The Coty Judgment
CJEU December 6, 2017
C-230/16

Remarks from the Plaintiff's Perspective

Andreas Lubberger

Two Teachings on Luxury

1. Forget Pierre Fabre
2. Luxury Goods necessitate Selective Distribution (SD) in that they demand a sales environment which mirrors their aura of exclusivity and SD is the (only) means of establishing such an environment

Two Teachings on Platform-Bans

1. Sales platforms with product-offers of all kinds are not suitable for luxury goods
2. The operator of a SD system needs to control the appearance of the point of sale. Without a contractual relationship with the operator at the point of sale, there is no control. Subsequently the operator of a SD system can oppose the sale of his products from places beyond his (contractual) control; platforms, for example.

Two Teachings on the Black Clauses of the BER on Vertical Restraints

1. The customers of a sales platform are not a separable customer group. Subsequently platform-bans don't collide with Article 4 b) BER
2. Don't worry about the (terrible) wording of Article 4 c) BER. You are off the hook once two conditions have been met:
    1. You avoid the prohibition of internet sales as such
    2. You avoid the prohibition of search engine advertising as such

Two Disappointments

1. The court has missed the opportunity of giving legal teachings other than on luxury goods and platform-bans
   - In view of the threats from the internet industry, one might have expected a far more general approach on SD
   - In view of the shortcomings of the BER (online-silence) and their guidelines (passive sales approach) one might have expected some guidance for the BER-update in 2022
2. The court has upheld the "product-type" requirement as an entry to the SD-release from competition law
   - Unnecessary and unstable (has caused Pierre Fabre)
   - Not in line with the teachings from economists which form the basis of the Green Book and the later BER on vertical restraints
   - Logically inconclusive ("by nature"-arguments are always doubtful)
   - Introduced to the Metro-criteria at a late stage; the two Metro judgments, the Lancôme judgment, the L'Oréal judgment, the AEG judgment and the Binon judgment call for only three, rather than four criteria:
     - 1. quality choice + 2. uniform definition + 3. uniform appli

Two Omissions

The pleadings from GA Wahl are the intellectual highlight of the case. Compared to his approach, the court has failed to:

1. - discuss the various concepts of competition and provide a framework for the role of price-competition vis-à-vis quality- and novelty-competition
2. - discuss the relationship between trademark law and competition law

Two Adjustments?

1. In Pierre Fabre the court addressed SD systems as a restriction by object (unless justified by necessity deriving from the product type)

   ➢ Has this approach been silently abandoned?

2. In Copad/Dior, the court incidentally referred to SD, although the case was on trademarks and trademark-licensing. Now this judgment has been quoted expressly as guidance for SD against the background of competition law

   ➢ Is this a backdoor for the entry of trademark law to influence competition law?

German Outline

We in Germany have a number of particular issues with the Coty Judgment:

- There will be no more evaluation by the referring court. The ECJ had ruled on the very case as well
- German brands do not benefit from the emphasis on luxury – for us, quality, sustainability and functionality stand in the foreground
- The German FCO considers platform-bans a hardcore restriction; how will it respond?
- What about the impact of the structure of the German online-market? Amazon has a dominant market position here

Popular Summary

The Oscar goes to Milano and Paris instead of Seattle and San José!

Thank you for your kind interest!

…and apologies for my German English