

LUXURY GOODS NO LONGER AVAILABLE ONLINE (?), OR PROHIBITION OF ONLINE SALES IN EU?

“So they’ve restricted our online sales”. This could be a paraphrase of the well-known first line of the famous Czech novel *The Good Soldier Schweik*, and one that summarises the judgment of the Court of Justice of the European Union (CJEU) in a dispute between the luxury cosmetics manufacturer “Coty Germany GmbH” (**Coty**) and one of its distributors “Parfümerie Akzente GmbH” (**Akzente**)¹, regarding the fact that Coty prohibited Akzente, as one of the members of the selective distribution network operated by Coty, from selling cosmetic products considered by Coty as luxurious, through online platforms of third parties (the “amazon.de” platform in this case) (**the “Judgment”**). In times when the European Commission punishes any restrictions of online sales, this Judgment is essential, even though not quite surprising.

Online sales of contract products by authorised distributors within a non-exclusive selective distribution network is not considered operating outside the authorised place of establishment as provided in Article 4(c) 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 (Regulation 330).² The restriction of online sales is considered hardcore and it automatically invalidates the distribution agreement. The restriction in the matter which the Judgment dealt with was also a hardcore restriction.³

Coty considered products sold under the “Coty Prestige” brand as luxurious and strictly requested from all its distributors protection of their luxurious image. In its distribution agreements, Coty required in respect of these products consistent observance of quality criteria, determined certain conditions for online sales of the products and expressly prohibited the obvious engagement of third unauthorised enterprises in the sales.⁴ Coty did not prohibit online sales through its own platform that met the conditions regarding a

¹ see [here](#).

² See Judgment of the CJEU from 13 October 2011 No. C-439/09 – “*Pierre Fabre Dermo-Cosmétique*” – relating to Article 4c) of regulation 2790/1999 which was valid earlier but which also fully applies to the “current” regulation 330/2010.

³ See Article 4 of Regulation 330 (Restrictions that remove the benefit of the block exemption – hardcore restrictions): “*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 [...].*”

⁴ “*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.*” “*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 [...].*” A supplemental agreement on internet sales provides that “*the authorised 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 authorised store and the luxury character of the products is preserved*”, and it expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige.

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luxurious image. The distributor Akzente did not like this prohibition and applied to a German court in the matter. Akzente succeeded in first instance proceedings. Nevertheless, the court of appeal applied to the CJEU with four preliminary rulings which the CJEU responded to in the Judgment.

There is luxury and there is *luxury*

The CJEU and ECJ already earlier confirmed that the “luxurious character” of certain goods is (may be) a key element which defines their nature, and that an undertaking has the right to protect the quality (and nature) of these goods in selective distribution if it observes the usual principles, which are the prohibition of discrimination and the principle of proportionality.⁵ It is thus legitimate for the producer to request that members of its distribution network fulfil certain quality, non-discriminatory and proportionality criteria (always assessed *ad hoc*), to ensure the protection of the luxurious image of the products and their proper use.

The fact that the CJEU confirmed the practice of Coty as permissible and that the possibility to invoke the exemption under Regulation 330 was not excluded is thus not such a major surprise.⁶ Consequently, authorised distributors are permitted to sell contract goods online not only via their own websites, as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved, but also through unauthorised third-party platforms when the use of such platforms is not discernible to the consumer (though the Court did not specify any particular details). By its prohibition, Coty restricts a specific form of online sales, and this prohibition may not be considered a restriction of customers or distributors within the meaning of Article 4(b) of Regulation 330/2010, or a restriction of passive sales to end users by authorised distributors within the meaning of Article 4(c) of the regulation.

The fact that e-shops of distributors (more than 90 percent of distributors who were addressed in the matter operate their own e-shops) are, according to the final report of the European Commission on the research of electronic sales from 10 May 2017⁷, the most important online distribution channel, was certainly also considered in the Judgment. The question is whether the Judgment would be identical if the circumstance were different (which may be expected in future).

The following key questions arise in connection with the Judgment:

⁵ See Judgment of the CJEU from 23 April 2009 No. C-59/08 regarding Copad SA versus Christian Dior couture SA, Vincent Gladel, as liquidator of Société industrielle lingerie (SIL): “...the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark’s prestige, sales to discount stores such as the ones at issue in the main proceedings, provided it has been established that contravention, by reason of the situation in the main proceedings, damages the allure and prestigious image which bestows on them an aura of luxury”.

⁶ Selective distribution networks 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) of the TFEU if 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, that the character of the given product, including image of prestige, requires selective distribution to ensure its quality and correct use, and the criteria laid down do not go beyond what is necessary.

⁷ see [here](#).

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1. what will be the further development of the definition “luxury goods” ? There may be an attempt to extend the definition so that it covers the largest volume of products possible; and at the same time,
2. will this decision stop any further liberalizing of the relatively strict rules of online sales, or will many other characteristics of certain products be presented which, similarly to “luxury”, should justify a different approach to certain producers and the conditions of the functioning of their selective distribution network?

Regarding indent 1

There is (of course) no clear definition of “luxury goods” as the formation of one is unrealistic. Nevertheless, in the Judgment the CJEU repeated its statements already presented in the “Copad” matter that the quality of luxury goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury, that the aura of luxury emanating from them is essential in that it enables consumers to distinguish the luxury goods from similar goods, and consequently that an impairment to that aura of luxury is likely to affect the actual quality of those goods.⁸ The question is whether the “aura of luxury” of a certain product may only be assessed based on its price, and public opinion.

These criteria will further be applied in order to assess which products (goods) may be considered luxurious and which not. In our opinion, some producers of certain goods may be expected to attempt to classify their products as luxury goods with the aim of protecting their image, and to try to restrict online sales of their products by their distributors using platforms of third parties. With regard to economic results, the producer’s decision to restrict sales of any products may be illogical; nevertheless, it may be different in the case of selective distribution. Interest in the proper functioning of the selective distribution network also, in major cases, includes the attempt to restrict sales through distribution channels not controlled by the producer (exclusive importer). The general restriction of sales to unauthorised entities is the essence of the functioning of the selective distribution (both qualitative and quantitative), and the European Commission takes this restriction into account (if three basic conditions are met).⁹ There are, however, certain limits which may not be surpassed.

It will be interesting to monitor the tendencies of the “extensive” interpretation referred to above namely on the jewellery, luxury time-piece and passenger car markets. Though a car may apparently not be referred to as a “luxury product”, we believe that, with regard to the specific nature of the automotive industry, the attempt to determine its own rules for online sales may be expected.

In this respect, we may assume that new judgments dealing with some of these attempts will be granted in the future.

There is also a question of whether the conclusions of the Judgment may also be applied to “luxury” services, such as restricting the sale of luxury services on “discount platforms”. We believe that they will

⁸ See the “Copad” judgment, indents 24 to 26.

⁹ See indent 174 and following of the Guidelines of the European Commission on Vertical Restraints No. 2010/C 130/01 (Guidelines).

apply, as the advantages of the protective shield of Regulation 330, and consequently, the conclusions stated in the Judgment, probably apply both to the distribution of goods and the rendering of services.¹⁰

Regarding indent 2

The selective distribution system of luxury products whose main purpose is to ensure the protection of the aura of luxury of these products complies with Article 101(1) of the Treaty on the Functioning of the European Union if distributors are selected based on unified objective criteria of a qualitative nature which are not applied in a manner which is discriminatory, and if they do not go beyond what is necessary (the principle of proportionality) (**Conditions**).

After the “Copad” judgment was granted, producers (exclusive importers) may prohibit the discount sale of certain products if this form of sale may affect the prestige of these products to such an extent that their quality may be doubted.

After the “Pierre Fabre” judgment was granted, a blanket ban on the online sales of products may not be imposed on distributors, not even with reference to the potential danger to consumers who, according to the Court, do not necessarily need the assistance of a qualified pharmacist to purchase pharmaceutical products. In other words, the preservation of the image of prestige may not be the only legitimate goal of the restricting of competition.

After the “Coty” judgment was granted, producers (exclusive importers) may prohibit the use of platforms of third parties for online sales in a recognisable manner if the Conditions are met. Though the prohibition, which is dealt with in the original proceedings, in fact restricts a certain form of online sales, it does not restrict the scope of customers of distributors as provided in Article 4b) of Regulation No. 330, or passive sales of authorised distributors to end users as provided in Article 4c) of this Regulation.

The fact whether this restriction will ensure, within online trading, the exclusive interconnection of these products and authorised distributors, and not the platforms of unauthorised distributors, is essential. As this interconnection is one of the goals of the selective distribution network, the approved prohibition is the logical restriction with regard to the qualities of the selective distribution network.

We can imagine that certain producers (mainly those who operate selective distribution networks) will, with regard to this goal of the restriction, and in addition, the goal to preserve the image and luxurious character of products legitimized by the Judgment, attempt to search for new “legitimate” goals to (further) restrict online sales. The security of consumers (when purchasing potentially dangerous goods), and the necessary assistance of an expert in the first after-sale education of consumers¹¹ or the necessary prevention of potential liability for damage caused by incorrect use of products may be set as examples.

It is also possible, as may be understood from the statement of Advocate General Nils Wahl on the matter¹², that in future the “Coty” exemption may apply to restrictions of online sales of any goods sold in selective

¹⁰ See the definition of a vertical agreement in Article 1(1)a) of Regulation 330/2010 or indent 2 of the Guidelines.

¹¹ Though the argument of the necessary presence of a qualified pharmacist during the sale was rejected in the Pierre Fabre judgment as unnecessary.

¹² see [here](#).

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distribution systems through platforms of third parties from third states etc. As we say, only the sky is the limit.

Conclusion

At times, when the European Commission aspires to make the online sales of goods (and services) available to all consumers irrespective of their location, the “Coty” judgment is, at first glance, a step back. After contemplation though, we may say that it is a logical and pragmatic move which could not be a surprise for anybody. Certain producers may, however, consider the “Coty” precedence as an opportunity to complicate a heavy-handed attempt by the European Commission which most producers do not consider positive (on the contrary). With reference to the Judgment, arguments for the benefit of a broader interpretation of the restriction of online sales of other than luxury products in all selective distribution systems may be presented.

In any case, we recommend that producers (importers) properly assess the impact of any intended restriction of online sales in their distribution systems and take into account the conclusions of the Judgment and the potential impacts on the application of Regulation 330.

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