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# **Selective distribution of luxury goods. The ban of online sales via third-party platforms imposed on authorised resellers does not breach EU competition law**

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On 6 December 2017, the Court of Justice of the European Union handed down its judgement in Case C-230/16, *Coty Germany*, on the compatibility of certain clauses included in a selective distribution agreement with Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The reference had been submitted in the context of a dispute between *Coty Germany GmbH* (“Coty Germany”), a supplier of luxury cosmetics established in Germany, and *Parfümerie Akzente GmbH* (“Parfümerie Akzente”), an authorised distributor of those goods, concerning the prohibition, contained in a selective distribution contract between Coty Germany and its authorised distributors, from using in a discernible manner third-party platforms for internet sales of the contract goods.

In order to preserve the luxury image of its products, Coty Germany markets certain of its brands via a selective distribution network, that is to say, through a limited number of authorised distributors, whose premises must comply with a number of objective requirements relating to the service offered to customers and their environment, décor and furnishing<sup>1</sup>. Following the entry into force of Regulation No. 330/2010<sup>2</sup>, Coty Germany had revised its contracts, inserting a clause allowing its authorised distributors to sell the contract goods online, provided that they used their own electronic shop window or third-party platforms, on condition that the use of such platforms was not discernible by consumers. By contrast, they were expressly prohibited from selling the goods online via discernible third-party platforms.

Parfümerie Akzente had for many years distributed Coty Germany goods, as an authorised distributor, both in its brick-and-mortar premises and over the internet. Internet sales were carried out partly through its own online store and partly via the “*amazon.de*” platform. In order to prohibit it from distributing its goods through that platform, Coty Germany brought proceedings before the *Landgericht Frankfurt am Main* (Regional Court, Frankfurt am Main), which, by judgment of 31 July 2014, dismissed that action on the grounds that the contractual clause at issue was contrary to Paragraph 1 of the *Gesetz gegen*

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<sup>1</sup> See paragraphs from 12 to 14 of the judgment: “...In particular, in the words of Article 2(1)(3) of that contract, ‘the décor and furnishing of the sales location, the selection of goods, advertising and the sales presentation must highlight and promote the luxury character of Coty Prestige’s brands. Taken into account when evaluating this criterion are, in particular, the façade, interior décor, floor coverings, type of walls, ceilings and furniture, sales space and lighting, as well as an overall clean and orderly appearance’.

Article 2(1)(6) of the distribution contract states that ‘the signage for the sales location, including the name of the undertaking and any add-ons or company slogans, must not give the impression of a limited selection of goods, low-quality outfitting or inferior advice, and it must be mounted in such a way that it does not obscure the authorised retailer’s decorations and showrooms’.

Furthermore, the contractual framework linking the parties includes a supplemental agreement on internet sales which provides, in Article 1(3), that ‘the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised’...”.

<sup>2</sup> Commission Regulation (EU) No. 330/2010 of 20 April 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 L 102 of 23.04.2010.

*Wettbewerbsbeschränkungen* (Law against restrictions of competition) and/or Article 101(1) TFEU. In accordance with the Court of Justice's judgment in Case C-439/09, *Pierre Fabre Dermo-Cosmétique*<sup>3</sup>, the German Court had found that the objective of maintaining a prestigious image of the brand could not justify the introduction of a selective distribution system which, by definition, restricted competition. Moreover, the clause at issue was held to constitute a hard-core restriction under Article 4(c) of Regulation No. 330/2010<sup>4</sup>.

Coty Germany brought an appeal before the *Oberlandesgericht Frankfurt am Main* (Higher Regional Court, Frankfurt am Main), which decided instead to stay the proceedings and to ask the Court of Justice whether Article 101(1) TFEU should be interpreted as meaning that a selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods, complied with that provision. The referring Court furthermore asked if the contractual clause at issue, prohibiting authorised distributors in a selective system for luxury goods designed to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the online sale of the contract goods, was compatible with Article 101(1) TFEU and if it constituted an hard-core restriction pursuant to Article 4, letters b) and c) of Regulation No. 330/2010<sup>5</sup>.

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<sup>3</sup> CJEU 13.10.2011, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*. In that case, the Court had found that a clause in a selective distribution contract banning the distributors of the company Pierre Fabre Dermo-Cosmétique from selling its products online amounted to a restriction on competition by object, unless that clause was objectively justified. Such a ban could not benefit from a block exemption but could, if certain conditions were met, benefit from an individual exemption.

<sup>4</sup> Pursuant to Article 4 of Regulation No. 330/2010, "... *The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:*

(...)

(b) *the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services (...)*

(c) *the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade...*".

<sup>5</sup> The preliminary questions referred to the Court are the following: "... 1) *Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a "luxury image" for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?*

2) *Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case?*

3) *Is Article 4(b) of Regulation No 330/2010 to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of the retailer's customer group "by object"?*

4) *Is Article 4(c) of Regulation No 330/2010 to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of passive sales to end users "by object"?*".

Referring to its judgment in *Pierre Fabre Dermo-Cosmétique*, the Court of Justice held that a selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods, did not breach Article 101(1) TFEU, provided that the following conditions were met<sup>6</sup>:

- resellers were chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion;
- the characteristics of the product<sup>7</sup> justified a selective distribution model in order to preserve quality and ensure proper use; and
- the criteria laid down did not go beyond what was necessary<sup>8</sup>.

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<sup>6</sup> The Court found that, “... Contrary to the claims of Parfümerie Akzente and the German and Luxembourg Governments, that conclusion is not invalidated by the assertion contained in paragraph 46 of the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649).

*That assertion must be read and interpreted in the light of the context of that judgment.*

*In that regard, it must be recalled that, in the case which gave rise to that judgment, the referring court was unsure as to whether a specific contractual clause imposing on authorised distributors, in the context of a selective distribution system, a comprehensive prohibition on the online sale of the contract goods complied with Article 101(1) TFEU, rather than whether such a system in its entirety was compliant. It must also be stated that the goods covered by the selective distribution system at issue in that case were not luxury goods, but cosmetic and body hygiene goods.*

*The assertion in paragraph 46 of the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649) forms part of the Court’s statements made for the purpose of providing the referring court in that case with the interpretative elements necessary to enable it to rule on the issue of whether the restriction of competition resulting from that contractual clause was justified by a legitimate objective and whether it pursued that objective in a proportionate way.*

*In that context, the Court took the view that the need to preserve the prestigious image of cosmetic and body hygiene goods was not a legitimate requirement for the purpose of justifying a comprehensive prohibition of the internet sale of those goods. The assertion in paragraph 46 of that judgment related, therefore, solely to the goods at issue in the case that gave rise to that judgment and to the contractual clause in question in that case.*

*By contrast, it cannot be inferred from the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649) that paragraph 46 thereof sought to establish a statement of principle according to which the preservation of a luxury image can no longer be such as to justify a restriction of competition, such as that which stems from the existence of a selective distribution network, in regard to all goods, including in particular luxury goods, and consequently alter the settled case-law of the Court, as set out in paragraphs 25 to 27 of the present judgment....” (paragraphs 30-35)*

<sup>7</sup> The Court has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods. See CJEU 23.04.2009, Case C-59/08, *Copad*, paragraphs from 24 to 29.

<sup>8</sup> See CJEU 13.10.2011, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, paragraph 41 and the case-law cited. It is for the referring Court to determine whether those conditions are met.

According to the Court's findings, the contractual clause that was at issue in fact pursued the objective of preserving the image of luxury and prestige of the goods, was objective and uniform, and applied without discrimination to all authorised distributors. However, it remained to be ascertained by the referring Court whether the clause was proportionate in the light of the objective pursued; that is to say, whether it was appropriate for preserving the luxury image of the goods and whether it did not go beyond what was necessary to achieve that objective.

The Court furthermore found that the prohibition imposed on authorised distributors from using in a discernible manner third-party platforms for the internet sale of the contractual goods, constituted a restriction consistent with the specific characteristics of the selective distribution system. Moreover, such prohibition enabled the supplier to check that the goods would be sold online in an environment meeting the qualitative conditions agreed with its authorised distributors. Conversely, the internet sale of luxury goods via platforms not belonging to the system did not allow the supplier to satisfy itself of the conditions in which those goods were sold, with the risk of harming their luxury image and very character. Therefore, the prohibition at issue was found appropriate to preserve the luxury image of the contractual goods<sup>9</sup>.

The Court moreover found that, in contrast to the clause that had been the object of the *Pierre Fabre Dermo-Cosmétique* case, the clause at issue did not contain an absolute ban imposed on authorised distributors from selling the contract goods online, only via third-party platforms operating in a discernible manner. Therefore, authorised distributors were permitted to sell the contract goods online both via their own websites, as long as they had an electronic shop window consistent with the luxury character of the goods, and via third-party platforms where their use was not discernible by consumers<sup>10</sup>. Under these conditions, the prohibition did not go beyond what was necessary in order to preserve the luxury image of Coty Germany goods.

It follows that, subject to the *Oberlandesgericht's* findings in the merit, the clause at issue was held compatible with EU competition law. Finally, in the event that the referring Court should conclude that the clause was caught in principle by the prohibition of restrictive agreements, decisions and concerted practices under EU law, it was still possible that it might benefit from a block

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<sup>9</sup> See paragraphs from 44 to 51 of the judgment.

<sup>10</sup> Moreover, "... as is apparent from the provisional results of the Preliminary Report on the E-commerce Sector Inquiry carried out by the Commission pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), adopted on 15 September 2016, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, is nevertheless constituted by distributors' own online shops, which are operated by over 90% of the distributors surveyed. That fact was confirmed in the final report relating to that inquiry, dated 10 May 2017..." (paragraph 54).

exemption<sup>11</sup>. According to the Court, the prohibition on the use in a discernible manner of third-party platforms for internet sales did not constitute a core-restriction pursuant to Article 4, letter b), of Regulation No. 330/2010, nor a restriction of passive sales to end users, pursuant to Article 4, letter c) of that Regulation.

In the light of the above, the Court answered the preliminary questions submitted by the Higher Regional Court of Frankfurt am Main, as follows:

*“...1) Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with that provision to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary.*

*2) Article 101(1) TFEU must be interpreted as not precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court.*

*3) Article 4 of Commission Regulation (EU) No 330/2010 of 20 April 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 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers,*

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<sup>11</sup> According to Article 2(1), of Regulation No. 330/2010, “... Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

*This exemption shall apply to the extent that such agreements contain vertical restraints...”.*

Article 3(1) of Regulation No. 330/2010 provides: “... The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services...”.

It follows from the order for reference that the market share thresholds laid down in Article 3 of that regulation have not been exceeded. Therefore, the clause at issue may benefit from the exemption provided for in Article 2 of that regulation. However, Regulation No. 330/2010 excludes from the benefit of the block exemption certain types of restrictions that are liable to have severely anticompetitive effects, irrespective of the market share of the undertakings concerned. Those restrictions are the hard-core restrictions set out in Article 4 of the Regulation.

*within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation...”.*