French Competition Authority Revisits Platform Ban in a Post-Coty World

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With Halloween just past, the French Competition Authority (FCA) is revisiting chainsaw massacre: on October 24, 2018, it adopted a decision imposing a 7 million euros fine on chainsaw manufacturer Stihl for imposing a *de facto* ban on online sales to its distributors (see press release here). Even more importantly, contrasting with previous French cases, the Stihl decision also clears a platform ban that the manufacturer imposed on its distributors, thus extending the reach of the Coty judgment well beyond the luxury world.

The Case in a Nutshell

Stihl is one of the leading manufacturers of mechanical garden tools, such as chainsaws, hedge trimmers, or lawnmowers. The company markets its products via a selective distribution network. With regard to online sales, Stihl (1) required its distributors to hand-deliver the products to their customers and (2) prohibited sales on online marketplaces.

After investigating the provisions of the selective distribution contracts, the FCA came to the following conclusions:

- The requirement to hand-deliver the products amounts to a *de facto* ban on online sales and is therefore anticompetitive

Stihl's selective distribution contract does not explicitly prohibit online sales. Since 2014, it even allows the online sale of all Stihl products, subject however to the product being hand-delivered to the customer. In practice, this requirement would force the online purchaser to go in person to the shop to collect the product. The FCA's investigation showed that Stihl enforced this requirement, by sending to its distributors reminders that its products were only available in stores.

Stihl argued, *inter alia*, that this hand-delivery requirement (1) did not amount to a ban on online sales, since it only affected the conditions of delivery, not the ability to purchase the product online, and (2) was in any event necessary to ensure the safe use of its products, by allowing the distributor to demonstrate, in person, how to safely use them.

The FCA disagreed on both counts. With regards to the first point, the regulator found that Stihl's proposed distinction between purchase and delivery was "*artificial*", since the hand-delivery requirement deprived online sales of their main benefit (namely, not having to go in person in a store). Therefore, this requirement did amount to a *de facto* restriction on online sales. On the second point, the FCA took the view that this requirement was disproportionate relative to its objective of ensuring the safety of its products. This was apparent from, *inter alia*, the fact that neither the applicable safety regulation, nor Stihl's main competitors, imposed such a hand-delivery condition.

In light of the above, the FCA concluded that the requirement to hand-deliver the products amounted to a *de facto* ban on online sales *à la* Pierre Fabre – an infringement that, according to the FCA, is constitutive of a restriction by object. In this regard, the FCA noted that, by forcing clients to pick up their products in store, Stihl restored physical catchment areas and therefore reduced intra-brand competition. This infringement was deemed serious by the FCA, which imposed a 7 million euro fine – an unprecedented amount for online sales restrictions.

- *The prohibition to commercialize Stihl's products on marketplaces is legitimate and proportionate*

The FCA first recalled that the Coty judgment provides that platform bans may be justified under certain circumstances. Importantly, while this judgment was focusing on luxury goods, the FCA took the view that it could be extended to other types of products.

In the case at hand, very much in line with the approach in the Coty judgement, the FCA found that the platform ban was legitimate, since:

(1) it ensured consumer safety and brand image by allowing Stihl to make sure that its products were sold by authorized distributors, and

(2) given that the products are hazardous, Stihl must be able to control that its distributors abide by a number of information obligations; this is made possible by the contractual relationship that exists between the supplier and the distributors. By contrast, in the absence of a contractual relationship between the supplier and the platform, Stihl would not be able to exert such a control if the products were sold on a marketplace.

In addition, the FCA took the view that the platform ban was not disproportionate, since marketplaces are not the most important channel for online sales – as demonstrated by the e-commerce sector inquiry (quoted in the French decision). This was, according to the FCA, all the more true in the sector under examination.

Therefore, the FCA closed the proceedings with regards to Stihl's platform ban.

A Fresh Perspective on Online Restrictions

In December of last year, the European Court of Justice (CoJ) delivered its judgment in the Coty case (see our article here). The judgment ruled that a supplier of luxury goods can prohibit its authorized distributors from selling those goods on marketplaces. This ruling came as a surprise to a number of commentators and put a hard stop to a line of national cases, including from the French and the German competition authorities, which had taken strong positions against platform bans. Coty also left a number of open questions, in particular concerning the scope of the judgment: was it limited to luxury goods, or could it be extended to other types of products?

One year on, the FCA decision takes stock of Coty and provides a fresh perspective on online restrictions. Two key take-aways, from our perspective:

- Enforcement against online sales restrictions is getting increasingly strict, as apparent from the – probably unprecedented – amount of the fine. The time of commitments in lieu of sanction and of low fines (e.g. €17,000 in the *Pierre Fabre* case, €900,000 in the *Bang & Olufsen* case) is over.
- The decision clarifies that Coty may apply beyond luxury goods – an idea that has gained a lot of traction over the past months. DG Comp recently issued a competition policy brief that expressed the view that that a prohibition on sales of non-luxury goods through online marketplaces would also not infringe Article 101(1) provided that the Metro criteria are satisfied. However, not everyone adheres to this view: commenting on Coty, Andreas Mundt, President of the German Bundeskartellamt, noted that the judgment would not affect the decisional practice of its authority, which is focused on branded, as opposed to luxury goods.

In conclusion, the chainsaw decision is a breath of fresh air for brands, but is also a useful reminder that businesses willing to impose online restrictions must do so with utmost caution: overstepping the mark is easy and may result in – very – hefty fines.