IN SEARCH OF THE SCOPE OF THE *COTY* RULES

"THE CHALLENGES OF REGULATING AND ENFORCING COMPETITION LAW"

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I. CJEU, Judgement of 6.12.2017 *COTY* (C-230/16, EU:C:2017:941)

The CJEU's preliminary ruling in *Coty* is probably the most significant recent development in the area of online vertical restraints.

The fundamental question raised by the Frankfurt Higher Regional Court could be simplified as

Whether in a selective distribution system for luxury goods a prohibition on authorized distributors to use third-party online platforms for the sale of the contract goods in order to preserve their luxury image constitutes a restriction of competition by object.

CJEU, Judgement of 6.12.2017 *COTY* (C-230/16, EU:C:2017:941)

A few years earlier the CJEU in its ***Pierre Fabre*** judgement (C-439/09, ECLI:EU:C:2011:649) had ruled that the general prohibition of online sales qualified as ***restriction by object*** because the need ***to preserve the prestigious image of cosmetic and body hygiene goods could not justify an absolute ban on internet sales*** of those goods.

Distinguishing ***Coty*** from *Pierre Fabre* on the ***principle of proportionality*** the court clarified that the ban on the use of third-party online platforms falls ***out of the scope of Art 101 (1) TFEU***, when that ban

(a) has the objective of preserving the luxury image of the contract goods and

(b) satisfies the criteria of Metro I *(*CJEU, C-26/76: *applied in a uniform and non-discriminatory manner and not going further than objectively necessary to protect the quality of the relevant products).*

II. Do the *Coty* rules apply only to "luxury goods"?

While the EU Commission and a large part of the academic world welcomed the "more realistic approach" of the Court (AG Wahl), the President of the German Cartel Office (***BKartA***) stressed that the judgment will not affect the Authority's practice as ***it only applies to luxury goods***.

This statement opens a new round of discussions on the difficult co-existence of selective distribution and online sales. The questions it raises are the following:

- How important is the ***scope of "luxury goods"*** for the suppliers' right to impose restrictions of sale through third-party platforms?
- In other words, what is the ***scope of the legality presumption*** of the ban on third-party platform sales in a selective distribution system?

Luxury goods and non-luxury goods

- It could be argued that:

It was not the CJEU's intention to restrict its judgment to luxury goods but that ***the Court just adopted the language used by the Frankfurt Higher Regional Court in its request for a preliminary ruling***.

- On the other hand:

Proponents of the view expressed by the President of the BKartA may point to paragraph 32 of *Coty* in which the ***CJEU explains the difference of the specific circumstances*** between *Coty* and *Pierre Fabre* ***also referring to the difference of the products in question*** *(Coty: luxury goods / Pierre Fabre: cosmetic and body hygiene goods)*.

Luxury goods, non-luxury goods & trademark law

Copad, a judgment which *Coty* heavily relied on (C-59/08, ECLI:EU:C:2009:260), supports a wider definition of the goods, to which the *Coty* rules apply.

Copad suggests that ***protection of trademarks on grounds of their prestige*** is granted not only to luxury goods but to ***every branded good the image of which is important for the trademark proprietor***.

Should competition law take a similar view which would result to a wider application of the Coty rules? If so

- every ban on third-party platform sales of high quality consumer goods fulfilling the criteria of *Metro I* would fall outside the scope of Art. 101 (1)
- difficulties in defining "luxury goods" and explaining the reasons for their favorable treatment would be avoided

But: the number of internet sales bans would increase thus granting an unfair advantage to powerful suppliers who invest in the image of their goods.

Luxury goods and non-luxury goods: where do we stand?

- The ***DG Comp*** shares the view of the wider application of the *Coty* rules. In a quite recent publication it stated that

  "The arguments provided by the Court are valid irrespective of the product category concerned (*i.e. luxury goods in the case at hand) and are equally applicable to non-luxury products"*, Competition Policy Brief, April 2018).

- Moreover, the ***Hamburg Higher Regional Court*** in its judgement of 22.3.2018 (Case 3 U 250/16) held that a supplier of ***food supplements and various toiletries*** may prohibit distributors from selling its goods over certain third-party platforms. The Court confirmed there is no clear distinction between luxury goods and high-quality goods and that ***the distribution of high-quality products may also require additional presentation and consulting services in order to convey a high-quality image and the positive characteristics of the product.***

Luxury goods and non-luxury goods : where do we stand?

Overall, a ***restrictive application of the Coty rules to luxury goods:*** hardly justifiable in competition terms and inconsistent with trademark law.

As AG Wahl put it in his *Coty* Opinion: *"**although price competition is important, it does not constitute the only effective form of competition** … There are thus **legitimate requirements**, i.e. maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which **may justify a reduction of price competition in favor of competition relating to factors other than price**"* .

Accordingly, a supplier choosing to compete in quality rather than in prices should be free to impose online bans in order to convey a high-quality image of his products. Therefore, it could be argued that ***narrowing the scope of this freedom by limiting the products for which such bans could be considered justified would in fact result to a restriction of inter-brand competition.***

Luxury goods and non-luxury goods: where do we stand?

However, it should be noted that even a restrictive interpretation of *"luxury goods"* is rather unlikely to substantially affect the organization of selective distribution systems of non-luxury goods.

- Since *Coty* cannot be understood as treating bans on non-luxury goods as hardcore restrictions, if their object is to preserve the image of the contract goods, the difference between luxury and non-luxury goods is about falling out of the scope of Art. 101 (1) TFEU or falling under the scope of the VBER.

- True, enjoying the legality presumption is an advantage but the practical consequences of the categorization of the goods in question have seriously diminished after *Coty*.

Open issue: possible discrepancies in the categorization of goods by NCAs and national courts that may affect the level-playing-field.

III. Does Coty affect bans on distributors to use Price Comparison Tools (PCTs)?

Shortly after *Coty* was published the German Federal Court (BGH) held that the bans imposed by ASICS on the members of its selective distribution system to use Price Comparison Tools (PCTs) violated Art. 101 (1) TFEU.

Was this the first serious disagreement with Coty? At the outset the BGH underlined the differences between third-party online platforms and PCTs observing that:

- Contrary to online platforms ***PCTs do not constitute distinct on-line sales channels*** but merely grant retailers the opportunity to advertise their online offers to interested visitors who are ***redirected to the retailer's website*** from whom the goods can be purchased
- Consequently, restrictions on the use of PCTs may ***hinder the use of internet as a sales channel***
- Depending on their nature (objective/qualitative/ absolute) such bans may ***either be block-exempted or treated as hardcore restrictions***.

Does Coty affect bans on distributors to use Price Comparison Tools (PCTs)?

Furthermore, taking into account the facts of the case the BGH found that the judgment under review was not in conflict with *Coty* because:

(a) the ***goods of ASICS were not luxury goods*** and

(b) the ***bans imposed by ASICS were much broader*** than those in *Coty.*

(c) Moreover, such bans were ***not aimed at providing consumer advice or at protecting the image of the goods***, since PCTs only redirect interested visitors to authorized dealers.

IV. Conclusions

- It is quite clear that more episodes in the series of online vertical restraints will follow
- Beyond doubt is *Coty*'s importance for the rational handling of the *per se* rules in vertical restraints. Uncertain is the scope of its rules
- A restrictive application of the *Coty* rules to luxury goods would not only be inconsistent with the law of trademarks but it could also have negative effects on inter-brand competition
- The distinction between luxury and non-luxury goods is about falling out of the scope of Art. 101 (1) TFEU or falling under the scope of the VBER. This distinction is of rather limited practical importance
- So far we know, the *Coty* rules are not necessarily transferrable to PCTs.

Thank you for your attention!