



Sales on third-party platforms and selective distribution networks

The Coty Germany GmbH ruling of the Court of Justice of the European Union ([CJEU, 06 December 2017, C-230/16](#)) significantly strengthens the power of selective distribution networks to oppose the sale of luxury goods on discernible third-party platforms.

Background

In order to preserve the luxury image of the brands sold under its selective distribution system, Coty Germany GmbH (Coty) imposes reselling conditions on its authorized distributors; this concerns both sales in physical locations and online sales. One of Coty's distributors, Parfümerie Akzente, refused to sign an amendment prohibiting the sale of Coty products on third-party platforms discernible to consumers and carried on selling them on digital platforms such as Amazon.de. Coty sued Parfümerie Akzente before the German courts, seeking an injunction to stop its distributor from selling Coty products on such platforms. Frankfurt's Oberlandesgericht, hearing the case on appeal after Coty's claim was dismissed in first instance, decided to refer to the CJEU for a preliminary ruling several questions about the validity, in regard of European competition law, of a selective distribution system focussing on luxury goods and of the restrictions such a system entails with respect to sales on third-party platforms.

The CJEU's ruling

The CJEU's position is crystal clear: Subject to conditions, a clause forbidding authorized distributors from using third-party platforms in a discernible manner to sell luxury goods is lawful. Not only is this decision a true profession of faith for the selective distribution system with respect to luxury brands (1), it can also be used as a basic guide to the lawful prohibition of sales through third-party platforms (2).

1. Selective distribution and luxury goods

First of all, the court holds that the prohibition contained in article 101 (1) TFEU does not apply to selective distribution networks if certain conditions are met:

- resellers are chosen on the basis of **objective criteria** of a **qualitative nature**
- laid down **uniformly** for all resellers and
- applied in a **non-discriminatory** fashion, and
- **the characteristics of the product in question necessitate** such a selective distribution network in order to preserve its quality and ensure its proper use, and the criteria laid down **do not go beyond what is necessary**.

The court essentially focussed on the last two requirements when it held that "*having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly*". The court thereby avails itself of an element which a priori does not directly proceed from the product's characteristics or nature but which is instead related to the allure and image bestowing on the product an "*aura of luxury*". In that regard, the court notes that "*that aura*

is essential in that it enables consumers to distinguish them from similar goods". The court thereby clarifies the scope of its Pierre Fabre Dermo-cosmétique ruling ([CJEU, 13 October 2011, C-439/09](#)) in the context of the selective distribution of luxury goods, in that it distinguishes between a prestigious image (e.g., of cosmetics and personal hygiene products) and a luxury image.

2. **Luxury goods and discernible third-party platforms**

Regarding the specific issue of the validity of a clause prohibiting authorized distributors of a selective distribution network from using third-party platforms in a discernible manner to sell luxury goods, the CJEU conducted a similar analysis.

The court almost takes for granted that the clause at issue is objective, uniform, and applied to authorized distributors in a non-discriminatory way, subject however to confirmation by the national court. The only remaining requirement is therefore that of proportionality in regard of the pursued objective. In that regard, the court had to determine "*whether such a prohibition is **appropriate** for preserving the luxury image of those goods and whether or not it goes beyond what is **necessary** to achieve that objective*".

a. **Appropriateness**

Seeking to justify the appropriateness of the prohibition for preserving the goods' luxury image, the CJEU notes that the double obligation imposed on authorized distributors, i.e., to sell solely through their own online shops and not to use third-party platforms in a discernible manner, provides the supplier "*with a guarantee, from the outset,*" that those goods will be exclusively associated with the authorized distributors. The court further notes that such a prohibition includes "*a limitation which is coherent*" in the light of the specific characteristics of the selective distribution system and that a selective distribution system makes "*an appropriate means*" by which to preserve the luxury image of luxury goods.

According to the court, the prohibition is also appropriate because of the absence of a contractual relationship between the supplier and third-party platforms, an obstacle which prevents the former from being able to require from the latter compliance with the conditions of quality which the sale of luxury goods entails. In third position, the court argues that given that such platforms constitute a sales channel for goods of all kinds, without distinction, the fact that sales are carried out solely in the online shops of authorized distributors strengthens the luxury image among consumers – although that is probably the court's least decisive and convincing argument.

b. **Necessity**

The court also had to determine whether the prohibition contained in the clause at issue went beyond what was strictly necessary for the attainment of the objective pursued.

The court answers the question in the negative after noting, firstly, that in contrast to the Pierre Fabre Dermo-Cosmétique case the clause at issue here does not contain an absolute prohibition of online sales for authorized distributors, and secondly, that the main distribution channel, in the context of online distribution, is constituted by the distributors' own online shops (see [the final report on e-commerce sector published on May 10, 2017](#)).

The court concludes that **an absolute prohibition to sell luxury goods carried by a selective distribution network through a discernible third-party platform is lawful under article 101 (1) TFEU** (although it does not follow the [opinion of Advocate General Wahl](#) who had called for a more casuistical analysis that would notably take the specific goods into account).

c. **Exemptions**

It is clear from the ruling that the CJEU intended all along to validate clauses prohibiting selective distributors from selling luxury goods on discernible third-party platforms. Even where a national court should find that such a clause restricts competition in the meaning of article 101 (1) TFEU, according to the CJEU, **the clause could benefit from an exemption** under article 101 (3) TFEU and the Block Exemption Regulation no. 330/2010. In fact, in addition to market share thresholds – which according to the court were not exceeded in the case at hand –, a clause in a selective distribution agreement prohibiting the use of third-party platforms in a discernible manner to sell

luxury goods does not constitute a restriction either of the distributors' customers or of passive sales by distributors to end users in the meaning of article 4 of the Block Exemption Regulation.

Scope of the decision

- Suppliers may lawfully include in their **selective distribution agreements** a clause prohibiting the sale of their **luxury goods** on discernible third-party platforms (such as eBay or Amazon).
- **Selective distribution networks carrying prestigious goods or FMCG** should examine both the grounds for the CJEU's decision and the opinion of Advocate General Wahl closely (especially as regards the possibility of entering into contractual relationships with third-party platforms) to determine how they might use the new precedent to their benefit.

In that regard, it will be interesting to see what the concept of luxury goods is construed to encompass. For instance, the district court in Amsterdam ruled on 04 October 2017 that Nike could lawfully prohibit the sale of its products through unauthorized online platforms, notably to preserve its products' "luxury" image.

By recalling the essential criteria for determining the validity of a selective distribution network and, in a way, by returning to the basic principles of its Metro jurisprudence, is the CJEU not leaving the way open for suppliers to prohibit the sale of other goods (prestigious goods, or even high-tech goods) on discernible third-party platforms if they consider that such sales harm the legitimate objectives pursued by their selective distribution system?

- The ruling could push **third-party platforms** to develop a... less discernible model (e.g., an "e-shop-in-shop" model) in response to the CJEU's objections and/or suggestions.

By Christophe Héry

Contact: Christophe Héry

E-mail: chery@lmtavocats.com

Tel.: +33 1 53 81 53 00

Fax: + 33 1 53 81 53 30

LmtAvocats⁷

www.lmtavocats.com



Follow us on

Click on the following links to view our previous Distribution / Competition newsletters:

- [The pre-contractual duty to inform of suppliers and franchisors](#)
- [When does a business relationship become an established business relationship?](#)
- [Good news for selective distribution networks](#)
- [Differential pricing and category-specific terms and conditions](#)
- [Commercial agents, material breach of contract and duty of loyalty](#)
- [Designers and operators of connected devices: Beware the new personal data protection rules!](#)
- [Forum-selection clauses and the sudden termination of an international business relationship](#)
- [Are you a victim of anti-competitive practices? Then these new rules should help you to secure compensation](#)
- [The freedom to negotiate prices: A significant imbalance is where the courts draw the line](#)
- [The Sapin II Act: Relaxing pricing transparency regulations and hardening the rules against restrictive business practices](#)

Click here to view our previous newsletters: [Newsletter](#)

Lmt Avocats A.A.R.P.I. is an independent business law firm with about 40 lawyers and staff led by 10 partners. Whether as legal advisors or trial lawyers, we provide advice and assistance, mostly in international contexts, to both French and foreign clients in the main fields of business law: company law, employment, tax, commercial litigation, distribution and competition law, real estate law, IP / IT, international arbitration, industrial risk & liability, insurance law, and bankruptcy law.

This newsletter is not a legal opinion and should not be construed as giving any advice on any specific facts or circumstances. If you no longer wish to receive this newsletter, please send us an e-mail at [Unsubscribe](#) with a word to that effect in the subject line.