

CLIENT ALERT

# What Does the Coty Judgment of the European Court of Justice Mean for Companies?

*Case C-230/16, Coty Germany GmbH v. Parfümerie Akzente GmbH, ECJ Judgment of 6 December 2017*

13 December 2017

## AUTHORS

Jacques-Philippe Gunther | Susanne Zuehlke | Mathilde Ayel | Francesca Gentile | Philipp Heuser

On 6 December 2017, the European Court of Justice (“ECJ”) ruled that suppliers of luxury goods can, under certain circumstances, prohibit their authorized distributors, in the context of a selective distribution system, from selling on a third-party internet platform.<sup>1</sup>

The judgment defines an important line for suppliers of branded goods and online marketplaces, which has been the subject of much controversy recently.<sup>2</sup> In this Client Alert, we (i) take a brief look at the facts of the case, (ii) summarize the main findings of the ECJ, and (iii) consider what the ruling means for companies in practice.

### 1. Facts

The ruling was issued in a dispute between Coty, a leading supplier of luxury cosmetics in Germany, and one of its authorized distributors, Parfümerie Akzente. Coty sells luxury cosmetic products through a carefully organized, selective distribution network throughout Europe. The distribution agreement contains the right for Coty to approve sales outlets based on a detailed range of quality requirements. The agreement prohibits the sale of products under a different name or to engage a third-party undertaking which has not been authorized.

---

## What Does the Coty Judgment of the European Court of Justice Mean for Companies?

Coty sought to amend the agreement to include a provision according to which “the authorized retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an ‘electronic shop window’ of the authorized store and the luxury character of the products is preserved.” In addition, Coty sought to add an express prohibition of the use of a different business name as well as the recognizable engagement of a third-party undertaking, which is not an authorized retailer of Coty.

When Parfümerie Akzente refused to accept the amendment, Coty brought an action before the German district court of Frankfurt am Main. In July 2014, that court dismissed the action and ruled<sup>3</sup> that in the light of the ECJ’s *Pierre Fabre* ruling,<sup>4</sup> the objective of maintaining the prestigious brand image of a mark could not justify the introduction of a selective distribution system, which includes a hard-core restriction under Article 4 (b) or 4 (c) of the VBER.<sup>5</sup> Coty appealed to the Higher Regional Court of Frankfurt, which decided to refer the case to the ECJ for a preliminary ruling according to Article 267 TFEU.<sup>6</sup> The Frankfurt court asked essentially three questions:

- Is a selective distribution system organized to protect a luxury image compatible with Article 101 (1) TFEU?
- If so, is a prohibition to engage third parties in a manner discernible to the customer for the purposes of internet sales compatible with Article 101 (1) TFEU?
- Assuming such a prohibition includes a restriction of competition in the sense of Article 101 (1) TFEU, does it constitute a hard-core violation under Article 4 (b) or Article 4 (c) of the VBER?

### 2. Findings of the Court

The Coty ruling contains three main findings, all of which will be very important for future analysis.

First, the Coty judgment provides an opportunity for the ECJ to clarify its earlier *Pierre Fabre* ruling. In *Pierre Fabre*, the court reiterated that the organization of a selective distribution network is not prohibited by Article 101 (1) TFEU, and recalled the two main criteria:

- i. distributors are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential resellers and these criteria are applied in a non-discriminatory manner; and
- ii. the characteristics of the product in question necessitate such a network to preserve quality and ensure proper use, and the criteria do not go beyond what is necessary to do so.

Not surprisingly, the ECJ uses the opportunity to affirm that it did not intend to outlaw the possible use of selective distribution systems for luxury goods *per se* in its *Pierre Fabre* judgment and confirms that the criteria set out above continue to apply to distributors of luxury goods.<sup>7</sup>

---

## What Does the Coty Judgment of the European Court of Justice Mean for Companies?

Second, the ECJ then moves on to consider specifically the clause prohibiting third-party online platform sales and confirms that this clause designed to protect the image of luxury goods, which prohibits resellers from using, in a discernible manner, third-party online platforms for the internet sale of luxury goods, does not infringe Article 101 (1) TFEU:

- i. With regard to the first requirement, the ECJ observes that the referring court already recognized that the clause is applied in an objective and uniform manner without discrimination to all authorized distributors. In this context it will be particularly important for the brand manufacturer not to sell products via third-party online platforms and not to allow such sales elsewhere in its distribution system. Otherwise, it will not be possible to maintain a prohibition of sales via third-party online platforms.
- ii. The ECJ also considers that the clause is necessary, appropriate and proportionate for the preservation of the image of Coty's luxury goods. The ECJ considers that the clause ensures that the products are sold only by the authorized distributors. Moreover, the clause offers the supplier the possibility to take action against a distributor which does not sell the goods online in compliance with the qualitative conditions required. Such an action is not possible against a third-party online platform because of the absence of a contractual relationship, which can harm the luxury image of the supplier's goods. The ECJ also notes that the luxury image is preserved by the fact that the goods are usually sold separately from other, more standard goods which can be found on a marketplace.

With regard to proportionality, the ECJ highlights that the clause does not contain an absolute prohibition of online sales because the prohibition only refers to "the internet sale of the contract goods via third-party platforms which operate in a discernible manner toward consumer." Authorized distributors remain in fact free to sell through their own websites if they have an "electronic shop window" for the authorized store. They can also use unauthorized third-party platforms, provided that the third-party provider involved is not discernible to the consumer which means that consumers are not aware that a third-party platform is being used and remains in an environment that meets the distributor's quality standards.

Based on this, the ECJ concludes that the clause at issue in the Coty case does not constitute a restriction of competition in the sense of Article 101 (1) TFEU.

Third, given this finding, it would not have been necessary to discuss the remaining questions of whether a third-party online platform ban can be considered as a hard-core restriction. However, the ECJ acknowledges that the Frankfurt court may come to different conclusions when evaluating the facts of the case and addresses the questions of whether such third-party online platform sales ban can constitute a hard-core violation in the sense of Article 4 (b) (i.e. client and/or territory restriction) or (c) (i.e. restriction of passive sales) of VBER.

---

## What Does the Coty Judgment of the European Court of Justice Mean for Companies?

In the present case, the ECJ considers that the clause does not restrict authorized distributors from selling to certain customers or on certain territories nor prohibit passive sales as soon as:

- i. The restriction is limited to a non-authorized third-party online platform ban and does not “prohibit the use of the internet as a means of marketing the contract goods;”
- ii. The clause does not make it possible “to circumscribe, within the group of online purchasers, third-party platform customers;” and
- iii. Authorized distributors are not prohibited from advertising “via the internet on third-party platforms and to use online search engines,” with the result that passive sales are not restricted (§§ 65-67).

Once the clause does not constitute a hard-core violation in the sense of Article 4 of Vertical BER, the ruling opens the path to an application of the VBER (if the market share thresholds of 30% are not exceeded) or an individual exemption.

### 3. What Does the Judgment Mean in Practice?

The European Commission welcomed the Coty judgment as a very important step to provide more clarity and legal certainty to market participants with regard to selective distribution agreements. According to the Commission, the judgment will facilitate a uniform application of competition rules across the European Union.<sup>8</sup>

The judgment was met with more skepticism by Andreas Mundt, head of the German Federal Cartel Office (“FCO”), who in a speech at the Annual Meeting of the German Studienvereinigung Kartellrecht in Bonn considered that there will need to be a strong focus on whether the goods in question do in fact qualify as “luxury goods.” In this context, he referred to the Adidas and Asics matters, where the FCO required certain changes to distribution practices from the parties, and did not consider that the Coty judgment will require a review of the FCO practice. He also noted that it will be very important to consider whether excluding the use of online platforms is a proportional measure in light of the overall context of the distribution agreement. He noted that where brand manufacturers use third-party online platforms for direct sales, or permit them elsewhere in their distribution system, it will be very difficult to justify a ban on distributors.

It is clear that general bans of online sales or even general bans of sales on third-party platforms continue not to be compatible with Article 101 (1) TFEU. However, the Coty judgment does (re-)open the door to carefully designed selective distribution systems for luxury products for which certain limitations of online sales are necessary and proportionate to preserve brand image and prestige of luxury goods. Companies who consider such limitations necessary to preserve brand image and prestige of products must (i) clearly articulate the specific luxury nature of their products, (ii) organize a coherent and non-discriminatory distribution system with objective qualitative criteria, and (iii) carefully consider the specific reasons that might require a limitation of internet sales.

---

## What Does the Coty Judgment of the European Court of Justice Mean for Companies?

It is somewhat more difficult to ascertain the actual or intended scope and thus future impact of the further observations of the ECJ on the fact that a limitation of sales via a third-party online platform in a discernible manner does not qualify as a hard-core restriction in the sense of Article 4 (b) and (c) VBER, because *inter alia* “it does not appear possible to circumscribe within the group of online purchasers, third-party platform customers” and that therefore, a third-party online platform ban does not amount to a restriction of the customers of distributors within Article 4 (b) of the VBER or a restriction of passive sales to end users, within the meaning of Article 4 (c) VBER. These statements now may raise a question as to whether a third-party online platform or other partial internet sales bans could be permitted outside of the relatively limited realm of selective distribution systems. While it will be difficult to expand the actual Coty ruling to read as covering non-selective distribution scenarios, it will be very interesting to see whether the ECJ will pursue this line of thought when presented with the next opportunity to consider partial platform bans.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

---

**Jacques-Philippe Gunther**

+33 1 53 43 4538

[jgunther@willkie.com](mailto:jgunther@willkie.com)

**Susanne Zuehlke**

+32 2 290 18 32

[szuehlke@willkie.com](mailto:szuehlke@willkie.com)

**Mathilde Ayel**

+33 1 53 43 4526

[mayel@willkie.com](mailto:mayel@willkie.com)

**Francesca Gentile**

+32 2 290 18 45

[fgentile@willkie.com](mailto:fgentile@willkie.com)

**Philipp Heuser**

+32 2 290 18 20

[pheuser@willkie.com](mailto:pheuser@willkie.com)

Copyright © 2017 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).

---

## What Does the Coty Judgment of the European Court of Justice Mean for Companies?

---

<sup>1</sup> It would seem that the ECJ largely followed the Opinion of AG Wahl of 26 July 2017.

<sup>2</sup> See for example: Upholding restrictions on internet platform resales: Higher Regional Court of Frankfurt, Judgment of 22 December 2015, Ref. 11 U 84/14 (“Deuter” – backpacks); Higher Regional Court of Karlsruhe, Judgment of 25 November 2009, Ref. 6 U 47/08 (“Scout 1” – backpacks); Higher Regional Court of Munich, Judgment of 2 July 2009, Ref. U 4842/08 (“adidas” – sport articles). Restrictions on internet platform resales were considered as a violation of the antitrust laws by, e.g., Higher Regional Court of Schleswig, Judgment of 5 June 2014, Ref. 16 U 154/13 (“Casio” – digital cameras); Kammergericht Berlin, Judgment of 19 September 2013, Ref. 2 U 8/09 (“Scout 2” – backpacks); see also FCO decision of 19 August 2015, case no. B3-137/12 (adidas – ban of third-party platforms); FCO decision of 28 August 2015, case no. B2-98/11 (ASICS – prohibition on the use of brand names and on supporting price comparison engines); in which the FCO required the companies to amend their distribution systems to allow online sales (including sales via third-party platforms). Press releases are available [here](#). In addition, see the recent French case “Caudalie” which approved the contractual clause of a distributor which was prohibiting its authorized distributors from selling its cosmetic products through third-party internet platforms : decision of the French Court of Cassation, 13 September 2017, Caudalie / 1001 pharmacies (case no 16-15.067).

<sup>3</sup> District Court Frankfurt am Main, Judgment of 31 July 2014, Ref. 2-3 O 128/13.

<sup>4</sup> ECJ, Judgment of 13 October 2011, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence and Others*.

<sup>5</sup> Commission Regulation (EU) No. 330/2010 of 20 April 2010, OJ L 102/1 et seq.

<sup>6</sup> Higher Regional Court Frankfurt am Main, Judgment of 19 April 2016, Ref. 11 U 96/14 (Kart).

<sup>7</sup> ECJ, Judgment of 23 April 2009, C-59/206, *Copad*, paras. 24-26.

<sup>8</sup> Financial Times, “ECJ rules in favour of Coty over online sales ban,” 6 December 2017, available [here](#).