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Trade, Labor and EU Law Perspectives

Will Santa's workshop become more expensive? Luxury goods and online sales

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On Saint Nicholas' birthday 2017 (6 December), the Court of Justice (the *Court*) held that selective distribution agreements, which prevent authorised distributors from using unauthorised third-party (online) platforms to sell luxury goods can in principle be compatible with Article 101(1) of the Treaty of the Functioning of the European Union (*TFEU*); the prohibition on anti-competitive agreements (Case C-230/16, *Coty Germany v Parfümerie Akzente* [2017], ECLI:EU:C:2017:941).

So, beware, if you were intending to make some last minute Christmas purchases on E-bay or Amazon tonight, you might find that luxury perfume you had your eye on unavailable online.

Santa's EBay wish list?

Coty sells luxury cosmetics in Germany and markets its brands as high-end, luxury goods through a selective distribution system. Coty inspects its retailers to ensure that the high-end and luxury "aura" of its products is sufficiently safeguarded. Coty had wanted to introduce an additional provision to the agreement, preventing its distributors from using third-party platforms for the online sale of its products. However, a distributor, Parfumerie Akzente, refused to these amendments. Coty brought an action before the national court, which held that Coty's proposed clause was contrary to Article 101 TFEU.

Coty appealed the first instance's ruling to the Higher Regional Court in Frankfurt, which stayed the proceedings and referred the matter to the Court for a preliminary ruling.

The Court's answers: Christmas is cancelled?

In answering the questions posed, the Court first confirmed that Article 101(1) TFEU does not prohibit the use of a selective distribution system as long as such resellers are chosen on the basis of objective criteria laid down uniformly for all potential resellers. Most importantly, such selections must not be applied in a discriminatory fashion and the characteristics of the product must require such a system in order to preserve the product's quality and ensure its proper use". The Court went on to hold that (with some exceptions), the preservation of an "aura of luxury", could be justifiable to preserve the quality and proper use of a product, and could therefore be permissible under Article 101(1) TFEU. Santa needs to be sure that he is buying top-notch presents.

In considering the specific prohibition imposed by Coty on the use of third-party platforms, the

Court indicated that if a selective distribution agreement is intended to preserve the image of the goods and does not go beyond what is necessary to achieve that goal, such an agreement is permissible.

In respect of whether the clause was appropriate in light of the objective pursued, the Court considered that this prohibition enabled Coty to check that the online environment in which its products are sold corresponds with the qualitative conditions imposed. Since there is no contractual relationship between Coty and the platform, Coty was unable to require a third-party platform to comply with all quality conditions, forms of presentation, which can therefore harm the goods' image. It also emphasised that many different kinds of goods are sold via those third-party platforms whereas luxury goods are (normally) not sold via those platforms. The fact that luxury goods are solely sold via the online shops of authorised distributors would contribute to the luxury image of the goods among customers. The Court also took into account that the clause did not constitute a *per se* prohibition against online sales; authorised distributors were able to sell Coty's products online, not only through their own online shops but also – importantly – via unauthorised third-party platforms when the use of such platforms is not discernible to the customer.

The Court finally examined whether the contract (i) restricted customers to whom the contracted goods could be sold or (ii) authorised distributors' passive sales to end users (both qualify as hard-core restrictions under the Vertical Block Exemption Regulation). If so, such restrictions cannot benefit from an exemption within the meaning of Article 101(3) TFEU.

In considering this, the Court emphasised that authorised distributors were allowed under the contract with Coty, to sell the luxury goods via their own online shops and could advertise their products via the internet and on third-party platforms. Customers were therefore generally able to find the online offer of the authorised distributors via search engines.

All I want for Christmas is... a luxury web shop

In the 2011 *Pierre Fabre* case (Case C-439/09, *Pierre Fabre* [2011], ECLI:EU:C:2011:649), the Court held that an outright ban on internet sales was unlawful. The Coty judgment has therefore been perceived to deviate or at least to nuance this earlier case law. However, the Court heavily relies on the fact that it only concerned luxury products and that the prohibition did not constitute an absolute ban on internet sales.

Despite its arguably limited application, for selective distribution agreements relating to luxury products, this judgment still provides welcome clarification and EU competition authorities will have to follow its approach where the application of Article 101(1) TFEU is concerned.

A important unanswered question remains, however: what constitutes “luxury”. Is a Patek Philippe watch a luxury good? Probably. Is a Mickey Mouse watch a luxury good? Probably not. But is a Swatch watch a luxury good? The answer varies according to each person's (and perhaps each advocate general's) Christmas wish list and it would not be surprising if in the New Year this question will be brought before a court before Santa's next round of shopping begins.

Furthermore, the Court seems to suggest that a “platform ban” in a selective distribution contract may also be justifiable under the Vertical Block Exemption Regulation in connection with products other than luxury goods, as long as it is not absolute. This judgment may therefore open the door for further restrictions on Santa's online shopping (perhaps even for the Mickey Mouse watch), provided that the market share of parties to the contract is below 30%.

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