

In the Picture



My luxury image shattered by online sales. What now?

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Imagine...

For years you have worked to build and defend the luxury image of your *Prestige Watches*. You require your distributors to run classy stores with well-trained sales personnel on hand to offer expert advice to customers. This is a crucial element in your company's business model, which focuses on quality and excellent service rather than on price competition.

Recently, however, the sales figures have been plummeting. A market study reveals that consumers perceive *Prestige Watches* less and less as luxury goods. In particular sales on online marketplaces seem to be harming the luxury image. The luxury character of the watches is much less evident on these marketplaces, while the price differences compared to other watches become that much more obvious to consumers.

According to your marketing team, you can burnish the image of your *Prestige Watches* through a temporary ban on online sales, combined with an aggressive promotional campaign.

You submit this plan to the legal department, which immediately raises the red flag. Contractually, no

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ban on online sales is possible - and in any case, such a prohibition would constitute a serious violation of competition law.

You shake your head in disbelief: can a manufacturer not determine for itself how and where its products are sold? Is there truly no way to prevent your luxury goods from becoming third-rate products?

A brief clarification.

In principle, every distributor must have the right to sell online. However, a manufacturer can impose quality conditions on its distributors for the sale of its products, and this with respect to both offline and online sales.

Quality conditions are particularly important in selective distribution systems.

In *Pierre Fabre*, the Court confirmed that these quality conditions may not lead to a general ban on online sales for the authorized distributors, not even if such a ban were intended to preserve the prestigious image of the products at issue.

Recently, within the framework of a selective distribution system, the question arose as to whether a manufacturer may forbid its authorized distributors to sell the contract goods via online platforms of third parties, such as Amazon Marketplace, bol.com or eBay. Unlike in case of a general ban on online sales, authorized distributors can then still sell the contract goods online via their own website.

In *Coty*, the Court of Justice confirmed that a prohibition on authorized distributors to sell luxury products via online platforms of third parties is a quality condition that does not restrict competition. The prohibition is appropriate for preserving the luxury image of the products and moreover does not go further than what is necessary to achieve that objective, since the authorised distributors can still sell the products via their own website. According to the European Commission's recent e-commerce sector inquiry, that is still by far the most important online sales channel.

Finally, the Court confirms that prohibiting authorized distributors to sell via online platforms of third parties does not constitute a "hardcore restriction of competition". Even if such a ban *did* restrict competition (e.g., because the characteristics of the good involved do not make selective distribution necessary), it would still qualify for a block exemption or an individual exemption from the prohibition on restrictions of competition.

In short: enhancing the image of your *Prestige Watches* by stopping them from being sold online altogether is not permitted. However, you can oblige your authorized distributors not to use online platforms of third parties that are discernable for the customer.

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Concretely.

- Do not impose on your distributors a *general* ban on selling your products online.
- You can always impose quality criteria on these online sales.
- You can prohibit your authorized distributors to sell via online platforms of third parties that are discernable for the customer without this constituting a hardcore restriction of competition.
- If you use purely qualitative selective distribution, such a ban does not even restrict competition.
- Always check whether it is also *contractually* possible to impose such a ban.

Want to know more?

- Judgment of the Court of Justice of 13 October 2011, no. C-439/09, EU:C:2011:649, *Pierre Fabre Dermo-Cosmétique*.
- Judgment of the Court of Justice of 6 December 2017, no. C-230/16, EU:C:2017:941, *Coty Germany*.
- F. Wijckmans and F. Tuytschaever, [Vertical Agreements in EU Competition Law \(3rd ed., Oxford, OUP 2018\)](#), including a chapter on e-commerce.
- Frank Wijckmans, “*Coty Germany GmbH v Parfümerie Akzente GmbH*: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms”, *Journal of European Competition Law & Practice*.