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Selective distribution: Recognition of the rights of suppliers to prohibit the sale of their products on marketplaces

The validity of clauses imposed by suppliers on their authorized distributors prohibiting the online sale of their products has given rise to numerous disputes in recent years. French and EC courts generally hold that such clauses are invalid because they restrict competition.

Yet, in a decision dated September 13, 2017, the *Cour de Cassation* (French Supreme Court) softened its stance by recognizing suppliers who have a selective distribution network the right to impose on their distributors - subject to conditions - contractual terms prohibiting them from selling products on unauthorized online sale platforms.

1/ Brief reminder of the concept of selective distribution

Selective distribution is defined in Commission Regulation (EU) No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices as follows: *"a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorized distributors within the territory reserved by the supplier to operate that system"*^[1].

Selective distribution systems are particularly used in the luxury sector (clothing, perfumes, jewelry) as well as in sectors that require a strong integration between the manufacturer and the distributors (automotive, motorcycles). In such distribution systems, suppliers select their distributors on the basis of objective and pre-defined criteria (expertise of the distributor, characteristics of the point of sale, etc.).

Practices implemented within a selective distribution system benefit from an automatic exemption and thus escape the classification as anti-competitive agreements insofar as the supplier's market share does not exceed 30%, provided however that distributors are not imposed "black" clauses or clear-cut restrictions, such

as those referred to in the above-mentioned Regulation (EU) No 330/2010[2].

While online sale is not addressed in this Regulation, the European Commission issued on October 13, 2000 Guidelines which specify that “An outright ban on Internet or catalogue selling is only possible if there is an **objective justification**” and also that in this context “The supplier may **require quality standards** for the use of the Internet site to resell his goods”[3] [4].

In France, the *Cour de cassation*, relying on a judgement issued by the Court of Justice of the European Union on October 13, 2011[5], has held that a clause prohibiting distributors of dermo-cosmetic products from selling such products online is unlawful unless it is demonstrated that it contributes to an economic progress and that it is essential to achieve such progress[6].

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2/ Background and procedural history of the commented case

In the decision commented herein[7], Caudalie, a manufacturer of cosmetic products distributed through a selective distribution network, had entered with its distributors into a contract which prohibited them from selling the products via websites other than their own, and imposed them the obligation to create on their own website a section especially dedicated to the Caudalie brand.

Caudalie had nonetheless noted that its products were sold on an online platform operated by eNova Santé, a company that federated pharmacies and offered them to use its platform to sell their products. Caudalie initiated summary proceedings based on the fact that, according to it, these sales through the platform caused it a manifestly unlawful nuisance resulting from the breach of its selective distribution network. It relied on Article L.442-6 I §6 of the French Commercial Code that prohibits and sanctions the fact of “*Being directly or indirectly involved in contravening the prohibition on reselling outside the network imposed on distributors bound by a selective or exclusive distribution contract covered by an exemption under the rules applicable to competition law*”.

Caudalie sought in particular an injunction against eNova Santé to stop the sale of Caudalie branded products and to remove any and all references to its products on the online platform.

In a judgement handed down on February 2, 2016, the Court of Appeals of Paris dismissed Caudalie’s claims. It held that by authorizing online sales only through the distributor’s own website, it prohibited, as a matter of principle, the distributor from selling online through other platforms, whatever the characteristics of such platforms. According to the Court of Appeals, there was serious and consistent evidence that this ban was likely to constitute a hardcore restriction of competition excluded from the benefit of exemption provided for by Article 101(3) of the TFUE.

The Court of Appeals relied in particular on two decisions rendered by the *Autorité de la concurrence* (the French Competition Authority or hereinafter “FCA”) on July 23, 2014[8] and June 24, 2015[9] in relation to Samsung’s selective distribution network, as well as on a press release issued by the FCA on November 18,

2015 in a similar case concerning Adidas France^[10].

In both aforementioned decisions of the FCA, Samsung's selective distribution network contracts included *inter alia* a clause that banned online sales through unauthorized websites and/or third-party websites, including marketplaces, which, according to the FCA, could be indicative of vertical restrictions on active and passive sales by retailers operating on the relevant market (at that stage the case was still to be further investigated by the FCA).

The abovementioned press release had been issued following an investigation by the FCA on the business practices of Adidas France. As a result of the investigation, Adidas France had removed the prohibition from its selective-distribution contracts for its distributors to use online marketplaces. In its press release, the FCA recalled that **"in any event, a manufacturer cannot, under any circumstances, prohibit an approved distributor from selling its products online^[11]"**.

3/ The reach of the decision handed down by the *Cour de Cassation* on September 13, 2017

In its decision dated September 13, 2017, the Commercial Chamber of the *Cour de Cassation* quashed the judgment that had been issued by the Court of Appeals of Paris on February 2, 2016.

Indeed, the *Cour de Cassation* considered that the Court of Appeals had failed to explain why the decisions and press release of the FCA it had referred to were likely to set aside the existence of a manifestly unlawful nuisance resulting from the breach of Caudalie's selective distribution network.

In this respect, the *Cour de Cassation* recalled that the *Conseil de la concurrence* (the French Competition Council, i.e. the FCA's predecessor, hereinafter the "FCC") had previously held that Caudalie's distribution network was valid^[12].

Indeed, Caudalie, as well as other companies selling para-pharmaceutical products and using a selective distribution network that prohibited or substantially limited the right of the distributors to sell online, had been investigated by the FCC between 2006 and 2007.

During the investigation, Caudalie had undertaken to significantly amend the terms of its selective distribution contract concerning online sales by its authorized distributors.

Caudalie had thus authorized the sale of its products on the Internet, subject to certain conditions being met (quality of the website of the distributors, compliance of such website with Caudalie's own graphic charter, implementation by the distributors of a hotline advisory service, obligation to secure Caudalie's prior approval for advertisements or special offers, etc.). On the other hand, it had not amended the contractual terms providing that its products could be sold online only on the website of each distributor, which *de facto* prevented sales through platforms.

The FCC had validated the commitments made by Caudalie without requiring it to make additional modifications to its distribution contract. It considered that Caudalie had relaxed its requirements as to the quality of the distributors' website without restricting its objective concerning the respect for the brand image of its products, and that it had thus provided a satisfactory response overall to the competition-related concerns identified by the FCC. As such, the FCC did not prosecute the case.

As a result of the decision commented herein, a supplier may prohibit its authorized distributors from selling its products through an online platform wherever – as was the case in the commented decision – the lawfulness of its selective distribution network has been globally established.

As such, the *Cour de Cassation* favors a global assessment *in concreto* of the supplier's network. It refuses to consider that the mere ban on distributors to sell through an online platform constitutes, as a matter of principle, a hardcore restriction of competition excluded from the benefit of Article 101(3) of the TFEU.

The *Cour de Cassation* did not, however, call into question the principle according to which prohibiting authorized distributors from selling products online is unlawful, unless it is demonstrated that it contributes to an economic progress and that it is essential to achieve such progress^[13].

^[1] Article 1(e) of Commission Regulation (EU) No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

^[2] Cf. Articles 4 and 5 of the above-mentioned Regulation

^[3] Emphasis added

^[4] Guidelines on Vertical Restraints (2000/C 291/01) of October 13, 2000

^[5] CJEU, October 13, 2011, case C-439/09

^[6] Commercial Chamber of the *Cour de Cassation*, September 24, 2013, n°12-14344

^[7] Commercial Chamber of the *Cour de Cassation*, September 13, 2017, n°16-15067

^[8] French Competition Authority, decision n° 14-D-07 dated July 23, 2014

^[9] French Competition Authority, decision n° 15-D-11 dated June 24, 2015

^[10] Press release available on the FCA's website:
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671&lang=en

^[11] Emphasis added

^[12] French Competition Council, decision n°07-D-07 dated March 8, 2007

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[13] Cf. aforementioned decision of the Commercial Chamber of the *Cour de Cassation*, September 24, 2013, n°12-14344

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