



Distribution Newsletter Switzerland

The Coty judgment on selective distribution systems - importance for Switzerland and key takeaways

In its Coty judgement of 6 December 2017, the ECJ confirmed that a supplier of luxury goods may establish a selective distribution system with the aim of protecting the luxury image of its products. To achieve this aim of protecting the luxury image, the supplier may prohibit authorised retailers from selling the products on third party platforms which operate in a discernible manner towards consumers, such as Amazon, eBay, and Zalando.

In the following, we will have a look at the key takeaways from the Coty case, and its importance for selective distributions systems in Switzerland.

1 ECJ approves the use of selective distribution systems subject to certain conditions

Selective distribution systems are systems in which (i) the supplier undertakes to sell the contract goods or services only to selected distributors on the basis of defined criteria, and (ii) those distributors undertake not to sell those goods or services to non-authorised distributors but only to end users or other approved distributors within the network.

Though selective distribution systems necessarily affect competition in the market, the ECJ confirmed that the implementation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that certain requirements are met, namely

- the characteristics of the product in question necessitate a selective distribution network in order to preserve its quality and ensure its proper use,
- resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, and,
- the criteria laid down do not go beyond what is necessary.

With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, the ECJ found that a luxury image is a product-characteristic which necessitates selective distribution. The characteristics and conditions of a selective distribution system may, in themselves, preserve the quality and aura of luxury goods, and ensure their proper use. Of course there are also other high-quality and/or high-technology products which may necessitate selective distribution.

2 ECJ endorses the prohibition on internet sales by discernible third-party platforms

The ECJ endorsed the prohibition on internet sales by discernible third-party platforms and it found that such prohibition does not go beyond what is necessary. Prohibiting internet sales by discernible third-party platforms provides the supplier with a guarantee that its luxury goods will be exclusively associated with the authorised distributors, and it enables the supplier to check that the luxury goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.

Dwelling on the appropriateness of the prohibition at issue, the ECJ stressed that authorised distributors remained permitted to sell the goods online both via their own websites (as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved) and via unauthorised third-party platforms when the use of such platforms is *not* discernible to the consumer. The prohibition applied solely to the internet sale of the goods via third-party platforms which operate in a discernible manner towards consumers, which the ECJ considered appropriate to preserve the luxury image of those goods.

It has to be assumed that the same would apply in the context of selective distribution of other high-quality and/or high-technology products provided the prohibi-



tion on internet sales by discernible third-party platforms would help to preserve the legitimate goals pursued by the selective distribution system.

3 The situation in Switzerland

Though ECJ decisions have no binding effect on Swiss authorities and courts, the Coty judgment will certainly have a relevant impact on the practice of the Swiss Competition Commission (“ComCo”) and Swiss competition law. The Verticals Notice of 28 June 2010 (as amended on 22 May 2017) issued by the ComCo explicitly states that the European competition rules shall, as a rule, apply by analogy.

On 12 June 2017, the ComCo issued its revised Explanatory Notes to the Verticals Notice. While the Explanatory Notes do not specifically refer to restrictions on sales via discernible third-party platforms, the ComCo expressed its general view on restrictions on online sales. The ComCo held that, as a rule, prohibitions and restrictions on online sales qualify as a serious restriction of competition. On the other hand, the ComCo stated that a supplier must be allowed to impose certain quality requirements regarding online sales on its distributors to the extent such requirements are appropriate to attain the legitimate objectives of the supplier's distribution system, in particular a selective distribution system.

In view of this it is safe to assume that the ComCo and Swiss courts will follow the ECJ and its considerations in the Coty judgment.

4 The key takeaways from the Coty case

The Coty judgement primarily affects suppliers of luxury products and it provides helpful guidance to them as to what is permissible. The key takeaways are:

- it is permitted to establish a selective distribution system for the distribution of luxury products;
- the restrictions imposed on the authorised resellers must be consistent with the aim of protecting the luxury image of the products, they should not go any further than is necessary, and they must be applied in a non-discriminatory manner;
- restrictions on sales via discernible third-party platforms to protect a luxury image are permissible provided that this does not amount to a *de facto* prohibition on online sales;
- the above applies accordingly to other high-quality and/or high-technology products which necessitate a selective distribution network in order to preserve their quality and ensure their proper use.

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