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EU Competition Law Newsletter

Highlights

- *Guess* What: The Commission Strikes Down Online Restrictions in Distribution Agreements
- *Servier*: The General Court Gets Tough on the Commission's Economic Assessment
- The Court of Justice Sets a High Bar for Seeking Damages Against the Commission for Protracted Judicial Proceedings

Guess What: The Commission Strikes Down Online Restrictions in Distribution Agreements

On December 17, 2018, the European Commission ("Commission") fined Guess, a branded clothing company, €40 million for breaching Article 101 TFEU by limiting cross-border sales through restrictions contained in its distribution agreements.[1] The decision stems from the Commission's e-commerce investigation and has important implications for business: it reaffirms the Commission's current enforcement focus on distribution agreements in the online sector following the 2018 Consumer Electronics[2] decisions, clarifies the scope of prohibited online (advertising) restrictions, expands on the scope of the 2018 EU Geo-Blocking Regulation, and provides guidance for potential leniency in non-cartel cases, a rare phenomenon at EU level thus far.

Case Summary

The Commission concluded that Guess' wholesale and retail agreements with the members of its selective distribution network restricted competition by preventing them from: (i) bidding on Guess brand names and trademarks as key words for online search advertising; (ii) selling online absent a prior authorization from Guess; (iii) selling to consumers located outside allocated territories; (iv) cross-selling among authorized wholesalers and retailers; and (v) setting independent retail prices for Guess products. These restrictions resulted in increased online sales through Guess' website at the expense of its wholesalers/retailers.

[1] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018.

[2] *Asus* (Case COMP/AT.40465), *Denon & Marantz* (Case COMP/AT.40469), *Philips* (Case COMP/AT.40181), and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018.

Implications

Online sales restrictions. The decision is in line with the Court of Justice's reasoning in *Coty* that a specific contractual clause within a selective distribution agreement for luxury goods is presumed lawful if it has a legitimate objective (such as the protection of the luxury image of the brand), is laid down uniformly for all potential resellers, applies in a non-discriminatory fashion, and does not go beyond what is necessary.[3] The *Guess* decision clarifies that a company is not able to rely on the *Coty* reasoning if it requires its retailers to obtain authorization for online sales through their proprietary websites without any justification or quality criteria governing the authorization process: Guess retained full discretion in authorizing its wholesalers/retailers' online sales.

Online search advertising restrictions. This is the first instance where concerns over online search advertising restrictions expressed in the final report of the Commission's e-commerce sector inquiry transpired into an infringement decision at EU-level.[4] It follows similar previous findings by the German Bundeskartellamt (2015)[5] and the U.S. Federal Trade Commission (2018[6]). Specifically, the *Guess* decision establishes that an absolute ban on the use of trademarks and brand names for online sales advertising, which prevents authorized retailers from bidding on these key words at online advertising auctions, and therefore presently reserving this privilege to Guess only,[7] constitutes a *by-object* restriction of competition.

Geo-blocking. The recently adopted Geo-Blocking Regulation prevents a supplier from contractually prohibiting a retailer to respond to unsolicited customer requests (so called *passive* sales) although it does not prohibit restrictions of *active* sales.[8] Moreover, Article 4(c) of the Vertical Block Exemption Regulation[9] classifies restrictions of active or passive sales to end-users by members of a selective distribution network as hardcore restrictions rendering the block exemption inapplicable. The *Guess* decision complements the Geo-Blocking Regulation, reaffirming that restrictions on cross-border

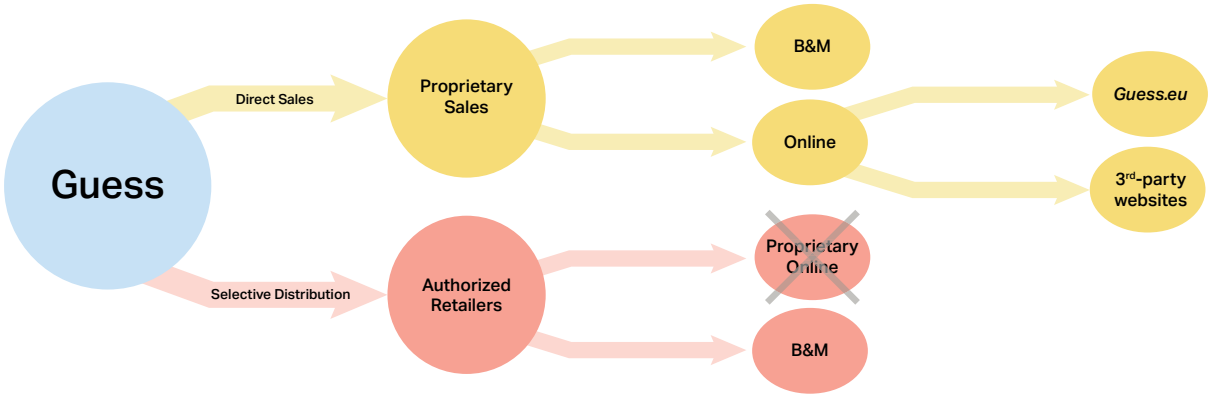

Figure 1 : Guess distribution networks

[3] *Coty Germany* (Case C-230/16) EU:C:2017:941.

[4] Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, COM/2017/0229 final of May 10, 2017.

[5] Bundeskartellamt decision of August 26, 2015 in Case B2-98/11 – *ASICS* found that prohibiting the use of brand names in paid search engine advertising constitutes a hardcore restriction.

[6] U.S. Federal Trade Commission decision of November 14, 2018 in the Matter of *1-800 Contacts* (Docket No. 9372) found that agreements preventing retailers from bidding on keywords harmed competition by artificially reducing the prices the brand-owner would pay for online advertising and the quality of the search engine results delivered to customers.

[7] Increased competition at online advertising auctions increases the cost-per-click of the advertisements, thereby increasing advertising prices.

[8] Regulation (EU) 2018/302 of the European Parliament and of the Council of February 28, 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 LI 60/1 ("Geo-Blocking Regulation").

[9] Regulation (EU) 330/2010 of the European Commission 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, OJ 2010 L 102/1 ("Vertical Block Exemption Regulation").

sales or advertising to end-users (*active* sales) within a selective distribution network may infringe competition rules, if the restrictions are incompatible with the *Coty* standards.

Retail price maintenance ("RPM"). The Commission found that the RPM clauses imposed on Guess' authorized retailers further impaired cross-border sales. In line with precedent, the Commission held that RPM clauses in the context of selective distribution networks constitute a *by-object* infringement.

Leniency in non-cartel cases. The *Guess* decision marks the third instance in non-cartel cases where the Commission reduced a company's fine as a result of its cooperation pursuant to paragraph 37 of the Fining Guidelines,[10] following the 2016 *ARA*[11] and 2018 Consumer Electronics[12] decisions. And it is the first publicly reported instance in a non-cartel case where a company decided to cooperate with the Commission even before the issuance of a Statement of Objections ("SO"), affording the Commission increased efficiency and added value. Guess benefited in kind—obtaining a 50% fine reduction (from €80 million to approximately €40 million). This is a notable application of leniency principles in so far as the Commission's well-known Leniency Notice only applies to cartels. The Commission also published a Fact Sheet outlining a road map for leniency in non-cartel cases, which is addressed in more detail in the News section below.[13]

Conclusion

The *Guess* decision confirms that the creation of the digital single market continues to feature prominently on the Commission's agenda. Parties should carefully review their distribution agreements to ensure that counterparties are not limited in their ability to sell or effectively advertise online, or there is at least a carefully crafted justification along the principles pronounced in *Coty*.

Servier: The General Court Gets Tough on the Commission's Economic Assessment

On December 12, 2018, the General Court partially annulled a Commission decision finding that the Servier Group breached Article 101 and 102 TFEU by delaying generic entry in the perindopril[14] market through entering into reverse payment patent settlement agreements with five generic manufacturers and acquiring a competitor's technology to produce perindopril.[15] The judgment is a rare case of a full annulment of the Commission's Article 102 TFEU dominance assessment and the first annulment of a dominance case on market definition grounds since *Continental Can* in 1973. Moreover, the General Court's distinction between side-deals and licensing agreements has important implications for patent settlements in practice.[16]

Specifically, the General Court found that by placing "excessive" importance on price competition at retail level, the Commission's demand-side assessment disregarded the importance of prescriptions made by medical practitioners, which are primarily based on therapeutic use and not cost. As a result, the

[10] Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation No. 1/2003, OJ 2006 C 210/2 ("Fining Guidelines").

[11] *ARA Foreclosure* (Case COMP/AT.39759), Commission decision of September 20, 2016.

[12] *Asus* (Case COMP/AT.40465), *Denon & Marantz* (Case COMP/AT.40469), *Philips* (Case COMP/AT.40181), and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018.

[13] *See* Commission Fact Sheet on Cooperation – FAQ.

[14] Perindopril is an angiotensin converting enzyme ("ACE") inhibitor product, used for the treatment of cardiovascular diseases such as hypertension.

[15] *Servier and Others v. Commission* (Case T-691/14) EU:T:2018:922 and *Perindopril (Servier)* (Case COMP/AT.39612), Commission decision of July 9, 2014. The Commission also imposed additional fines on generic manufacturers for their participation in the patent settlement agreements.

[16] The judgment is issued ahead of the Court of Justice's ruling in *Lundbeck* (*see Lundbeck v. Commission* (Case C-591/16 P)) and a referral from the UK Competition Appeal Tribunal in connection with appeals by GlaxoSmithKline and five generic companies (*see Generics (UK) and Others* (Case C-307/18)).

Commission erred in defining a separate market for perindopril based on active substances (ATC-5) as it disregarded other ACE inhibitors with similar therapeutic use, in turn overstating market shares. This has vitiated the Commission's finding that Servier's perindopril enjoyed a dominant position. It is a notable application of the Court of Justice's ruling in *Intel*,[17] which called for a stricter approach in the review of the Commission's economic analysis. As a result, the General Court voided the Commission's finding that Servier held a dominant position, in turn annulling the entire dominance assessment and revoking the €41 million fine separately imposed for the Article 102 TFEU violation in relation to Servier's agreements with the generics as well as its technology acquisition agreement.

The judgment also notably expands on *Lundbeck*[18] by clarifying what type of ancillary agreements would not be deemed to disguise a reverse payment patent settlement arrangement. The General Court distinguished licensing agreements from "side-deals" and highlighted that licensing agreements may only indicate an incentive to refrain from competition if the royalty clauses go beyond existing market conditions. In contrast, side deals were defined as ancillary commercial agreements legally or temporally connected to the patent settlement scheme that may be used to conceal value transfers. The General Court found that the Commission had failed to establish that the licensing agreements between Servier and Krka went beyond market conditions, which led to the annulment of the Commission's decision related to these agreements.[19]

Parties should, therefore, carefully consider the type and format of agreements entered into with competing generics, in particular in the patent dispute context.

The Court of Justice Sets a High Bar for Seeking Damages Against the Commission for Protracted Judicial Proceedings

On December 13, 2018, the Court of Justice dismissed Gascogne's claim for damages suffered as a result of the payment of bank guarantee charges and associated interest incurred due to the excessive duration of the General Court proceedings.[20]

It is common for companies not to pay a Commission fine pending appeal before the EU Courts and instead opt for a bank guarantee, which is customarily subject to fees and interest, that ensures the payment will be made upon final adjudication. As reported in our November 2018 newsletter, the standard of review in non-contractual liability claims against the EU institutions is high.[21] This judgment demonstrates the parties may struggle to obtain damages even when the EU institutions have breached their right to an effective remedy.

In November 2011, the General Court dismissed Gascogne's action for annulment against a Commission infringement decision in the industrial bag cartel case,[22] five years after Gascogne brought the appeal.[23] The Court of Justice upheld the General Court judgment

[17] *Intel v. Commission* (Case C-413/14 P) EU:C:2017:632.

[18] *Lundbeck v. Commission* (Case T-472/13) EU:T:2016:449.

[19] The General Court set aside the Commission's decision relating to the licensing agreements between Servier and Krka.

[20] *European Union v. Gascogne Sack Deutschland and Gascogne* (Joined Cases C-138/17 P and C-146/17 P) EU:C:2018:1013.

[21] EU Competition Law Newsletter, November 2018.

[22] *Industrial Bags* (Case COMP/AT.38354), Commission decision of November 30, 2005.

[23] *Groupe Gascogne v. Commission* (Case T-72/06) EU:T:2011:671 and *Sachsa Verpackung v. Commission* (Case T-79/06) EU:T:2011:674.

on substance but acknowledged the excessive duration of the judicial proceedings.[24] Interestingly, in an attempt to address concerns about the length of proceedings, the EU subsequently decided to substantially increase the number of judges at the General Court.[25] Gascogne brought an action against the EU under Article 268 TFEU[26] seeking approximately €4 million in material damages (reflecting additional bank guarantee costs incurred, interest, and loss on account of delayed entry of new investors due to uncertainty surrounding the judgment) and non-material damages (reflecting reputational harm, disruption to the business, and anxiety and inconvenience experienced by the members of the company's executive bodies and employees). The General Court recognized approximately €50,000 in material damages consisting in the payment of additional bank guarantee charges and €10,000 in non-material damages.[27]

On appeal, the Court of Justice revoked the order for material damages.[28] The assessment focused on the *causal link* behind the material harm required for non-contractual liability under Article 340 TFEU. The Court of Justice found the determining cause was the company's discretionary choice to maintain the bank guarantee even after it became apparent that the proceedings would exceed the normal duration of actions for annulment in competition matters. This is a particularly high bar because the applicant was unlikely in a position to cancel the bank guarantee while it did not know the outcome of the appeal and while it was unclear that the duration of the proceedings would eventually be found to be excessive.

In light of the Court of Justice's ruling, parties will need to make a judgment call on whether to cancel a bank guarantee at a particular point of the proceedings or potentially bear the additional costs. This should also factor into parties' selection between a bank guarantee or a fine payment in full.

News

Commission Updates

The Commission Tests Machine Learning in *Thales/Gemalto* Merger Review

Thales/Gemalto,[29] conditionally approved in Phase II on December 11, 2018, marks the first case where the Commission accepted the use of technology-assisted review ("TAR") to help with the Commission's extensive requests for internal documents in a merger case. TAR uses machine learning capabilities to assess the relevance of documents and undertakes a legal privilege review to determine responsive documents to be produced to the Commission. Specifically, TAR relies on iterative human review of sample sets of data—these are used to train the TAR model to replicate human logic to recognize relevant documents. TAR is already used extensively in the United States and is intended to make the document collection and review process more time and cost efficient. It is expected that the Commission's initial experience with TAR may also inform its contemplated guidelines on the treatment of internal documents in merger reviews.

[24] *Gascogne Sack Deutschland v. Commission* (Case C-40/12 P) EU:C:2013:768, para. 102 and *Groupe Gascogne v. Commission* (Case C-58/12 P) EU:C:2013:770, para. 96. The Court of Justice found that the General Court had breached the second paragraph of Article 47 of the Charter in that it failed to comply with the requirement that it adjudicate within a reasonable time.

[25] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of December 16, 2015 amending Protocol No. 3 on the Statute of the Court of Justice of the European Union, OJ 2015 L 341/14.

[26] Article 268 TFEU attributes jurisdiction to the Court of Justice in disputes relating to compensation for damage for non-contractual liability.

[27] *Gascogne Sack Deutschland and Gascogne v. European Union* (Case T-577/14) EU:T:2017:1.

[28] *European Union v. Gascogne Sack Deutschland and Gascogne* (Joined Cases C-138/17 P and C-146/17 P) EU:C:2018:1013.

[29] *Thales/Gemalto* (Case COMP/M.8797), Commission decision of December 11, 2018.

Visa and MasterCard Offer Commitments and the Commission Imposes a Fine on MasterCard

In 2015, the Commission sent a Statement of Objections to MasterCard outlining two forms of potentially anticompetitive conduct.

The first conduct related to concerns that high interchange fees ("MIFs") for transactions using cards issued outside the EEA may increase prices for European retailers. In 2017, the Commission expanded its investigation to include Visa. The Commission has previously investigated MIFs applied to cross-border transactions within the EU, and EU legislation has been passed that explicitly caps MIFs for EU card payments. The legislation does not, however, apply to cards issued outside the EU that are being used within the EU, and which, therefore, incur inter-regional MIFs.

Regarding this first conduct, Visa and MasterCard proposed commitments on December 4, 2018 in an attempt to address the Commission's concerns. They have offered to cap card payment fees for brick-and-mortar outlets at 0.3% and online outlets (where the merchant's fixed place of business is in the EEA, irrespective of websites' locations) at 1.5% reflecting higher fraud risk. This is somewhat surprising considering that there have been calls for a universal fee cap of 0.3% for all cards and sales channels. That said, the proposed commitments remain subject to the outcome of the Commission's pending market test.

The second conduct related to concerns that MasterCard was restricting the ability of retailers to shop around within the EEA for different banks to handle their payments (so-called "cross-border acquiring"). Until 2015, when EU legislation introduced caps on MIFs, there was significant variation in MIFs across borders in the EEA. MasterCard's rules required retailers' banks (so-called "acquiring banks") to apply the MIFs of the country in which the retailer was located. This had the effect of limiting cross-border competition between acquiring banks, particularly affecting retailers in countries with higher MIFs. On January 22, 2019, the Commission fined MasterCard €570 million for that conduct.[30] MasterCard benefited from a 10% fine reduction for cooperating with the Commission's investigation. This indicates the Commission's willingness to apply leniency principles beyond cartel cases, as highlighted in the recent *Guess* decision and the ensuing Fact Sheet addressed below.[31]

The Commission Diverges from U.S. Antitrust Regulators by Demanding Remedies in Energizer's Acquisition of Spectrum's Battery Business

On December 11, 2018, the Commission conditionally approved Energizer's acquisition of Spectrum's batteries and portable lighting business after a Phase I review.[32] Energizer and Spectrum are two of the world's largest manufacturers and suppliers of consumer batteries. The transaction was unconditionally approved in the U.S. despite relatively high market shares of at least 40%. Conversely, the parties faced an uphill battle in the EU, where the Commission was concerned that the transaction would create the largest (or sometimes the only) supplier in several national markets in the EEA including for household batteries, portable battery chargers, and hearing aids (without disclosing market shares at this stage).

To alleviate the Commission's concerns, Energizer offered: (i) to divest Spectrum's Varta business, which sells household and specialty batteries, chargers, and portable lighting in the EMEA region; and (ii) to enter into an exclusive supply and license agreement with the purchaser of the Varta business for the sale of hearing aid batteries (under Spectrum's Rayovac brand) to mass retailers in EMEA, enabling the purchaser to develop its own hearing aid battery business through a re-branding strategy.

[30] *MasterCard* (Case COMP/AT.40049), Commission decision of January 22, 2019.

[31] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018. *See also* the Commission's Fact Sheet outlining a road map for leniency in non-cartel cases.

[32] *Energizer/Spectrum Brands (Battery and Portable Lighting Business)* (Case COMP/M.8988), Commission decision of December 11, 2018.

The Commission Publishes a Road Map for Leniency in Non-Cartel Cases

On December 17, 2018, the Commission published a Fact Sheet outlining a road map for leniency in non-cartel cases based on its experience in the recent *Guess* decision,[33] which resulted in a 50% fine reduction due to Guess' cooperation beyond its legal obligation.[34] After the issuance of the Fact Sheet, the Commission also applied leniency (10% discount) in the *MasterCard* decision.[35]

The Fact Sheet highlights that apart from the typical substantive aspects of cooperation (including acknowledgement of the infringement and provision of significant added value), procedural aspects, such as the timing of cooperation, play an important role, too: the Commission's preference for an early resolution may yield larger fine reductions if undertakings cooperate prior to the issuing of an SO. Reductions may also be awarded for cooperation on remedies, provided the company acknowledges that the proposed remedy is suitable and proportionate to effectively terminate the infringement, as evidenced by the 30% reduction awarded to ARA in 2016.[36]

Court Updates

The General Court Clarifies that Liability May Follow the Assets in Case of "Bad Faith" Asset Restructurings

On December 6, 2018, the General Court dismissed an appeal against a Commission infringement decision in the retail food packaging cartel[37] that imposed a joint fine on Coveris Rigid ("Coveris"), the direct cartel participant, and its parent company, Huhtamäki Oyj.[38]

Coveris claimed that a third-party acquirer of the assets involved in the infringement should be held liable instead. The General Court recalled that fines are generally imposed under the principle of personal liability. Conversely, liability will follow the assets by virtue of the principle of economic continuity solely in "exceptional circumstances," notably where the legal entity that owned the assets at the time of the infringement ceased to exist in law or ceased all economic activities (neither of which was the case here).[39] This judgment clarifies (*obiter dicta*) that "exceptional circumstances" could also entail a scenario where the previous and new independent owner structured the asset transfer in "bad faith" in an attempt to avoid paying the fine. In such case, the liability would follow the assets transferred to a new independent owner even though the legal entity involved in the infringement still exists.[40]

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[33] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018.

[34] Prior to the Guess decision, the Commission had previously rewarded cooperation in non-cartel cases in the 2016 *ARA* and 2018 *Consumer Electronics* decisions (see *ARA Foreclosure* (Case COMP/AT.39759), Commission decision of September 20, 2016; and *Asus* (Case COMP/AT.40465), *Denon & Marantz* (Case COMP/AT.40469), *Philips* (Case COMP/AT.40181), and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018).

[35] *MasterCard* (Case COMP/AT.40049), Commission decision of January 22, 2019.

[36] *ARA Foreclosure* (Case COMP/AT.39759), Commission decision of September 20, 2016.

[37] *Coveris Rigid France v. Commission* (Case T-531/15) EU:T:2018:885.

[38] *Retail Food Packaging* (Case COMP/AT.39563), Commission decision of June 24, 2015.

[39] *Commission v. Anic Partecipazioni* (Case C-42/92 P) EU:C:1999:356, para. 145; *Aalborg Portland and Others v. Commission* (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P) EU:C:2002:337, para. 359; and *ETI and Others* (Case C-280/06) EU:C:2007:775, para. 40.

[40] A similar finding has previously been made in relation to intra-group asset restructurings. The Court of Justice held that the economic continuity principle could be applied even if the undertaking at breach still exists where that undertaking and the entity to which its economic activities were transferred had been under control of the same person (*see Commission v. Parker Hannifin Manufacturing and Parker Hannifin* (Case C-434/13 P) EU:C:2014:2456, para. 41 and *ETI and Others* (Case C-280/06) EU:C:2007:775, paras. 48–49).

Upcoming Events

Date	Conference	Organizers	Location
January 29 to 30	Competition Law Nordic	Knect365	Stockholm
January 31 to February 1	14th Annual Conference of the GCLC: Remedies in EU Competition Law: Substance, Process & Policy	GCLC	Brussels
February 1 to 2	GCR Live 8th Annual Antitrust Law Leaders Forum	GCR	Miami
February 14	Dial "M" for Merger: Telecoms Update 2018	Brussels Matters	Brussels
February 28	GCR Live Pharmaceuticals	GCR	Washington, D.C.

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