner third-party online platforms to sell the brand's goods.

The CJEU confirms that the luxury brands may require a selective distribution system to preserve the quality of their products. An "aura of luxury" is essential to characterise and distinguish luxury products. Any damage to this aura could affect the inherent quality of the products.

The CJEU also clarifies its Pierre Fabre ruling in which it seemed to consider that preserving an image of prestige was not a sufficiently legitimate reason for restricting competition. The CJEU now explains that the need to preserve the image of Pierre Fabre’s cosmetic and hygiene products did not justify an absolute ban on online sales. The prohibition imposed on authorised distributors in a selective distribution system on making use in a discernible manner of third-party platforms for online sales is not per se contrary to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Whether or not such a prohibition breaches Article 101(1) TFEU depends on whether:

- that provision is necessary to preserve the image of the luxury products;
- it is determined in a uniform fashion and applied without distinction; and
- it does not go beyond what is necessary.

In Coty, the CJEU gives some guidance on these points. A prohibition on third-party online platform sales helps brands control how their products are sold. This is an essential element of a selective distribution network, but luxury brands may struggle to control distribution of their products through third-party online platforms as there is no direct contractual relationship between the brand and the platform.

In addition, third-party online platform bans are not absolute bans on online sales. During its e-commerce inquiry, the EC found that most internet sales are made through distributors’ own websites and that online platforms are not necessarily a significant distribution channel.

Finally, the CJEU considers that the ban on using third-party online platforms in a discernable manner does not constitute a hardcore restriction under Articles 4(b) or (c) of VABE. Provisions which restrict sales channels do not limit the customers to whom the distributor can sell, or the territory in which these sales may be made. Further, authorised distributors could still sell relevant products through platforms in a non-discernible manner (i.e. without third party branding) that does not undermine the luxury image of the brand and its products.

4. Practical consequences

The CJEU's judgment provides much-needed clarification for luxury brands on their ability to restrict distributors' sales on third-party online platforms within a selective distribution network. The CJEU's emphasis on the importance of preserving an aura of luxury reinforces why the display of products and the sale environment are so important to brands and could assist in justifying other qualitative restrictions.
Nonetheless, both selective distribution and the control of online sales methods must be justified by the nature of the products and must be necessary and proportionate. Not all products will be by their nature suited to distribution through a selective network. Even where the use of a selective distribution network is justified, an absolute prohibition on the resale of products through third-party online platforms in a non-discernible manner (i.e. with no third party branding) is still likely to be considered too restrictive and therefore a breach of Article 101 TFEU.


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