Overview

On July 26, AG Wahl delivered his opinion in the Coty case, whose hearing took place at the EU Court of Justice (CoJ) at the end of March. We provide below an overview of the case to date as well as of the main takeaways from AG Wahl's Opinion.

The Case in a Nutshell

The dispute involves a US-based perfume and cosmetics maker, Coty Inc., and one of its selective German distributor, Parfumerie Akzente. In 2012, Coty revised its selective distribution agreements which, among other things, prevented its retailers from re-selling Coty branded products through online third-party platforms such as eBay and Amazon. Parfumerie Akzente nonetheless decided to distribute Coty's goods through Amazon. As a consequence, Coty brought proceedings against Parfumerie Akzente, first before the Landgerichte (Lower Court) and then before the Oberlandesgericht (Higher Regional Court) in Frankfurt seeking a court order that would require its distributor to stop using online third-party platforms in a discernible way to resell Coty branded products in Germany.

Last year, the Higher Regional Court referred the case to the European Court of Justice (CoJ) to seek guidance as to whether manufacturers may ban online sales via third-party platforms in order to protect their brand image and reputation. In particular, the German Court asked whether selective distribution systems aimed at protecting the luxury image of the supplier's products are compatible with Article 101(1) TFEU and, if so, whether it is permissible within that context to generally prohibit retailers from using third-party online marketplaces, irrespective of whether the manufacturer's legitimate quality standards have in fact been negatively impacted.

Coty's Position

Coty, as many manufacturers of branded products, argues that it should be allowed to use a selective distribution system in order to protect the "aura of luxury" of its goods. Brand owners have been increasingly concerned about the risk that low-end distribution channels, in particular online marketplaces, would devalue their brands and products. Accordingly, a rising number of brands have advocated that, under EU antitrust rules, they should be allowed to use selective distribution in order to protect the image and aura of their product. Coty – supported by France, Italy, the Netherlands, Austria, Sweden and the Commission and as opposed to the position held by Parfumerie Akzente, Germany and Luxembourg – maintains that selective distribution agreements aiming at preserving the luxury image of the goods may be excluded from the scope of the prohibition set forth in Article 101(1) TFEU.

Next, Coty advances that, in accordance with selective distribution rules, it should be allowed to ban retailers from using online platforms such as Amazon or eBay. Brand owners justify such bans on the ground that allowing the use of third-party platforms reduces the ability of the brand owner to protect the image and the high-end quality of its products. Thus, by restricting online sales via third-party platforms, the luxury supplier can better track and provide guarantees that its products have been sold in a legitimate way (and are not counterfeit).

AG Wahl's Opinion

On July 26, Advocate General (AG) Wahl delivered his opinion and sided with Coty on both issues.
The first issue was triggered by diverging views and interpretation of the Pierre Fabre judgment of the CoJ in 2011, in particular paragraph 46 of the ruling stating that "the aim of maintaining a [prestige] image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU." The quoted language raised the query whether the CoJ was minded to call into question the possibility for brand suppliers to justify qualitative selective distribution on the need to protect their image.

In this regard, AG Wahl considers that the above language in Pierre Fabre was only meant to address the online ban restraint imposed by Pierre Fabre on its retailers and that it could not have a chilling effect on a well-established case law. He recalls that according to that case law (in particular starting with Metro), suppliers of luxury goods should be allowed to make use of selective distribution in order to preserve the brand image and quality of the product. Providing that the qualitative criteria for selective distribution (i) are related to the properties of the product, (ii) are applied consistently and uniformly without discrimination across the system and (iii) are not disproportionate, the system should withstand scrutiny and be upheld under EU competition law.

The key reason advanced by Wahl is that EU Competition law should not only be focused on price competition. Interbrand competition may justify a reduction in intra-brand competition on price in favor of preserving quality and innovation. The goal consisting in protecting the image and reputation of a brand as a justification for using selective distribution would apply irrespective of the luxury character of the good. Accordingly, selective distribution should also be available to suppliers of high-quality and high-tech products.

On the second issue, namely whether in a selective distribution a supplier may prevent its appointed distributors from selling through discernible third-party platforms such as Amazon or eBay, AG Wahl observes that in the case at hand, the contested clause should be justifiable by the need to protect the image of the product. Interestingly, AG Wahl endorses the arguments of brand owners that such a ban could well be pro-competitive in two ways: (i) it would preserve "the guarantees of quality, safety and identification of origin of the product by requiring retailers to supply services of a certain level when the contract products are sold"; and (ii) it would protect the brand against parasitism and counterfeiting by ensuring that non-authorized undertakings do not benefit from the investments made by the luxury-goods maker and its authorized distributors in order to enhance the quality and prestige of the goods.

More importantly, as opposed to Pierre Fabre, the clause at issue does not constitute an outright ban against passive sales, as Coty's authorized distributors can still sell the products online, through their own website (or by using third-party platforms in a non-discernible manner).

Further, AG Wahl justifies the ban as an appropriate way to enable the supplier to exercise a certain level of control over the distribution channel's of its goods. In that regard, AG Wahl highlights that compliance with qualitative selective requirements may be "effectively ensured only if the internet sales environment is devised by authorized resellers, who are contractually linked with the supplier/head of the distribution network, and not by a third party operator, whose practices escape the influence of that supplier."

Finally, AG Wahl considers that such a ban on sales via third-party platforms cannot be characterized as a restriction by object or a "hardcore restriction" within the meaning of the Vertical Block Exemption Regulation. This is not only because, as mentioned above, the ban is in his view capable of bringing pro-competitive benefits, but also because the limitation does not hinder the ability of retailers from engaging in e-commerce on their own and, hence, does not constitute a limitation on passive sales to end users.

**Next Steps and Possible Consequences**

As to the next steps, the CoJ will deliver its final judgment possibly before the end of the year, and thereafter the matter will head back to the German Regional Court for final consideration. In terms of potential implications, the following should be noted:
First of all, the CoJ should hopefully shed light on the interpretation of paragraph 46 of the Pierre Fabre judgment as to whether the aim of maintaining a prestige image is a legitimate justification for implementing a selective distribution system. Also, assuming that Wahl’s opinion is followed by the CoJ—which happens in four out of five cases—the outcome of the Coty case should differ from the Pierre Fabre case. In Pierre Fabre, the supplier imposed a de facto blanket ban on online sales, thus excluding any possibility to sell the goods via the Internet, whilst in the present case the issue was limited to restricting sales on third-party platforms that do not fall within the authorized selective distribution network.

Secondly, assuming again that the Court follows AG Wahl, then luxury manufacturers will probably have more scope to control the way their authorized retailers sell on the Internet. Conversely, retailers who are looking for visibility and traffic to their websites may find that such a ban is limiting their ability to grow sales and profits.

Thirdly, for online marketplaces, such as Amazon and eBay, this ruling would likely limit their ability to host retail services on their platform, not only in relation to luxury goods but also for a wide range of so-called “high-quality”/“high-tech” products where selective distribution is justified.

This said, while admittedly Wahl’s opinion opens the door wide for brand owners to enforce such a ban, suppliers would still need to ensure that they satisfy the 3-prong test set out in Metro, in particular that the ban is justified on account of the nature of the product and proportionate to the need to protect the image of the same. Also, this opinion does not suggest that marketplaces are not in a position to meet the qualitative criteria that a supplier may impose to its authorized distributors and, hence, could become part of the selective network in their own right.

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