

ECJ: Third-party Platform Bans Permissible

6 December 2017

Can suppliers prohibit their authorised distributors from selling luxury products on third-party platforms such as Amazon or eBay? In its judgement of 6 December 2017 (Case C-230/16 – “Coty”), the European Court of Justice (ECJ) finally had the chance to shed some light on this highly-debated issue. Both suppliers and distributors have waited with great anticipation for a clarification from Luxembourg. The ECJ now took a supplier-friendly stance and confirmed that platform bans for luxury goods are not *per se* anticompetitive.

Background: Selective Distribution Systems and Platform Bans

In selective distribution systems, suppliers sell their products only to authorised distributors. These distributors, for their part, need to comply with certain qualitative requirements relating to the presentation of the products and the overall shopping environment. To ensure that these requirements are met not only in stores but also online, suppliers often prohibit the use of third-party platforms like Amazon or eBay. This is particularly true for luxury good suppliers who do not want their products to appear on such platforms for fear of damage to their brand image. Especially for small and medium-sized resellers, however, such restrictions significantly cut their potential reach as third-party internet platforms are an important distribution channel for them.

The Legal Controversy

The German Federal Cartel Office considered platform bans to be in breach of German and European competition law because they severely restrict small and medium-sized businesses in their access to new customers and market reach. The European Commission, however, most recently indicated that they consider platform bans permissible.

German courts have taken inconsistent views. Whereas the Higher Regional Courts of Schleswig and Munich ruled that platform bans (at least outside the scope of selective distribution systems) are in breach of competition law, the Higher Regional Courts of Frankfurt and Karlsruhe considered platform bans permissible. These different approaches taken by agencies and courts illustrate how urgently the ECJ's Coty judgment has been awaited to shed some light and provide guidance.

The Coty Case

The Higher Regional Court of Frankfurt in a request for a preliminary ruling asked the ECJ whether an outright prohibition of third-party platforms was compatible with EU competition law. In the case at hand, the luxury perfumes supplier Coty had sought an injunction against one of its authorised distributors for selling Coty products not only on its own online shop but also via Amazon. Coty considered this to be in breach of a contractual obligation, which prohibited online sales via third-party platforms. The first instance court ruled that the clause was anticompetitive.

Preservation of Luxury Image May Justify Selective Distribution Systems

The ECJ now clarified that selective distribution systems primarily designed to preserve the luxury image of specific goods can be compatible with EU competition law. Previously, the ECJ had ruled in “Pierre Fabre” (Case C-439/09) that preserving a brand’s luxury image could *not* justify a general ban of internet sales, albeit in relation to cosmetics and body care products. The court now clarified that the “Pierre Fabre” decision was based on the specific fact that the clause in question established an *absolute ban of internet sales*, which was considered anticompetitive. However, the ECJ now confirmed that it did not intend to question its established case law on selective distribution systems as the selective distribution system itself was not at issue in “Pierre Fabre” (see Case 26/76 – “Metro I”, Case 31/80 – “L’Oréal”; Case 75/84 – “Metro II”).

Platform Bans Permissible

Moreover, the ECJ clarifies that luxury goods suppliers using a selective distribution system may impose platform bans, e.g. prohibit sales on Amazon or eBay, in order to protect the luxury image of their products. Such platform bans must be imposed equally on all distributors in a non-discriminatory way and they must not disproportionately restrict the distributors.

While it is up to the referring court to examine whether these criteria are met, the ECJ indicated that it considered the clause used by Coty to be legitimate and proportionate. In particular, the court found that protecting the luxury image constitutes a legitimate goal of platform bans and that distributors are not unnecessarily restricted because such bans are the only way for suppliers to make sure their criteria regarding the product presentation and the shopping environment are met. In addition, distributors still have the possibility of selling the products in their own online stores or through third-party platforms provided these are not visible to the end-customer.

No “Hard Core” Restriction

In addition, the ECJ ruled that platform bans do not constitute *per se* or “hard core” restrictions within the meaning of the EU Block Exemption Regulation on Vertical Restraints (restriction of a customer group or restriction of passive sales). This is a rather

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technical clarification, which means that even if the criteria described above are not met, platform bans can still qualify as legal.

Conclusion

The ECJ's judgement has brought important clarifications for the use of selective distribution systems and the legitimacy of platform bans in particular. Platform bans can be permissible in certain situations. They do not fall within the scope of the prohibition on restrictive agreements if the criteria established by the ECJ are met. The ECJ has provided important guidance to suppliers on how to design their selective distribution systems in compliance with competition law.

Still, the decision leaves some questions on platform bans open. For instance, there will be quite some discussion on suppliers' room for manoeuvre when defining what constitutes luxury goods.

BLOMSTEIN will continue to monitor the developments described closely and will provide updates on any significant developments. Please do not hesitate to contact [Anna Blume Huttenlauch](#) and [Max Klasse](#) if you have any questions on how the ECJ's ruling might affect your company.