

Kluwer Competition Law Blog

Guess Where Enforcement Stands Post E-Commerce Sector Inquiry?

Yves Botteman (Dentons) · Thursday, February 14th, 2019

On December 17, 2018, the European Commission (EC) imposed on the clothing company Guess a hefty penalty of EUR 40 million for allegedly severe restrictions relating to the online sales activities of its authorized distributors. The full text of the [Decision](#) was published by the EC on January 25, 2019.

While the substance of the Decision does not really bring anything new on the way enforcers have thus far addressed online restraints imposed by brand suppliers, *Guess* is not devoid of interest – *au contraire*. *Guess* not only takes stock of the EC's findings in the final report of the e-commerce sector inquiry, which the EC released in May 2017, but uniquely aggregates a series of price and non-price online restraints into a single infringement case. *Guess* is also a useful reminder of the consequence that suppliers face when they impose such restraints on their resellers. Enforcement to date – and *Guess* makes no exception in that respect – shows that such restraints are invariably considered to fall within the scope of restrictions of competition 'by object', meaning that they are treated as being so injurious to (intra-brand) competition that (a) no further inquiry into their effects is necessary to support a finding of infringement and (b) there is virtually no scope for successfully arguing redeeming efficiencies.

Beside these useful reminders, *Guess* provides yet another fresh instance – following *Asus*, *Philips*, *Pioneer*, and *Denon & Marantz* in July 2018 – where the EC readily engages in settlement proceedings and rewards cooperation in a vertical setting.

Background

Guess designs, distributes and licenses clothing and accessories for men, women and children under numerous trademarks. Guess markets its products in Europe via a selective distribution network.

In June 2017, the EC opened an investigation into a series of restrictions that Guess imposed on its authorized retailers. In particular, the latter were allegedly prevented from:

- Using the Guess brand names and trademarks for the purposes of online search advertising (*e.* through AdWords auctioning);
- Selling online without a prior specific authorization by Guess. The investigation revealed that

Guess reserved full discretion for withholding such authorization, that is, such a refusal was not subject to any objective justification or criteria;

- Selling to consumers located outside the authorized retailers' allocated territories;
- Cross-selling among authorized wholesalers and retailers; and
- Independently deciding on the retail price at which they resell the Guess branded products.

A Useful Recap of Antitrust Enforcement Post E-Commerce Sector Inquiry

In May 2017, the EC published its final report on its e-commerce sector inquiry. Among other findings, the inquiry revealed an increased use by suppliers of contractual restrictions aimed at (re)asserting control over their distribution network and protecting their brands in the online space. Almost two years on, *Guess* comes as one of multiple follow-on enforcement cases. But interestingly, the case draws together a series of restrictive practices, which the EC and National Competition Authorities (NCAs) have targeted and aggressively prosecuted as restrictions 'by object' in recent years. We review each in turn below.

- Online sales ban

Guess' agreements made online sales by authorized retailers conditional on the retailer first obtaining explicit authorization from Guess to conduct online sales. However, this authorization was not circumscribed by any objective criteria, giving Guess full discretion in deciding whether to allow authorized retailers to sell its branded products online.

Considering that such prior authorization had as its main object the restriction of sales on authorized retailers' websites in order to (i) protect Guess' own online sales activities from intra-brand competition by its authorized retailers and (ii) limit the authorized retailers' ability to sell the branded products outside their catchment area, the EC concluded that this requirement amounted to a *de facto* online sales ban à la *Pierre Fabre*. Accordingly, following this line of cases, the EC found that the practice qualified as an anticompetitive restriction 'by object' and, in the absence of any convincing redeeming virtue, was illegal.

- Unjustified absolute territorial partitioning

Guess' selective distribution agreements restricted active and passive sales by members of the selective network to end users located outside their allocated territory. In particular, the agreements confined authorized retailers' advertising and selling activities to their respective allocated territory, under penalty of immediate termination. As further highlighted in the course of the e-commerce sector inquiry, the EC considers practices having effects equivalent to geo-blocking as a limitation on cross-border trade and selling and, hence, as constitutive of a restriction of competition 'by object'.

Guess came on the heels of the Regulation 2018/302 on unjustified geo-blocking, which applies as of December 3, 2018. This Regulation prohibits geo-blocking and other geographically-based restrictions which deny consumers the benefit of purchasing products and services on a cross-border basis, thereby limiting choice and undermining the advantage of online commerce. Guess' practices consisting of restricting passive sales by its authorized resellers to consumers would therefore now be prohibited by the Geo-blocking Regulation.

- Cross-selling within the selective distribution network

A number of provisions in Guess' distribution agreements restricted the ability of wholesalers and authorized retailers to promote and sell Guess products to other wholesalers or authorized retailers within Guess' selective distribution network. More specifically, Guess' wholesale agreements provided for (i) minimum purchase obligations, (ii) an obligation to report Guess any of the wholesalers' product purchases from sources other than Guess, allowing Guess to monitor the restrictions imposed on wholesalers and dissuading wholesalers from purchasing from other authorized members of the selective distribution network, (iii) an obligation to ensure at the wholesalers' own expense that the products sold to their retailer customers remain within the allocated territory, (iv) a prohibition to advertise products outside the wholesalers' allocated territory or to approach other wholesalers within Guess' selective distribution system, these latest being necessarily outside the wholesaler's allocated territory as Guess only nominated one wholesaler per territory per product line. Under the same logic, the retail agreements only allowed sales to end users and restricted purchases across the selective distribution network, by providing – depending on the agreements – that (i) retailers store could only sell to final customers, (ii) the store operator could only purchase products from Guess, Guess' local wholesaler or from an authorized Guess manufacturing licensee for its own account and for resale only in the store in the territory, and (iii) transactions were prohibited among authorized retailers.

The EC unsurprisingly reiterated the settled principle that a restriction of sales among authorized retailers within a selective distribution network constitutes a restriction of competition by object, reminding brand suppliers that the members of a selective distribution network must be free to cross-sell the products covered by the distribution agreement among each other.

- Resale price maintenance

Guess' distribution agreements restricted the ability of Guess' retailers to determine their resale prices. According to Guess, the objective was to make *“the product image uniform on the market”*. The EC found this justification unconvincing and reaffirmed its stance that the imposition of minimum or fixed retail prices upon retailers as one of the most serious restraints of intra-brand competition.

- Online advertising restriction

In order to control the expansion of online sales by its independent distributors, Guess also restricted the use of the Guess brand names and trademarks, in particular Google AdWords. More specifically, Guess systematically prohibited its authorized retailers from using or bidding on Guess brand names and trademarks as keywords in Google AdWords in Europe.

This case is the first time that the EC has had the opportunity to review search advertising restrictions imposed by suppliers. Building on existing case-law at national level, in particular from Germany, the EC reached the conclusion that Guess prevented retailers from being sufficiently visible and accessible in the online space and, hence, seriously hindered their ability to sell online. Accordingly, the prohibition on the use of Guess brands and trademarks for the purpose of search advertising amounted to an unjustifiable restriction on Internet sales and, yet again, fell into the 'by object' box.

The EC Rewards Cooperation in Vertical Restraints Cases

In calculating the initial amount of the fine, the EC noted the vertical dimension of the illegal practices and acknowledged the less damaging effect of such practices on competition. This resulted in the EC using a multiplier of 7% on the value of sales affected by the infringement, which is much lower than in horizontal cartel and abuse of dominance cases. Still, the initial amount was very significant, *i.e.* close to EUR 80 million.

The EC granted Guess a 50% reduction on the initial amount in order to reward the company's cooperation beyond its legal obligation to do so. In particular, according to the Decision, Guess acknowledged the infringements before the issuing of a statement of objections, revealed a restriction of competition which was not known to the EC and provided the EC with additional evidence representing significant added value in comparison with the evidence already in the EC's possession.

Guess is the second time that the EC has rewarded cooperation in antitrust investigations relating to restrictions imposed by suppliers on their authorized retailers. This emerging practice effectively translates and imports the well-established framework for rewarding cooperation by companies under cartel investigations, *i.e.* the leniency programme and cartel settlement mechanism. In this vein, the EC published a fact sheet alongside the Decision, which explains the framework for a successful cooperation à la *Guess*, which is intended to incentivize suppliers under investigation for having imposed anticompetitive vertical restraints to promptly cooperate with the EC.

Restrictions of Competition by Object

As indicated above, for each strand of conduct, the EC did not bother to inquire into the likely or actual effects of the impinged practices. On the contrary, the EC's reasoning is that all of the flagged restraints fall within the 'by object' category. Because the bar to rebut such a classification is set at an unsurmountable level, *i.e.* in terms of proving overriding efficiencies that may flow from such practices, this leaves the supplier with virtually no scope to successfully defend its business conduct. This is particularly the case – as here – where the EC could rely on documentary evidence revealing the company's intentions and strategy behind some of those practices. Accordingly, suppliers faced with such accusations are under heavy pressure to admit their sins and settle the case against a discount on the fine rather than dig themselves into a hopeless and time-consuming fight.

In sum, *Guess* is a stern reminder that companies should keep the EU competition pitfalls in mind when devising their distribution strategy and designing their distribution agreements.

A Common Agenda pursued by Enforcers

Guess is a further illustration that European competition authorities are driven by a common enforcement agenda in relation to e-commerce. Specifically, enforcers are keen to ensure that brand suppliers do not reserve the online channel to themselves to the detriment of their authorized resellers. In this regard enforcers have been unsympathetic to claims that such practices were meant to avoid cannibalization and/or free-riding. Indeed, when sanctioning *Guess*' commercial

strategy behind the above practices, the EC espoused the Bundeskartellamt's (BKA) enforcement objective, set out in its October 2018 [policy paper on the Digital Economy](#), "to keep markets open and prevent e-commerce from being concentrated in the hands of only a few players, i.e. the manufacturers themselves, some large dealers and even fewer leading platforms, which would dramatically reduce customers' choice options".

In the months and years to come, we anticipate that this uncompromising enforcement approach will continue and expand, especially so as to also capture large online marketplaces (see, e.g., the parallel investigations by the EC and the BKA against Amazon). In parallel, however, the review of the Vertical Block Exemption Regulation, which started on February 4 with the launch of the EC market [consultation](#), should provide an opportunity for the industry and stakeholders to call such an aggressive enforcement approach into question, *inter alia* in view of divergent positions taken by some EU Member States and third countries on some of the above restraints.

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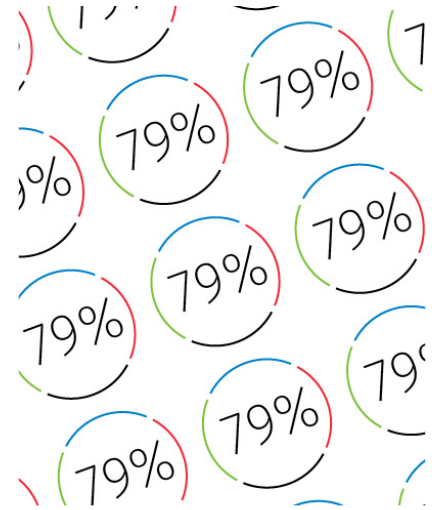
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