

## Carte blanche for bans on Amazon?

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As the importance of e-commerce continues to grow, competition authorities and courts across Europe have been grappling with the question of whether brand owners can control online sales of their products without breaching EU competition law. This week's ruling on *Coty*<sup>1</sup> by the Court of Justice of the European Union (ECJ) confirms that luxury goods manufacturers can lawfully prevent their distributors selling their products on third party platforms, such as eBay and Amazon, which represent increasingly important sales channels.<sup>2</sup>

### Background

The legality of so-called “marketplace restrictions” - where manufacturers effectively ban sales via third party platforms - has proved controversial in recent years.

Marketplace restrictions are usually imposed in the context of selective distribution systems (a commonly used arrangement for manufacturers to control both *who* can sell their goods and *how*). Traditionally, these arrangements are permitted provided that the criteria used to control sales are justified by the nature of the goods - for example, their luxury image. However, the ECJ caused confusion more recently when it suggested that the aim of preserving a luxury image was not a valid justification and therefore cast doubt on the selective distribution arrangements used by luxury goods companies across Europe.<sup>3</sup>

When confronted by marketplace restrictions (whether for luxury or non-luxury goods), authorities and courts across the EU have taken diverging views. Authorities in Germany and France have criticised restrictions that exclude third party marketplaces, emphasising the need to keep all channels of online distribution open and recognising that marketplaces can be an important online sales channel (particularly for small- and medium-sized distributors with fewer resources to establish their own online shops).<sup>4</sup> On the other hand, Dutch courts have been less willing to condemn marketplace restrictions, acknowledging manufacturers' interests in preserving their brand image or ensuring high levels of customer service.<sup>5</sup>

In the present case (referred to the ECJ by the German court), *Coty* operated a selective distribution system for its luxury cosmetic products and imposed restrictions that prevented retailers from selling those products on third party platforms, such as Amazon. They could, importantly, still make sales online

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<sup>1</sup> Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.

<sup>2</sup> See the European Commission's [Final Report](#) on the e-commerce sector inquiry.

<sup>3</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* [2011] ECR I-9447 at para. 46 (*Pierre Fabre*).

<sup>4</sup> See, for example, the Adidas case in [Germany](#) and [France](#) (which was resolved by voluntary commitments) and the *Asics* case in [Germany](#) (albeit that the competition authority decided the case on other grounds and the status of the marketplace restriction, while criticised, was left open).

<sup>5</sup> See, for example, the [judgment](#) of the Rechtbank Amsterdam in a dispute between Nike and one of its distributors.

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through their own websites. This case therefore presented an opportunity for the ECJ to resolve the uncertainty weighing on luxury goods manufacturers and provide guidance on marketplace restrictions to competition authorities and courts across the EU.

## Judgment

The ECJ closely follows the recommendations made by the Advocate General in his opinion of 26 July 2017. The judgment firstly confirms that the traditional case law on selective distribution remains valid: luxury goods suppliers can restrict sales to authorised distributors in order to preserve the “luxury image” of their goods.<sup>6</sup>

The judgment also confirms that luxury goods suppliers can include a ban on authorised distributors selling through third party platforms such as Amazon. The ECJ considered the absence of a direct relationship between the supplier and the third party platform to be significant in this context as the supplier cannot control how its goods are displayed on the platform. The judgment also highlighted the fact that Coty’s restrictions still allowed retailers to advertise online and sell via their own website and therefore did not prohibit all online sales.

Finally, the judgment establishes that such restrictions on authorised distributors selling via third party platforms are not a restriction of competition within Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and, even if within Article 101(1), are not “hard core” restrictions for the purposes of the Vertical Agreements Block Exemption.<sup>7</sup> As a result, suppliers (of both luxury and non-luxury products) have a much wider room for manoeuvre in restricting sales by authorised distributors on Amazon and eBay.

## Conclusion

It remains to be seen what effect this ruling will have on the practice of some national competition authorities in Europe, such as the Bundeskartellamt (BKA), that have taken a stricter approach towards marketplace restrictions. According to the BKA’s President, marketplaces are particularly important in Germany<sup>8</sup> and small retailers in Germany would suffer if the ECJ authorised marketplace restrictions. The BKA has responded to the ECJ’s judgment in Coty by rejecting suggestions that the ruling threatens its approach, arguing that the ruling is limited to “genuinely prestigious products”, which have not been the focus of the BKA’s enforcement activities. Its statement added: “*Our preliminary view is that [manufacturers outside the luxury industries] have not received carte blanche to impose blanket bans on selling via platforms*”. It looks likely therefore that the BKA will continue to challenge manufacturers of non-luxury products who seek to impose marketplace restrictions on their distributors.<sup>9</sup> This is not the

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<sup>6</sup> The judgment clarifies that the more recent judgment (*Pierre Fabre*) should be understood as relating specifically to the factual circumstances of that case and should not be interpreted more widely.

<sup>7</sup> The Vertical Agreement Block Exemption Regulation (Block Exemption) provides a “safe harbour” for vertical agreements if certain formal conditions are satisfied (including a 30% market share threshold for parties), regardless of whether they may have positive or negative effects on competition in the relevant market.

<sup>8</sup> In Germany, 62% of retailers who responded to the European Commission’s e-commerce sector inquiry use marketplaces, as opposed to 13% in Italy and 4% in Belgium (see the [Final Report](#) on the e-commerce sector inquiry).

<sup>9</sup> The Austrian competition authority has also issued a similar response, noting that marketplace restrictions will still require a case-by-case analysis.

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only competition case where the BKA's approach has differed from that of other national competition authorities - the online hotel booking cases are another example of this.<sup>10</sup>

For many manufacturers of non-luxury products, the ECJ's ruling is nevertheless helpful as it allows them to rely on the Block Exemption where their market share is below the 30% threshold. For others, however, the uncertainty will continue as they seek to comply with different approaches by competition authorities across Europe.



Philippe Chappatte  
T +44 (0)20 7090 4424  
E [philippe.chappatte@slaughterandmay.com](mailto:philippe.chappatte@slaughterandmay.com)



Emma Griffiths  
T +44 (0)20 7090 4265  
E [emma.griffiths@slaughterandmay.com](mailto:emma.griffiths@slaughterandmay.com)



Henry Llewellyn  
T +32 (0)20 737 9422  
E [henry.llewellyn@slaughterandmay.com](mailto:henry.llewellyn@slaughterandmay.com)

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<sup>10</sup> See Slaughter and May briefing, '[Dealing with divergence - a new way forward following the online hotel bookings cases](#)' (April 2017) for further details.