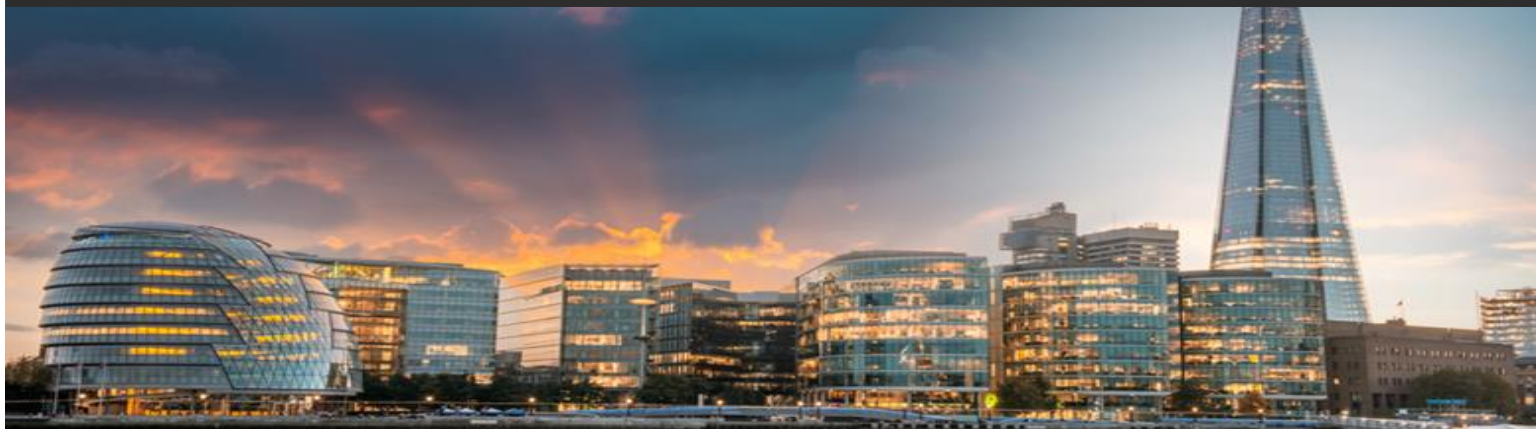


Alert | Antitrust Litigation & Competition Regulation

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CJEU: Online Platform Bans in Selective Distribution Arrangements Permitted Where They Protect ‘Aura of Luxury’ of Luxury Goods – But What is a ‘Luxury’ Good?

On 6 December 2017 the EU Court of Justice (CJEU) issued its long-awaited preliminary ruling in the case of *Coty Germany GmbH v Parfümerie Akzente GmbH*, on issues referred from a Frankfurt court concerning the distribution of luxury goods. The ruling follows the approach recommended in the [opinion of CJEU Advocate General Wahl](#), issued in July this year. The CJEU generally – but not always – follows the Advocate General’s non-binding opinion. In summary, the CJEU confirmed that:

1. Suppliers may use a selective distribution system designed primarily to preserve an “aura of luxury” for luxury goods, if the following two conditions are met:
 - a. Authorised resellers must be chosen on the basis of objective, qualitative criteria.
 - b. These criteria must be laid down uniformly for all potential resellers and applied in a non-discriminatory manner.
2. Within a permissible selective distribution system, suppliers may control the manner in which authorised distributors resell online, where this is necessary to preserve the luxury image of goods. In this context, controls are permissible where they require distributors to resell only in their own business name and:

- a. on their own website, or
- b. on a third party platform, but only if this can be done in a manner not discernible to customers.

The CJEU did not elaborate on what it would consider a luxury good, which raises a question mark over the meaning of luxury and leaves the practical difficulty of identifying the types of goods that may justify a selective distribution system. The ruling does not affect other cases where selective distribution is used for technical and complex goods. Nevertheless, it has now been made clear that within a selective distribution system, a suitably constructed restriction on sales through third-party platforms may be compatible with EU competition law.

Key Questions Answered

Can suppliers use a selective distribution system for luxury goods?

Yes. A selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods is compatible with EU competition law, as long as authorised resellers are chosen on the basis of objective, qualitative criteria that do not go beyond what is necessary and are applied in a uniform and non-discriminatory manner.

Referring to existing case law, the CJEU confirmed that the quality and reputation of luxury goods is in part derived from their allure and prestigious image, which bestow on them an “aura of luxury”. Suppliers may impose conditions in a selective distribution system that allow them to ensure that their goods are sold in a manner that enhances their value and contributes to sustaining their “aura of luxury”.

In a selective distribution system for luxury goods, can authorised distributors be prohibited from selling goods on third-party online platforms in a discernible manner?

Yes, subject to certain conditions. The CJEU took the view that an obligation on authorised distributors to resell online only on their own website or, if on a third party platform, only in an undiscernible manner, can be compatible with EU competition rules.

The CJEU found that the obligation imposed in the *Coty* case was coherent with the purpose of putting in place a selective distribution system in the first instance, *i.e.*, to preserve the luxury image of the goods sold.

- The obligation enabled the supplier to check that the goods were sold online in an environment compliant with the agreed qualitative conditions.
- Sales made via third-party online platforms could risk a deterioration in the online presentation of those goods, which in turn could harm the luxury image and character of the goods.
- The requirement to sell solely in the online shops of the authorised reseller contributed to the luxury image of the goods.

Prohibiting platform sales in this manner was proportionate as it did not ban all internet sales, the CJEU held. It relied in particular on the European Commission’s finding in its E-Commerce Sector Inquiry that 90 percent of distributors surveyed had their own online shop, which remained the main distribution channel despite the growth of third-party online platforms. This suggested that banning platform sales would not impact customers disproportionately. Lesser means to protect the luxury image of the goods were not available, as the supplier was not part of the contractual relationship between its authorised distributors and third-party platforms.

The CJEU decided that the types of online sales obligations Coty Germany sought to impose would not amount to “by object” (*i.e.*, very serious) restrictions, and so could benefit from the safe harbour under the Vertical Block Exemption Regulation (VBER) as long as both supplier and distributor had a market share of 30 percent or below. The VBER provides exemption from the EU rules that prohibit anti-competitive agreements if certain conditions are met and recognises that vertical agreements meeting those conditions and between parties with low market shares are generally efficiency-enhancing.

Conclusion

The ruling brings little clarity to when a selective distribution system can be used in practice, as the CJEU left open the question of what it would consider a luxury good. While it did not consider cosmetic and body hygiene goods to qualify as luxury goods, the CJEU did not go on to elaborate the requisite characteristics of “luxury”, leaving the referring court to determine whether Coty Germany’s cosmetics are luxury products.

Before putting in place a selective distribution system, therefore, suppliers should give careful consideration to whether the goods in question bear characteristics sufficiently luxurious to justify the imposition of qualitative restrictions. This will likely have to be self-assessed on a case by case basis, having regard to the nature of the goods (whether luxury, complex or technical) and the level of customer service envisaged. In this regard, the tenor of the CJEU’s ruling suggests that purely qualitative selection criteria necessary to preserve the characteristics of the goods are generally acceptable.

With respect to distribution arrangements that fall within the safe harbour under the VBER, the ruling provides assurance to suppliers of luxury goods that certain restrictions on platform sales imposed for the purpose of preserving the luxury image of the goods will be permissible under EU competition law, to the extent that those restrictions are necessary and proportionate to the protections sought.

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