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Now screening: Europe

K&L Gates' Francesco Carloni, Gabriela da Costa, Alessandro Di Mario, Michal Kocon and Katrin Hristova talk e-law.

ECOMMERCE AND RESTRICTIONS on online sales have been a hot topic in Europe for the past few years. This month, we report on the case of Coty Germany v Parfümerie Akzente, a recent landmark ruling of the EU's highest Court regarding restrictions on the use of online marketplaces within selective distribution systems.

The European Commission has found that fashion companies in Europe are increasingly using selective distribution systems, pursuant to which suppliers select resellers on the basis of specified criteria and resellers undertake not to sell the contract goods to unauthorised resellers. The EU Court's recent judgment therefore brings welcome clarity in an area of growing importance for fashion brands trading in Europe.

The Coty case concerned a dispute between luxury cosmetics supplier Coty Germany and an authorised retailer. In the framework of Coty's selective distribution system, its authorised retailers were permitted to sell online but not via third-party consumer facing platforms.

In its landmark judgment, the Court confirmed that companies may put in place selective distribution systems to preserve the luxury image of goods. The Court clarified that its 2011 statement that the "aim of maintaining a prestigious image is not a legitimate aim for restricting competition" had been misinterpreted.

The Court found that luxury brands can prohibit authorised resellers from using in a discernible manner third-party platforms for the online sale of their products, provided that such prohibition:

- has the objective of preserving the luxury image of those goods;
- is laid down uniformly and not applied in a discriminatory fashion; and
- is proportionate in the light of the objective pursued.

With regard to the marketplace ban in this case, the Court found that the restriction did not prohibit the use of the internet to market the goods. It also referred to the findings of the European Commission's eCommerce sector inquiry that distributors' own online shops were by far the main distribution channel for sales over the internet.

Another useful indication in the judgment is that a marketplace ban does not constitute a "hardcore" restriction of competition. Such restrictions are usually very difficult to justify. Therefore, even if one or more of the above conditions are not met, if the parties' market shares fall within certain thresholds a marketplace ban may also be acceptable under the EU vertical agreements block exemption regulation.

This judgment brings clarity for the fashion industry at the EU level in an area which had been uncertain and yet in which there had been aggressive enforcement at the national level, notably in Germany. This result should provide predictability for brands in Europe and is expected to have a positive spill-over effect at the national level.

The judgment also contains a number of helpful implications for fashion companies whose products might not be considered "luxury" but still possess a high quality brand image. Despite the Court's focus on "luxury" products in Coty, its reasoning and ruling is not limited only to such products and appears to have wider application.

Nevertheless, the ruling does not necessarily give rise to a carte blanche for all marketplace bans. Firstly, the Court noted several facts in the case, which - if absent - might render a ban more risky. These included that in Coty resellers were not prevented from advertising via the internet on third-party platforms or from using online search engines. Secondly, the ruling is likely to be of limited value where a supplier has authorised a party as a reseller but seeks to ban it from selling via a third-party platform, or where the supplier itself sells directly via its own store on the platform. Finally, there remains some doubt about the extent to which national authorities (notably in Germany) might seek to limit the ruling's scope, for example by arguing that it is limited to luxury products or less applicable where marketplaces are regarded as essential sales channels.

These observations notwithstanding, the ruling certainly clears the way for more aggressive online fashion distribution strategies in Europe. Australian brands should seek legal advice regarding how to strengthen their strategies in light of these developments. ■

For more information about issues relating to domain names please contact Simon Casinader, Senior Associate at K&L Gates (email simon.casinader@klgates.com.au).