

July 2017

## AG Opinion in *Coty*: Luxury goods and online marketplace bans.

On 26 July 2017, Advocate General Nils Wahl delivered his Opinion to the EU Court of Justice in *Coty Germany GmbH v. Parfümerie Akzente GmbH*. The key legal question in this case is hotly debated: can members of a selective distribution system for luxury goods be legally prohibited from selling on online marketplaces?

AG Wahl invites the Court to rule that such online marketplace bans, first, are not anti-competitive, provided they satisfy three criteria; and, second, even if such a ban does restrict competition, it does not constitute a “hardcore” restriction on competition and could be exempted under Article 101(3) TFEU. The opinion will be welcomed by the luxury goods industry.

Online marketplace bans are a particularly hot topic in competition law at this time. In May 2017, the European Commission noted in its final Report on the E-commerce Sector Inquiry (see Linklaters client alert on the Report [here](#)) noted that the growth of e-commerce had led to a significant increase in the use of selective distribution systems: “*manufacturers explicitly acknowledge that they use selective distribution as a reaction to the growth of e-commerce as it allows them to better control their distribution networks, in particular in terms of the quality of distribution but also price*” (E-commerce Report, para. 15 ii)).

The Commission also noted in the E-commerce Report that online marketplace bans are very commonly imposed on members of selective distribution systems. It did not, however, take a position on the legality of such restrictions, but indicated that “*the findings of the sector inquiry indicate that (absolute) marketplace bans should not be considered as hardcore restrictions*” (E-commerce Report, para. 42), since they generally do not amount to a *de facto* prohibition on online selling, and potential justifications and efficiencies may exist.

### Background on the *Coty* case and the questions referred to the ECJ

In the *Coty*-case (Case C-230/16), the EU Court of Justice has been given an opportunity to settle the analytical framework. The technical question is whether, in the context of a selective distribution network for luxury goods, online marketplace bans (e.g. sales *via* Amazon or eBay) imposed on authorised retailers are compatible with EU competition law and more particularly with Regulation N° 330/2010 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 (the “**Vertical Block Exemption Regulation**”). The [Opinion](#) the Advocate General Nils Wahl (“**AG Wahl**”) is available together with a [press release](#) (in French only) on the ECJ’s website.

The case concerns Coty Germany, a leading German supplier of luxury cosmetics and one of its authorised distributors, Parfümerie Akzente. In 2012, Akzente refused to approve new terms and conditions introduced by Coty in its selective distribution agreement according to which authorised distributors were to be prohibited from selling Coty's products on online marketplaces such as Amazon or eBay. Authorised distributors were to be allowed to sell Coty's products online only through an online window of their authorised shop to the extent that the luxury nature of the products was preserved.

Coty's dispute with Akzente led it to bring an action before the German courts seeking an order to prohibit Akzente from distributing the contract goods on "Amazon.de". In 2014, the Regional Court of Frankfurt held that such general prohibition within a selective distribution agreement amounted to a violation of both German and EU competition law. The Regional Court interpreted the ECJ's judgment in *Pierre Fabre Dermo-cosmétiques SAS v French Competition Authority* (Case C-439/09) as holding that the requirement to maintain a prestigious image is not a legitimate aim justifying a selective distribution system which necessarily restricts competition. Moreover, the Regional Court considered that the provision at stake constituted a hardcore restriction which could not be exempted.

Coty appealed the decision to the Higher Regional Court of Frankfurt which subsequently referred to the ECJ for a preliminary ruling asking four questions. We explain these questions below.

## The Opinion of AG Wahl and its implications

In his Opinion, AG Wahl invites the ECJ to rule that online marketplace bans prohibiting authorised retailers of a selective distribution system from selling luxury goods *via* platforms are not contrary to EU competition law provided certain conditions are respected.

### First question: Selective distribution systems for luxury and prestige goods aimed mainly at preserving the 'luxury image' of those goods are compatible with Article 101(1) TFEU

AG Wahl recalls (Opinion, paras. 37, 39, 52 and 66) that the ECJ has constantly held, since its judgment in *MetroSB-Großmärkte/Commission* of 25 October 1977, that selective distribution systems are compatible with Article 101(1) TFEU to the extent that:

- > The properties of the product necessitate a selective distribution system, in the sense that such a system constitutes a legitimate requirement, having regard to the nature of the products concerned, and, in particular, their high quality or highly technical nature, in order to preserve their quality and to ensure that they are correctly used;
- > Resellers are chosen based on objective criteria of a qualitative nature which are determined uniformly for all potential resellers and applied in a non-discriminatory manner; and
- > The criteria defined do not go beyond what is necessary.

More specifically concerning luxury goods and the necessity of a selective distribution system, AG Wahl recalls that the ECJ previously held that systems based on qualitative criteria may be accepted in the high-quality consumer goods production sector without infringing Article 101(1) TFEU to maintain a specialist trade capable of supplying specific services for such products. AG Wahl refers the ECJ to its judgments in *Metro SB-Großmärkte* (para. 20) and *AEG-Telefunken* (para. 33).

To conclude on this first question, AG Wahl puts forward two additional (counter) arguments:

- > First, he endorses an argument raised by certain parties comparing the issue at stake with the position taken by the ECJ in its case-law developed in connection with trade mark law holding that the setting up of a selective distribution system which sought to ensure that the goods were displayed in sales outlets in a manner that enhances their value, 'especially as regards the positioning, advertising, packaging as well as business policy', contributed to the reputation of the goods at issue and therefore to sustaining the aura of luxury surrounding them (see ECJ judgment 23 April 2009, *Copad*, para. 29);
- > Second, AG Wahl disagrees with certain parties having raised that this position would be contrary to the ruling in *Pierre Fabre*. He considers that para. 46 of *Pierre Fabre* stating that "*the aim of maintaining a [prestige] image is not a legitimate aim for restricting competition and cannot therefore justify finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU*" has given rise to highly divergent interpretations (Opinion, para. 78) and he invites the Court to clarify this point. For AG Wahl, it was not the ECJ's intention in this judgment to hold that systems specifically designed to preserve the brand image of the products concerned must necessarily be caught by Article 101(1) TFEU. In the *Pierre Fabre* case, "*the only point at issue was a contractual clause containing a general and absolute ban on internet sales of the contract goods to end users, imposed on authorised distributors within the framework of a selective distribution system and that conversely, the selective distribution system in its entirety was not at issue*" (Opinion, para. 79).

AG Wahl finally recalls that it is now generally agreed that such distribution systems are likely to have, under certain conditions, pro-competitive effects (or at least neutral effect), in particular, when considering elements of qualitative nature (Opinion, paras. 40-47, 64, 86-87).

He therefore invites the ECJ to reply to the first question that "selective distribution systems relating to the distribution of luxury and prestige products and mainly intended to preserve the 'luxury image' of those products is an aspect of competition which is compatible with Article 101(1) TFEU, provided that resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner for all potential resellers, that the nature of the product in question, including the prestige image, requires selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and that the criteria established do not go beyond what is necessary".

## **Second question: A supplier of luxury goods may impose an online marketplace ban on its authorised resellers**

In reply to the second question, AG Wahl invites the ECJ to hold that a supplier of luxury goods may prohibit its authorised retailers from selling its products on third-party platforms such as Amazon or eBay. AG Wahl focuses on whether the prohibition at stake is legitimate in light of the qualitative objectives pursued and, if appropriate, whether it is proportionate.

First AG Wahl advocates that the head of a selective distribution network may, for the purposes of preserving the brand image or prestige image of the products which it sells, prohibit its authorised distributors from using third-party undertakings in a discernible manner. AG Wahl refers to para. 54 of the Commission's *Vertical Guidelines* admitting quality standards for the use of the internet site to resell its goods. He emphasised that in making use of third-party platforms in the context of the distribution of the products, the authorised distributors and, more importantly, the network head "*no longer have control over the presentation and image of the products, since, inter alia, those platforms frequently display their logos very prominently at all stages of the purchase of the contract goods*".

Second, AG Wahl considers that the provisions at stake may be excluded from the scope of Article 101(1) TFEU in that they are likely to improve competition based on qualitative criteria. Not only does it ensure that those products are sold in an environment that meets the qualitative requirements imposed by the head of the distribution network, but it also makes it possible to guard against the phenomena of parasitism, by ensuring that the investments and efforts made by the supplier and by other authorised distributors to improve the quality and image of the products concerned do not benefit other undertakings (see press release and Opinion, § 106).

Finally, contrary to the provision examined by the ECJ in the Pierre Fabre case, the provisions at stake are far from imposing an absolute prohibition on online sales. In fact, the clause only requires its authorised distributors not to sell the contract products *via* a third-party platform since they do not comply with the qualitative requirements imposed by the network head. Likewise, it does not prohibit authorised distributors from distributing the contract goods *via* their own internet sites. It cannot therefore be considered as “*an outright ban on or a substantial restriction on internet sales*”.

As regards proportionality, AG Nils Wahl considers that such prohibition is appropriate to achieve the objectives of Coty (Opinion, § 113).

### **Third and fourth questions: In the event the contested prohibition is found to be caught by Article 101(1) TFEU, it does not constitute a “restriction by object” and should be exempted**

AG Nils Wahl finally advocates that in case the Higher Regional Court finds the prohibition at issue to be caught by Article 101(1) TFEU and that it, *a priori*, restricts competition, it should still be exempted based on requirements of Article 101(3) TFEU, or block exempted based on the Vertical Block Exemption Regulation in case found applicable based on an *in concreto* analysis (Opinion, § 121).

On this point, the AG considers that the contested prohibition does not constitute a hardcore restriction within the meaning of the Vertical Block Exemption Regulation, and therefore “*it is not automatically excluded from the benefit of a block exemption*”. More specifically, AG Wahl does not see the prohibition as a hardcore customer restriction, nor a passive sales restriction since it does not have the effect of partitioning territories or of limiting access to certain customers.

### **Commentary**

The AG's Opinion confirms the ECJ's previous case law that suppliers of luxury goods can have a legitimate interest in protecting their brand image by imposing qualitative requirements on their authorized distributors and that such restrictions can enhance competition based on qualitative criteria. Said restrictions are likely to improve the luxury image of the products concerned as they ensure that those products are sold in an environment that meets the qualitative requirements set out by the brand owner. These restrictions also protect investments against free-riding and the suppliers' and other authorised distributors' efforts to improve the quality and image of the products concerned.

The AG's Opinion makes it clear that any qualitative criteria, including any online marketplace bans, should be applied in a non-discriminatory manner and should have the aim to protecting the legitimate interests of the supplier to guard investments in the quality and image of the luxury goods. In any event, as is also clear from the Vertical Block Exemption Regulation, suppliers of luxury brands cannot impose an outright ban on internet sales by their authorized distributors. Such restrictions would be considered a hard-core restrictions under Article 101(1) TFEU.

The AG's Opinion is not binding upon the ECJ, but is followed by the ECJ in the majority of its cases. Nevertheless, we will need to await the ECJ's final judgment to have a clearer and final view on these questions. In any event, the judgment is likely to provide

helpful guidance for companies in the luxury goods industry to tailor existing and future distribution agreements with a view to enhancing the brand image of their luxury products, also on the internet.

Authors: Pierre Zelenko, Charlotte Colin-Dubuisson and Marine Cornou.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2017

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an independent consultant or, outside of Belgium, an employee of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England, or on [www.linklaters.com](http://www.linklaters.com).

Please refer to [www.linklaters.com/regulation](http://www.linklaters.com/regulation) for important information on Linklaters LLP's regulatory position.

We currently hold your contact details, which we use to send you newsletters such as this and for other marketing and business communications.

We use your contact details for our own internal purposes only. This information is available to our offices worldwide and to those of our associated firms.

If any of your details are incorrect or have recently changed, or if you no longer wish to receive this newsletter or other marketing communications, please let us know by emailing us at [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com).

## Contacts

For further information please contact:

**Jonas Koponen**  
Global Competition Practice  
Head  
Partner, Brussels  
+32 25050227  
[jonas.koponen@linklaters.com](mailto:jonas.koponen@linklaters.com)

**Pierre Zelenko**  
Partner, Paris  
+33 156435704  
[pierre.zelenko@linklaters.com](mailto:pierre.zelenko@linklaters.com)

**Nicole Kar**  
Partner, London  
+44 2074564382  
[nicole.kar@linklaters.com](mailto:nicole.kar@linklaters.com)

**Annamaria Mangiaracina**  
Partner, Brussels  
+32 25050307  
[annamaria.mangiaracina@linklaters.com](mailto:annamaria.mangiaracina@linklaters.com)

**Charlotte Colin-Dubuisson**  
Managing Associate, Paris  
+33 156435724  
[charlotte.colin-dubuisson@linklaters.com](mailto:charlotte.colin-dubuisson@linklaters.com)

**Maikel van Wissen**  
Managing Associate,  
Amsterdam/Brussels  
+31 207996257  
[maikel.van\\_wissen@linklaters.com](mailto:maikel.van_wissen@linklaters.com)

[Linklaters.com](http://Linklaters.com)