EU JUDGMENT ON BANNING SALES VIA ONLINE MARKETPLACES - WHAT DOES IT MEAN FOR NON-LUXURY BRANDS?

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The EU's highest court, the Court of Justice of the EU, has decided that suppliers operating a selective distribution system may be able to prevent their authorised resellers from selling on third party platforms. The Court's decision brings welcome clarity to an area where divergent national approaches had given rise to considerable commercial and legal uncertainty for brand owners in recent years. Although the judgment primarily focuses on selective distribution systems for luxury products, the ruling also has potentially valuable implications for other businesses, including non-luxury brands.

BACKGROUND

Coty, a supplier of luxury cosmetic goods in Germany, sold some of its brands through a selective distribution network of authorised resellers (meaning a system where only resellers meeting certain criteria were permitted to sell Coty products). While Coty's authorised resellers were generally allowed to sell online, they were prohibited from retailing via third party platforms. The dispute in question arose when, in accordance with its selective distribution conditions, Coty sought to prevent one of its retailers, Parfümerie Akzente, from distributing Coty goods online via a major online marketplace.

THE COURT'S JUDGMENT

The Court was asked to assess whether such a restriction infringed EU competition law.

It concluded that the EU law rule prohibiting anti-competitive agreements does **not** preclude a contractual clause which prohibits authorised resellers in a selective distribution network of luxury products from selling via third-party online platforms, provided that: (i) the clause has the objective of preserving the luxury image of the goods in question; (ii) it is laid down uniformly and not applied in a discriminatory fashion; and (iii) it is proportionate in the light of the objective pursued. Where these conditions are met, the clause will not be regarded as a restriction of competition at all, regardless of the parties' market positions.

However, critically, the Court went on to conclude that even if one or more of the above conditions are not satisfied, a marketplace ban is still likely to benefit from automatic exemption under the so-called “Vertical Agreements Block Exemption” if the parties' respective market shares as supplier and buyer do not exceed 30%.

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This is because in the Court's view a marketplace ban does not amount to a “hardcore” restriction of competition, meaning per se excluded from the benefit of a block exemption as it is likely to have severe anti-competitive effects in the market. In particular, the Court found that a marketplace ban is not tantamount to one of the well-established hardcore restrictions, and specifically amounts to neither a restriction of customers nor a restriction of passive sales to end users. This is because it did not appear to be possible to identify within the group of online purchasers specific “marketplace” customers that resellers were prevented from accessing.

IMPLICATIONS FOR NON-LUXURY BRANDS

The *Coty* judgment also contains a number of helpful practical implications for non-luxury product suppliers seeking to impose marketplace bans on their authorised resellers, and potentially clears the way for more aggressive online distribution strategies in Europe:

- Despite the Court's focus on “luxury” products in *Coty*, the ruling is not limited only to such products. It is well established that other types of products (e.g. “high quality” or “high technology” goods) can justify a system of selective distribution. Accordingly, provided that a marketplace ban in the context of a selective distribution system for such other products has the legitimate objective of preserving the quality of such products or ensuring their proper use, is applied consistently, and is proportionate, then it should not give rise to any competition concerns.
- Even if the above conditions are not met, the selective distribution system and specific clause should still benefit from exemption under the Vertical Agreements Block Exemption if the parties' market shares are under 30%, since the Court's technical reasoning for why a marketplace ban is not a hardcore restriction applies regardless of the nature of the product. This is fully consistent with the stated position of the European Commission.
- Similarly, although the judgment focuses on marketplace bans within a selective distribution system, the Court's reasoning appears intended to apply to other forms of distribution and be of even broader application.

However, suppliers should be aware that the *Coty* decision does not necessarily give rise to a *“carte blanche”* for online marketplace bans in all cases.

- In reaching its conclusions, the Court noted several factors weighing in Coty's favour, which - if absent in a particular case - might render a marketplace ban more risky. These included that Coty's resellers were (i) not prevented from advertising via the internet on third-party platforms or from using online search engines, and (ii) permitted to sell via third party platforms where involvement of the platform was not discernible to the consumer.
- The *Coty* decision is likely to be of limited value where a supplier seeks to ban its resellers from selling via an online platform, but has authorised the online platform as an authorised reseller, or itself sells directly via its own store on the platform. In such circumstances, numerous of the justifications considered by the Court in *Coty* would not be present. In the context of its e-Commerce Sector Inquiry, the European Commission in fact noted that *“brand protection considerations or an alleged lack of sufficient pre- or post-sale advice on marketplaces will be less convincing”* in these circumstances. As such, a marketplace

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ban in this scenario could risk infringing EU or national competition laws and suppliers should seek advice when considering such restrictions.

- Finally, there remains some doubt about the extent to which national competition authorities (notably Germany) might seek to limit the scope of the *Coty* judgment, by arguing, for example, that it is limited to luxury products or less applicable in countries where marketplaces are regarded as an essential sales channel. However, such national “exceptions” would render the Vertical Agreements Block Exemption meaningless, as its very purpose is to provide legal certainty by applying across the board to similar agreements. Nonetheless, companies should stay alert to developments in this area.

APPLICATION OF *COTY* OUTSIDE EUROPE?

It will be interesting to observe if and to what extent the Court's ruling will be followed in jurisdictions outside of the EU. For example, there are a number of jurisdictions across the world, such as Hong Kong and Turkey, which have traditionally followed the lead of the European Union, basing their competition laws and policies on the EU model. On the other hand, the United States - and countries that follow the U.S. approach towards vertical agreements - are likely to continue to allow suppliers even greater control than permitted under *Coty* when it comes to designing their online distribution and specifically marketplace policies. For example, in such jurisdictions we would expect to see suppliers seeking to ban resellers from using marketplaces whilst at the same time using such platforms themselves.

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, including developing legally compliant online marketplace strategies that maximise our clients' commercial objectives. We would be happy to discuss your company's goals and tailored distribution solutions to meet them.

Case reference: Judgment of 6 December 2017, Coty Germany (C-230/16)

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