

# Online Sales of Luxury Goods in Selective Distribution Networks – Coty Judgment

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On December 6, the European Court of Justice (“ECJ”) held that luxury good suppliers may prohibit members of their selective distribution network from selling their goods through third party “discernible” online platforms without breaching EU competition law. This is an important development in the evolving approach to online sales in the context of selective distribution.

## I. Background

This landmark judgment of the ECJ arises from a dispute between Coty, a leading supplier of luxury cosmetics in Germany, and Parfümerie Akzente, one of Coty’s longstanding distributors in Coty’s selective distribution network.<sup>1</sup> Parfümerie Akzente sold Coty’s products in its retail stores and over the internet (through its online store and through “amazon.de”). Following Coty’s revision of the selective distribution network agreements, internet sales were still authorized but distributors were not allowed to operate these either under a different name or by engaging a discernible non-authorized third party platform (such as “amazon.de”). Parfümerie Akzente refused to adhere to Coty’s amendments and in response, Coty sought to prevent the sales through “amazon.de” by suing Parfümerie Akzente before German national courts. Coty’s actions were dismissed and on appeal, the Higher Regional Court in Frankfurt decided to refer the case to the ECJ for a preliminary ruling.

If you have any questions concerning this memorandum, please call your regular firm contact or the following authors

### BRUSSELS

Rue de la Loi 57  
1040 Brussels  
+32 2 287 2000

**Antoine Winckler**  
[awinckler@cgsh.com](mailto:awinckler@cgsh.com)

**Christopher J. Cook**  
[ccook@cgsh.com](mailto:ccook@cgsh.com)

**Maurits Dolmans**  
[mdolmans@cgsh.com](mailto:mdolmans@cgsh.com)

**F. Enrique González-Díaz**  
[fgonzalez-diaz@cgsh.com](mailto:fgonzalez-diaz@cgsh.com)

**Thomas Graf**  
[tgraf@cgsh.com](mailto:tgraf@cgsh.com)

**François-Charles Laprèvote**  
[fclaprevote@cgsh.com](mailto:fclaprevote@cgsh.com)

**Robbert Snelders**  
[rsnelders@cgsh.com](mailto:rsnelders@cgsh.com)

**Romano Subiotto QC**  
[rsubiotto@cgsh.com](mailto:rsubiotto@cgsh.com)

**Nicholas Levy**  
[nlevy@cgsh.com](mailto:nlevy@cgsh.com)

<sup>1</sup> A selective distribution system is a network of authorized distributors selected on the basis of certain criteria and subject to a commitment not to sell the contractual goods to unauthorized distributors.



In the referral, the German court sought answers to three key questions regarding the compliance of Coty's selective distribution network contracts with Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), and in particular whether (i) the protection of luxury good's "luxury image" is sufficient justification for operating a selective distribution network; (ii) a ban on sales for luxury goods through "discernible" third party platforms is legitimate; and (iii) a ban on sales through "discernible" third party platforms constitutes a "hardcore" restriction of competition which prevents the application of the Vertical Block Exemption Regulation ("VBER").<sup>2</sup>

## II. ECJ's reasoning

In a key precedent, *Pierre Fabre*,<sup>3</sup> the ECJ held that an outright ban on online sales of cosmetics and body hygiene products by a distributor in a selective distribution network was incompatible with Article 101 TFEU and constituted a hardcore restriction under the VBER. In *Coty*, the ECJ essentially followed Advocate General Wahl's opinion and distinguished this case from *Pierre Fabre*.<sup>4</sup>

### Selective distribution with the aim to preserve the image of luxury goods is legitimate

The ECJ recalled settled case law that in order to be compatible with Article 101(1) TFEU, selective distribution must be based on (i) objective and (ii) qualitative criteria which should be used in a (iii) uniform and (iv) proportionate manner.<sup>5</sup>

The ECJ then referred to the *Copad*<sup>6</sup> judgment (a trademark case) and followed AG Wahl's opinion that luxury goods are not only defined by their "material characteristics", but also by "the specific perception which consumers have of them, and more

particularly [...] the 'aura of luxury' which they enjoy with consumers."<sup>7</sup>

Based on the above, the ECJ concluded that a selective distribution network which aimed at protecting the luxury image of goods was compatible with Article 101 TFEU. In so doing, the ECJ clearly established that luxury can legitimately justify certain restrictions of competition and dispelled the notion that *Pierre Fabre*<sup>8</sup> excluded protection of brand image as a legitimate purpose for selective distribution networks.

### Sales through third party online platforms may be restricted in selective distribution

The ECJ found that the ban of sales of luxury products through "discernible" third party online platforms was proportionate because the absence of any contractual relationship between the supplier and the third party platform made it impossible to ensure compliance with the qualitative criteria preserving the "aura of luxury". The ECJ further noted that authorized distributors could still sell their products (i) on their own independent website and (ii) through unauthorized third party platforms when the use of such platforms was not discernible to the consumer (e.g., if the distributor uses the third party platform as an invisible host for its own website). The ECJ thus concluded that the restriction was necessary and appropriate to fulfill the purpose of the selective distribution network.

### Ban on sales through third party online platforms is not a hardcore restriction

Finally, the ECJ addressed the question of whether a ban of sales through "discernible" third party online

<sup>2</sup> Specifically, the ECJ's inquiry pertained to Article 4(b) and Article 4(c) of Regulation No. 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

<sup>3</sup> *Pierre Fabre Dermo-Cosmétique SA v. Président de l'Autorité de la concurrence* (Case C-439/09) EU:C:2011:649.

<sup>4</sup> *Coty Germany GmbH v. Parfümerie Akzente* (Case C-230/16), opinion of Advocate General Wahl, EU:C:2017:603.

<sup>5</sup> In particular *Metro SB-Großmärkte v. Commission* (Case 26/76) EU:C:1977:167; and *NV L'Oréal and SA L'Oréal v. PVBA "De Nieuwe AMCK"* (Case 31/80) EU:C:1980:289.

<sup>6</sup> *Copad SA v. Christian Dior couture SA* (Case C-59/08) EU:C:2009:260.

<sup>7</sup> See *Coty Germany GmbH v. Parfümerie Akzente* (Case C-230/16), opinion of Advocate General Wahl, EU:C:2017:603, para. 72.

<sup>8</sup> *Pierre Fabre Dermo-Cosmétique SA v. Président de l'Autorité de la concurrence* (Case C-439/09) EU:C:2011:649, para. 46.

platforms constitutes a “hardcore” restriction under the VBER.

Under the VBER, “safe harbors” are created in respect of certain restrictions. They are however not applicable to “hardcore” restrictions, such as the allocation of customers and restrictions of passive sales. The ECJ concluded that the relevant ban on “discernible” third party platforms did not exclude any category of customers and that the access to the distributor’s website, *e.g.*, through online search engines, was sufficient and unrestricted. The ECJ hence concluded that the ban on online sales at issue was not a hardcore restriction. This means as a general matter that restrictions of sales on specified online platforms will need to be examined on a case-by-case basis by antitrust regulators and courts in order to assess any possible competitive effect before deciding on their validity under competition rules.

## II. Conclusion

The ECJ for the first time clearly recognized that luxury goods suppliers can set up a selective distribution network with the aim of preserving brand image. Likewise, luxury brand owners can now prohibit their distributors from selling products on Amazon or eBay without breaching EU competition law. The ECJ’s solution is therefore in contradiction with recent precedents from German and French competition authorities, notably in the *Adidas* cases.<sup>9</sup>

Furthermore, the notion of “luxury” goods in the *Coty* judgment is quite broad and competition authorities will probably have to determine more precisely the range of goods that could justify similar restrictions on online sales.

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<sup>9</sup> Bundeskartellamt, *Adidas* (Case B3-137/12); French Competition Authority, *The Autorité de la concurrence*

*has closed an investigation against Adidas* (Press release of November 18, 2015).