Coty, Asics and Google Shopping:

Practical Implications for Distribution Strategy

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Outline

I. Coty

II. Asics

III. Google Shopping
Coty runs a selective distribution system (SDS) for cosmetics/perfumes and applies criteria to support its luxury image.

Under amended rules:
- online sales from authorised retailer’s own online store permitted provided luxury character of products preserved
- authorised retailers must sell online under their own name and may not engage an unauthorised third party in a manner discernible to the public

Parfümerie Akzentze refuses to sign up to amended rules; sells through Amazon; Coty sues

First instance court finds against Coty on platform restriction, citing *Pierre Fabre*. OLG Frankfurt refers questions on SDS and platform restriction to the ECJ.
Coty - First issue: what types of product justify SDS?

- Under established case law, SDS justified where:
  - Needed to preserve the quality or ensure proper use of a product (Metro)
  - Promotes non-price competition: e.g., between outlets providing specialist services for high quality and high technology products (AEG)
  - Prevents damage to the prestigious image of luxury products, which for consumers is part of their quality, that may result from sales in inappropriate selling environments (Leclerc; trade mark law: Copad)

- Pierre Fabre:
  - «the aim of maintaining a prestigious image is not a legitimate aim for restricting competition». Did this overturn previous case law for luxury products?
Nature of luxury products justifies use of SDS under Article 101(1) TFEU to preserve their luxury image

- Court affirms pre-Pierre Fabre type of justification specific to luxury products

- Quality of luxury goods includes their allure and prestigious image; sales in inappropriate types of stores may damage this allure/image and thereby their quality

- Court distinguishes Pierre Fabre (protecting prestige not legitimate aim for restricting competition): different context of absolute internet sales prohibition; and non-luxury goods (cosmetics and body care products).
Coty - Second issue: platform restriction

- No prior EU guidance/case law on application of Article 101

- Commission considers platform ban to be block exempted
  - Vertical Guidelines, para. 54
  - E-Commerce sector inquiry report – platforms not key as 90% of surveyed retailers sell through own stores

- Conflicting case law at national level, within Germany
Coty platform restriction: Art 101

- Prohibition on selling Coty goods on third party platforms (3PP) in a manner discernible to consumers where it is intended to ensure the luxury image of those goods is compatible with Article 101(1)
  - The restriction must meet the Metro criteria: it must be (objectively) qualitative, uniform, non-discriminatory and proportionate

- As the objective of protecting the luxury image was legitimate, the focus was on whether the platform ban was proportionate. It is proportionate because:
  
  → It is appropriate in order to ensure that:
    - Coty goods are associated exclusively with authorised distributors (the essence of SDS);
    - all online sales of Coty goods meet qualitative requirements (Coty has no rights against platform; imposing quality criteria on 3PPs through authorised retailers not as effective);
    - Coty goods are not sold where all kinds of goods are sold (risks undermining luxury)

  → It does not go beyond what is necessary (limited effects on online sales):
    - Not absolute prohibition on online sales (or even on undiscernible platform sales);
    - E-commerce report> most distributors sell through own online shops
Coty platform restriction: VABER

- Prohibition on selling Coty goods on 3PPs in this manner is, in any event, exempted by the Vertical Agreements Block Exemption (VABER)
  - Only relevant where 3PP ban restricts competition under Art. 101
  - Not a ban on online sales (distinguishes Pierre Fabre)
  - Not a customer restriction and does not restrict passive sales to end users:
    → No identifiable group of 3PP customers to whom sales restricted
    → Distributors can advertise online, e.g., via online third-party platforms and search engines, enabling consumers to find retailers' own stores
Take aways from Coty

VABER: platform restriction
- Platform restrictions (in any system) benefit from the VABER. No indication this is limited to luxury products (based on limited effect, not objective justification)
- It cannot be assumed the same conclusion necessarily applies to internet advertising restrictions (absence of such restrictions emphasised by ECJ)
- Vertical Guidelines require equivalence of on- and off-line restrictions. Is this right if retailer can nonetheless effectively sell online?

Article 101(1): platform restriction
- Position clear for luxury products in SDS: no infringement
- Position not resolved for other products in SDS, but a key issue will be whether the product justifies the use of SDS
  → If it does not, question probably moot
  → If it does, the Coty reasoning may well apply by analogy (no association with unauthorised retailers; no direct contractual rights of supplier to enforce criteria)
- Even if Coty test not met, is it a restriction by object or is a market assessment required to establish effects?
Take aways from Coty (2)

Article 101(1): SDS

- As VABER applies broadly to SDS, how often is a 101(1) analysis key?
- Nothing has changed for luxury products (whatever they may be): nature of product justifies use of SDS under 101(1)
- Ruling not relevant for other products
- Original case law refers to quality not luxury
  - SDS should be a legitimate means to protect a reputation for quality more generally, and not only a reputation for luxury
- In any event, are different types of brand image not equally worthy of protection (lifestyle, environmental, etc?)
Asics facts & background

- Asics’ Distribution System 1.0
  - Includes Internet specific restraints, such as no price comparison sites (PCS), no use of Asics brand name in search engines and for advertising on third party platforms

- German Bundeskartellamt: Distribution System violates Article 101 TFEU because of PCS, search engine & advertising prohibition (2015)
  - PCS ban and search engine/advertising ban are object restrictions under Article 101(1)
  - Hard core restraints under Article 4(c) VABER
  - Not objectively justified, no efficiency justification
  - Critical of other restraints, but not included in Decision

- OLG Düsseldorf affirms (2017)
  - PCS bans are restriction by object (freedom of distributors, price competition) under Article 101(1) as they are not justified in light of the nature of the products – Pierre Fabre
  - No luxury or complex products, PCSs not detrimental to image of brand
  - Hard core restraint under VABER: passive sales restriction à la Pierre Fabre (irrelevant that only partial ban and not total ban of internet sales)
  - No leave to appeal (no open legal questions to be clarified)
Asics - Supreme Court (2017)

- **Challenge of denial of leave to appeal**
  - Limited to appeal court finding that VABER does not apply to PCS ban
  - No challenge of Article 101(1) TFEU infringement finding
  - Narrow scope of review

- **Supreme Court rejects appeal – no need to clarify whether PCS ban is blacklisted under Article 4(c) VABER**
  - No doubt about correct answer, no different views (including in Commission’s e-commerce Report)
  - At least total PCS ban (not qualitative criteria applicable to PCSs) is hardcore
  - Substantial restraint of online retailers’ ability to reach potential customers

- **No questions under EU law in light of Coty**
  - Coty concerned luxury products, not “regular” branded products
  - Asics restraints went beyond Coty restraints (e.g., prohibition of use of Asics trademark on third-party sites)
  - In practice, no longer guaranteed that customers have access to internet offering to a substantial extent
Asics - Questions

- Luxury products v. branded products - meaningful difference?
- Stricter approach to PCSs than to 3PPs under Article 101(1) TFEU?
  - Would PCS restraints based on qualitative criteria be treated differently?
- Under VABER, how can PCSs ban restrict effective internet selling (and be considered hard-core), when 3PP ban does not?
  - Would “pure” PCS ban, without search engine/advertising restraint be permissible under VABER?
- Can additional restraints imposed by Asics be relevant under VABER evaluation?
  - VABER needs predictable black and white rules, not case-by-case assessment of actual/potential impact
Google Shopping

- Case AT.39740 Google Search (Shopping), Commission Decision of 27/06/2017

- Not about restrictions imposed in distribution systems, but about alleged effect of Google’s unilateral conduct in general search service market on its competitors in shopping comparison services market

- Key point for Coty/Asics: Commission market analysis
  - Ultimate “victims” of restrictions imposed by Coty and Asics do not compete in same market
  - Fundamental distinction between shopping comparison services and merchant platforms (Amazon, Fnac, etc. do not compete with Google Shopping)

- Unlike comparison websites, the activities of merchant platforms closely resemble those of retailers, even if the platform is not legally the seller
  - The platform acts as a place where retailers and consumers can conclude sales
  - Platforms are perceived by both users and comparison shopping services as ‘final destination’ multi-brand retailers
  - Platforms typically offer after-sales support

- Unlike PCSs, merchant platforms do not attract traffic to the merchant’s own website by including its prices in a general comparison function
  - they are instead customers of PCSs
Link to Coty and Asics findings?

- Could be said to be consistent with the different outcomes in Coty and Asics
  - It is legitimate to prevent sales over platforms as they are in effect unauthorised retailers – it is the basic premise of SDS that the supplier should be able to decide who is part of distribution system.
  - Justification for preventing authorised retailers from using comparison websites may be seen as less obvious as any sale following use of a PCS takes place in the authorised retailer’s own webstore