

ECJ: The Judgement “Coty / Akzente” by the ECJ

Kluwer Trademark Blog

January 16, 2018

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Please refer to this post as: Kai Schmidt-Hern, ‘ECJ: The Judgement “Coty / Akzente” by the ECJ’, Kluwer Trademark Blog, January 16 2018, <http://trademarkblog.kluweriplaw.com/2018/01/16/ecj-judgement-coty-akzente-ecj/>

On 6th December 2017, the ECJ issued its judgement in the matter Coty / Akzente. The judgement is essentially about three questions:

- 1) Does the luxurious nature of products or trademarks justify a selective distribution system or did the Pierre Fabre judgement of 2011 put an end to that justification?
- 2) Does a selective distribution system justify a prohibition of sales on platforms like Amazon?
- 3) How are the hard-core clauses of the block-exemption regulation 330/10 construed which not only prohibit a restriction regarding customer groups, but which, according to the EU Commission, also concern restrictions of active and passive online sales?

The ECJ’s reply to the **first question** does not surprise. It was widely expected that the ECJ accidentally put the decisive passages of *Pierre Fabre* too broadly and that it did not intend to bury selective distribution for luxury products altogether. Especially the Bundeskartellamt and much of the online trade business have in fact been banking on the latter interpretation. With *Coty / Akzente*, the ECJ has clearly rectified that misconception and implicitly admitted a drafting error in *Pierre Fabre*. To clarify its position, the ECJ refers to its judgement in the matter Dior / Copad:

“With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, it must be recalled that the Court

has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods.”

As to the **second question** of a “platform ban”, the ECJ takes the trademark owners’ side with an unexpected clarity: Manufacturers are allowed to regulate the distribution of their goods in the contract with their dealers. For that reason, the manufacturer can prohibit sales on online platforms, because the operators of such platforms typically do not belong to the dealers authorised under a selective distribution system. The ECJ concludes plainly and simply:

“The absence of a contractual relationship between the supplier and third-party platforms is, however, an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorised distributors”.

Regarding the **third question**, the ECJ denies a violation of the hardcore restrictions of the group exemption regulation. First, Coty had not prohibited online sales as such. Second, Coty had allowed their dealers to advertise their own webshop on third-party platforms and search engines. With regard to an alleged restriction of exclusive customer groups, the ECJ found that the customers of an internet platform are no definable customer group, so that even an entire platform ban does not constitute the restriction of a customer group.

Conclusion:

- With Coty / Akzente, the ECJ creates a safe haven for selective distribution with regard to luxury products and luxury marks. Manufacturers of luxury goods need not fear the Bundeskartellamt or other competition authorities if they restrict online sales to an extent necessary to protect the aura of luxury attached to the goods and the mark.
- That objective also justifies the prohibition of sales via online platforms. However, these restrictions should be confined to sales and should not extend to advertising activities.
- An open question is whether “luxury” is a necessary precondition for establishing selective distribution and the restrictions of online sales that

come with it. Especially in Germany, most well-known brands can hardly be called luxury brands. Instead, they communicate a lasting and reliable quality. Whether these quality brands also deserve protection from a sloppy sales environment, which I am convinced they do, will probably be the subject of future prominent litigation.