

Newsletter, 13 December 2017

European Court of Justice: Coty-judgment on platform bans

European Court of Justice clarified that a marketplace ban for the online distribution of (luxury) products does not infringe Art. 101 (1) TFEU.

In its judgment of 6 December 2017 the European Court of Justice („ECJ“) confirmed that a supplier, in the case at hand a supplier of luxury goods, may restrict distributors in a selective distribution network from selling their goods through third party-platforms.¹ Whereas the European Commission reacted to the ruling by stating that “the judgment will facilitate a uniform application of competition rules across the EU”, the German Federal Cartel Office (“FCO”) pointed out that the “ECJ has limited its findings to genuine luxury products and that brand manufacturers have not received a *carte blanche* to issue blanket platform bans.”² Even though some national competition authorities seem to interpret the judgment very narrowly, we see little room for this perspective: In our view, the scope of this ruling cannot be confined to luxury products. This is due to the ECJ’s finding that platform bans are no hardcore restrictions within the meaning of the EU Vertical Block Exemption Regulation (“VBER”), irrespective of whether products are sold under a selective or a simple distribution system. In light of the framework of the VBER, the judgment thus exempts all platform bans from the EU cartel prohibition agreed within the scope of this Regulation.

Background

Coty Germany GmbH (“Coty”), a supplier of luxury cosmetics, markets certain of its brands through a selective distribution system. Under the system, online sales were permitted, provided they were made through an “electronic shop window” of the authorised dealers. The use of a different business name as well as the recognisable engagement of a third party, i.e. third party-platform, was prohibited. When Coty became aware that its long-term authorised reseller Parfümerie Akzente GmbH (“Akzente”) sold its products online via Amazon.de, it brought proceedings before the Re-

gional Court in Frankfurt in 2012.³ The Regional Court found that the platform ban infringed EU competition laws and was therefore unenforceable. When Coty appealed the decision to the Higher Regional Court in Frankfurt, the court put the question before the ECJ as to whether a platform ban in the context of a selective distribution system is legitimate under Art. 101 (1) TFEU.

Under German and European competition law suppliers are - below market share thresholds of 30% - entitled to select dealers based on their commitment to apply qualitative and/or quantitative criteria when reselling the contract products. Selection criteria that *de facto* prohibit online sales are considered hardcore restraints, generally unavailable for an exemption from the cartel prohibition.⁴ Selection criteria that only govern the modalities of online sales might be non-restrictive or available for an exemption - subject to their overall equivalence with corresponding offline sales criteria.⁵ So far, the decision practice in the EU with respect to marketplace bans is controversial. In Germany, some Higher Regional Courts considered the prohibition of online sales via marketplaces to be hardcore restraints, others found them to be lawful qualitative selection criteria.⁶ The FCO decided in numerous cases, such as ASICS, Adidas and Sennheiser, that the prohibition on members of selective distribution systems to sell on marketplaces such as Amazon constituted a restriction of competition by object. The clarification of this question by the ECJ was therefore highly awaited.

The ECJ ruling

First of all, the ECJ has reiterated its view that a selective distribution system designed primarily to preserve the luxury image of goods is

¹ ECJ, Judgment of 6 December 2017, [C-230/16](#), (“Coty”).

² <https://twitter.com/Kartellamt>

³ Regional Court of Frankfurt, Judgment of 31 April 2012, Az. 2-03 O 128/13.

⁴ ECJ, Judgment of 13 October 2011, [C-439/09](#) (“Pierre Fabre”), para. 54; European Commission, Vertical Guidelines, para. 56.

⁵ See European Commission, Vertical Guidelines, para. 54.

⁶ See our [newsletter](#) on the judgment of the Higher Regional Court of Frankfurt re deuter.

compatible with Art. 101 (1) TFEU on condition that the so called “Metro-criteria” are met: resellers are chosen on the basis of objective criteria of a qualitative nature, those criteria are applied in a non-discriminatory manner, the characteristics of the product in questions necessitate such a network in order to preserve its quality and ensure its proper use and that the criteria laid down do not go beyond what is necessary.⁷

The ECJ made clear that the Pierre Fabre-judgment was misinterpreted if it was claimed to have dealt with platform bans in a selective distribution system: Different from the case at hand Pierre Fabre only clarified that a total ban of online sales in such a system breached Art. 101 (1) TFEU.⁸ The judgement did, however, not constitute that the preservation of a luxury image as such cannot justify a restriction of competition, e.g. through the existence of a selective distribution network.⁹

The second keypoint of the judgment is that the prohibition of the use of third party-platforms imposed by Coty on Akzente was appropriate to preserve the luxury image of those goods.¹⁰ First of all, the platform ban ensures that the goods sold will be exclusively associated with the authorised distributors. Secondly, it allows a supplier of luxury goods to verify that the goods will be sold online in an environment that corresponds to the qualitative conditions that is agreed with its authorised distributors. The absence of a contractual relationship between the supplier and the third-party platform prevents the supplier from being able to require from those third-party platforms compliance with the quality conditions. Thirdly, the fact that luxury goods are only sold in online shops of authorised retailers contributes to that luxury image and thus to the preservation of one of the main characteristics of the goods sought by the consumers. Lastly, the ECJ also noted that the E-Commerce Sector Inquiry came to the result that the main distribution channel remains the distributors’ own online shop.

When discussing the possibility of an exemption under Art 101 (3) TFEU, the ECJ came to the significant conclusion that a platform ban does neither constitute a restriction of customers within the meaning of Art. 4 (b) VBER, nor a restriction of passive sales to end users, within the meaning of Art. 4 (c) VBER.¹¹ In that respect, the ECJ stressed that a platform ban as such does not

prohibit the use of the internet as a general means of marketing contract goods. In addition, third party platform customers are not considered as a separate group of customers within the group of online purchasers. Finally, the authorised distributors were allowed to advertise via the internet on third-party platforms and to use online search engines, with the result that customers would be able to find the online offer of those distributors.

Comment

The initial debate following the ECJ-ruling evolves primarily around the question whether the ruling is only applicable to luxury goods and as the FCO stated, does therefore not provide a carte blanche for brand manufacturers. This view overlooks one significant point: the ECJ has made it quite clear, also by putting its judgment in context to its previous decision practice, that a platform ban within the scope of the VBER does not qualify as a restriction by object under Art. 4 (b) nor (c) VBER. Art. 4 (b) VBER, however, does neither deal with selective distribution, nor is the scope of this provision in any way reduced to the sale of branded or luxury goods. In our view, the ECJ’s reasoning on Art. 4 (b) VBER can thus only mean that all platform bans imposed within the scope of the VBER are no hardcore restrictions under this provision, irrespective of whether they are imposed in a selective or a non-selective distribution agreement or whether they relate to luxury or non-luxury goods.



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⁷ See ECJ, Coty, para 36.

⁸ See ECJ, Coty, par a 32 et seq; in that regard, the ECJ referred inter alia to its decision practice on trade mark law.

⁹ ECJ, Judgment of 23 April 2009, [C-59/08](#), („Copad“).

¹⁰ See ECJ, Coty, para 42 et seq.

¹¹ See ECJ, Coty, para 62 et seq.

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