



Selective distribution systems. The European Commission fines Guess for restricting cross-border sales and online sales, as well as RPM practices

📅 06/02/2019

📌 SOCIETY, EU AND COMPETITION, CONSUMER AND RETAIL, FASHION AND LUXURY

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On 25 January 2019, the European Commission published its decision of December 2018¹ establishing that certain commercial practices implemented by *Guess?, Inc.*, *Guess? Europe, B.V.* and *Guess Europe Sagl* ('Guess') constitute an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Guess specialises in the design, marketing and distribution of apparel and accessories for men, women and children. Guess products are sold in all European Economic Area (EEA) countries except Iceland, both in bricks-and-mortar stores and online through its own online shop as well as online marketplaces. Guess products are also sold online by pure online retailers.

¹ Commission Decision of 17.12.2018 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area, Case AT.40428, Guess. Available at the following [LINK](#).



Guess runs a selective distribution system through agreements with its wholesalers and mono-brand retailers, as well as through general sales terms with its multi-brand retailers. Within this selective distribution network, independent mono-brand retailers are selected directly by Guess and multi-brand retailers are pre-selected by independent national wholesalers approved by Guess².

The Commission's formal investigation started in June 2017 as a follow-up to the e-commerce sector inquiry of 2015³, and focused on the company's distribution agreements and practices, in order to assess whether Guess illegally restricted retailers from selling cross-border to consumers within the EU Single Market.

The Commission found that the Guess distribution agreements contained a number of restrictive provisions, including:

- (i) online search advertising restrictions. In order to control the expansion of online sales by its independent distributors, Guess restricted the use of the Guess brand names and trademarks, in particular in Google AdWords⁴. Such restriction was systematically applied whenever an authorised retailer asked for permission to use any of the Guess brand names or trademarks as keywords in Google AdWords, upon seeking

approval from Guess for its advertising. In that way, Guess sought to maximise traffic to its own website at the expense of its independent distributors, as well as to minimise its own advertisement costs⁵;

- (ii) online sales restrictions, achieved through a contractual term making online sales by authorised retailers conditional on the retailer first obtaining explicit authorisation from Guess to conduct online sales. No quality criteria were specified for deciding whether or not to grant the authorisation, and Guess had full discretion to decide whether or not to allow authorised retailers to sell online⁶;

- (iii) restrictions on cross-selling among members of the selective distribution system. A number of provisions in the Guess distribution agreements limited the ability of wholesalers and authorised retailers to promote and sell Guess products to other wholesalers or authorised retailers within the Guess selective distribution network in Europe. With regard to wholesale agreements, this was achieved, amongst others, through: a) the limitation of the right to market and advertise the products outside of the

² See points 24-33 of the Commission Decision.

³ In May 2015, the Commission launched a sector inquiry into ecommerce, as part of the Digital Single Market strategy, aimed at gaining more market knowledge and better understand the nature, prevalence and effects of the barriers that hinder cross-border ecommerce, and furthermore to assess them in the light of EU antitrust law. In particular, the inquiry focused on potential barriers to cross-border online trade in certain industry sectors where e-commerce is most widespread, such as electronics, clothing, shoes and digital content. These barriers may include contractual restrictions in distribution agreements that prevent retailers from selling goods or services purchased online or cross-border to customers located in another EU country. For further information, see our previous article, available at the following [LINK](#).

⁴ Google AdWords is the largest and most widely used online search advertising service. That service allows economic operators, by reserving or bidding on one or more keywords, to obtain the placing of an advertising link to their website whenever an internet user enters one or more of those words as a request in the Google search engine. The advertising links typically appear on Google's general search results pages next to the so-called generic/natural search results.

⁵ See points 40-52 of the Commission Decision.

⁶ See points 53-63 of the Commission Decision.

wholesaler's allocated territory⁷; b) the provision of incentives for wholesalers to purchase the products from Guess only and not from other members of the distribution network; c) the obligation on wholesalers to report to Guess any product purchases from sources other than Guess, in that way allowing the latter to monitor the restrictions imposed and provide additional disincentives for wholesalers to purchase from other authorised members of the selective distribution system, and d) the obligation on wholesalers to ensure that the products sold to their retail customers remain within the allocated territory. As a result, Guess wholesalers could not advertise products outside their allocated territory nor approach other Guess wholesalers within the network, as they were necessarily established outside the wholesaler's allocated territory. Moreover, wholesalers could only sell to authorised retailers located in their own allocated territory⁸. The cross-border sales restrictions in retail agreements followed the same logic and complemented the restrictions in wholesale agreements⁹;

- (iv) restrictions on cross-border sales to end users. The distribution agreements include provisions preventing retailers from selling Guess products to users outside their allocated territory. The restrictions addressed both active and passive sales, not allowing

advertisements or sales outside the allocated territory¹⁰;

- (v) resale price maintenance (RPM) practices. The Commission found that the Guess distribution agreements aimed at harmonising retail prices in specific markets. In particular, Guess monitored the pricing of third-party retailers and tried to influence them to correct resale prices misaligned with Guess recommended resale prices¹¹.

As an overall consequence, the agreements allowed Guess to partition European markets. Moreover, the Commission found that in Central and Eastern European countries the retail prices of Guess products were, on average, 5-10% higher than in Western Europe.

The operation of a selective distribution network is not prohibited by Article 101(1) TFEU, provided that (i) resellers are 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, (ii) the characteristics of the product requires such a selective model in order to preserve quality and ensure its proper use and (iii) the restrictions do not go beyond what is proportional and necessary¹². However, agreements aimed at partitioning national markets or that make the inter-penetration of national markets more difficult should be regarded as agreements restricting competition within the meaning of Article 101(1) TFEU¹³. Moreover, a collusive behavior such as resale price maintenance is considered as a

⁷ Guess typically appoints one wholesaler for an allocated territory, which is always defined in the agreements either as one EEA country or sometimes as two or three neighbouring EEA countries.

⁸ See points 64-72 of the Commission Decision.

⁹ See points 74-78 of the Commission Decision.

¹⁰ See points 79-83 of the Commission Decision.

¹¹ See points 84-88 of the Commission Decision.

¹² CJEU 13.10.2011, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, paragraph 41. See also CJEU 06.12.2017, Case C-230/16, *Coty Germany*, paragraphs 36 and 40.

¹³ CJEU 04.10.2011, Joined cases C-403/08 and C-429/08 C, *Football Association Premier League and Others*, paragraph 139.

restriction of competition ‘by object’, since it likely has negative effects on prices, choice, quantity or quality of goods and services, and, therefore, it is not needed to prove its actual adverse effects on the market¹⁴.

With regard to the online search advertising restrictions, the Commission found that they aimed at reducing the competitive pressure exerted by authorised retailers on Guess’ own online retail activities and to keep down its own advertising costs. Guess’ retailers were, in that way, deprived of the ability to effectively generate traffic towards their own websites by means of online search advertising and, as a consequence, to sell the contractual products to customers, in particular, outside the assigned contractual territory or area of activity. According to the Commission, the restrictions on the use of the Guess brand names and trademarks in online search advertising did not pursue any legitimate objectives in relation to the operation of a selective distribution system, not even the protection of the brand image claimed by the company¹⁵.

In assessing the online sales restrictions, the Commission recalled the case-law of the Court of Justice. In particular, in *Pierre Fabre*¹⁶, the Court held that a contractual provision *de facto* prohibiting the use of internet as a marketing method amounts to a restriction of competition by object within the meaning of Article 101(1) TFEU. In *Coty*¹⁷, the Court held that a specific contractual

clause within a selective distribution agreement which pursues a legitimate objective is lawful under Article 101(1) TFEU only if the quality criteria are laid down “... *uniformly*...” and “... *not applied in a discriminatory fashion*...”¹⁸. The Commission furthermore noted that the written authorisation requirement in order for retailers to be entitled to sell online was not linked to any specified quality criteria, and rather pursued the objective to restrict sales on authorised retailers’ websites¹⁹.

The Commission moreover found that the restrictions on cross-border sales, both among members of the selective distribution system and to end users, again constituted a restriction ‘by object’ within the meaning of Article 101(1) TFEU, since they were capable of creating, maintaining or restoring national partitions in trade between Member States²⁰.

Finally, regarding RPM practices, it constitutes settled case-law that agreements that impose upon retailers’ minimum or fixed retail prices, thereby restricting their ability to determine their resale prices independently, restrict competition, once more by object, within the meaning of Article 101(1) TFEU²¹. Specifically, the Court had held already in *AEG* in 1983²², that in a selective distribution system, which by its very nature inherently restricts price competition, the imposition of fixed or minimum sales prices goes beyond the

¹⁴ See, *inter alia*, CJEU 11.09.2014, Case C-67/13 P, *CB v Commission*, paragraph 51; CJEU 19.03.2015, Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, paragraph 115.

¹⁵ See point 114-126 of the Commission Decision.

¹⁶ CJEU 13.10.2011, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*.

¹⁷ CJEU 06.12.2017, Case C-230/16, *Coty Germany*.

¹⁸ CJEU 06.12.2017, Case C-230/16, *Coty Germany*, paragraph 58.

¹⁹ Points 127-131 of the Commission Decision.

²⁰ Points 132-135 of the Commission Decision. In this sense, see also, *inter alia*: CJEU 07.07.1994, Case T-43/92, *Dunlop Slazenger v Commission*, paragraph 52; CJEU 06.07.2000, Case T-62/98, *Volkswagen v Commission*, paragraph 179.

²¹ See: CJEU 03.07.1985, Case C-243/83, *Binon v AMP*, paragraph 43; CJEU 01.10.1987, Case C-311/8, *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, paragraph 17; CJEU 19.04.1988, Case C-27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, paragraph 15.

²² CJEU 25.10.1983, Case C-107/82, *AEG v Commission*.

admissible requirements of such a distribution system²³.

Therefore, the Commission concluded that Guess' strategies and practices were contrary to Article 101(1) TFEU. Where a restriction pursuant to Article 101(1) TFEU is established, there is in principle the possibility of an exemption from the prohibition in Article 101(1) TFEU if the parties prove that the agreement fulfils the four conditions for exemption set out in Article 101(3) TFEU²⁴. However, in this case, the Commission found that Guess' conduct did not meet the conditions for an individual exemption, since there were no indicators that the conduct contributed to improving the production or distribution of Guess' products, or to promoting technical or economic progress, while allowing consumers a fair share of the potential benefits resulting from Guess' restrictive practices. Moreover, there were no indicators either that the conduct was indispensable, for example to address free-riding, or to protect Guess' brand image²⁵.

During the investigation, Guess submitted a formal offer to cooperate ('Settlement Submission'). The Settlement Submission included:

- an acknowledgement of Guess' liability for the infringement described in the Settlement Submission, as regards its object, the main facts, the legal characterisation of the infringement and of the main facts, including Guess' role and the duration of

Guess' participation in the infringement;

- a statement that the Settlement Submission was conditional upon the imposition of a fine by the Commission which does not exceed the amount specified in the Settlement Submission.

The Commission adopted the Statement of Objections (SO) in November 2018. Guess confirmed that the SO reflected the content of the Settlement Submission, reiterating its commitment to pursue the cooperation procedure.

The Commission noted that Guess' cooperation went beyond its legal obligation to do so by: (i) revealing a restriction of competition which was not known to the Commission until then; (ii) providing additional evidence representing significant added value compared with the evidence already in the Commission's possession, and strengthening the Commission's ability to prove the infringement as a result; (iii) acknowledging the infringement of Article 101 TFEU arising from the conduct; and (iv) waiving certain procedural rights, resulting in administrative efficiencies. The amount of the fine was therefore reduced by 50%, and the final fine imposed amounted to about 40 million euro.

²³ CJEU 25.10.1983, Case C-107/82, *AEG v Commission*, paragraphs 42-43.

²⁴ According to Article 101(3) TFEU, "... *The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;


(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question..."

²⁵ See points 149-164 of the Commission Decision.



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