

CASE CARD | 16 May 2022

Guess (AT.40428)

By object restrictions imposed within a selective distribution network

1. CASE SUMMARY

A. Summary of facts

Guess, a US-based company active in the clothing, shoes and accessories sector, employed a selective distribution system at the wholesale and retail level of trade. It also sold its products online directly through its own online shop and as a seller on online marketplaces.

Guess assigned a specific territory to each reseller and restricted their online and offline sales. The Commission identified five 'by object' restrictions:

- Online search advertising restrictions: Guess banned retailers from using or bidding on Guess brand names and trademarks as keywords in Google AdWords. This restriction was not included in the distribution agreements but was systematically applied whenever an authorized retailer asked for permission – as was required – to use any of the Guess brand names or trademarks as keywords in Google AdWords.

In so doing, Guess sought to maximize traffic to its own website and minimize its own advertisement costs. This restricted the 'findability' and ultimately the viability of the online retailers in Guess' selective distribution system;

- Online sales restrictions: Guess favoured its own online shop by limiting the number of independent operators selling Guess products online. Authorized retailers were contractually obliged to first obtain explicit authorization from Guess to conduct online sales. In addition, Guess did not specify quality criteria for online sales and had full discretion in deciding whether retailers were allowed to sell online.

The primary objective was to protect Guess' own online sales activities and to limit intra-brand competition by authorized retailers;

- Restrictions on cross-selling: Guess prevented wholesalers and retailers from cross-selling to each other by imposing outright sales restrictions and applying disincentives to cross-sales. This was done through different types of clauses in the respective wholesale and retail agreements, for example:
 - a restriction on wholesalers to promote or advertise outside their allocated territory, in some cases subject to termination of the agreement;
 - a minimum purchase obligation imposed on wholesalers, with purchases of Guess products from other



authorized members not being taken into account (i.e. only purchases from Guess were taken into account);

- an obligation for wholesalers to ensure at their own expense that the products sold to their retail customers “remain” within the “territory”;
 - restrictions on retailers on purchases across the selective distribution network, only allowing sales to end users; and
 - restrictions on sales by retail store sublicensees to non-retail customers, only allowing sales to end users.
- Restrictions on cross-border sales to end users: Guess imposed restrictions on active and passive sales by retailers to end users located outside their allocated territory. These restrictions were typically included in the retail store sublicense agreements.
 - Resale price maintenance: Guess imposed minimum prices by communicating a “recommended pricelist” with which retailers had to comply. Guess monitored its retailers’ prices and tried to influence them to stay in line with the ‘recommended’ resale prices. The objective was to have uniform retail prices in specific markets in order to make “the product image uniform on the market”.

In light of the above, Guess effectively restricted intra-brand competition and partitioned national markets contrary to Article 101(1) TFEU. Guess’ conduct did not qualify for an exemption under either Regulation 330/2010 or Article 101(3) TFEU.

The decision relates to practices in 27 EEA countries, excluding France, Iceland, Portugal and Spain. The infringement lasted nearly three years. It started on 1 January 2014 and ended on 31 October 2017.

Guess was fined EUR 39,821,000, after receiving a reduction of 50% for its cooperation.

B. Legal analysis

B.1 - Framework of analysis – selective distribution

The Commission first reiterates the two distinctive features of selective distribution before confirming that Guess’ selective distribution system fulfils both criteria:

- Guess sells the products only to distributors selected on the basis of specified selection criteria; and
- the selected distributors are prohibited from selling the contract products to other distributors not belonging to the selective distribution network. (§112)

B.2 - Article 101(1) TFEU – object restrictions

- Online search advertising restrictions: Guess claimed that the restriction served the legitimate objective of protecting Guess' brand image. The Commission refuted this claim and concluded that the restriction had as its object to reduce the ability of authorized retailers to advertise and ultimately to sell the contract products to customers, in particular outside the contractual territory or area of activity, and to limit intra-brand competition. (§114-125)
- Online sales restrictions: The Commission found that Guess sought to protect its online sales activities from intra-brand competition and to limit the retailers' ability to sell outside their territory and concluded that this conduct constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU. (§127-131)
- Restrictions on cross-selling: The Commission reiterated settled case law that a restriction of sales between authorized distributors constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU, and concluded that the restrictions on cross-selling imposed by Guess restricted competition by object. (§132-134)
- Restrictions on cross-border sales to end users: The Commission found that these restrictions were capable of creating, maintaining or restoring national divisions in trade between Member States and therefore it concluded, in accordance with settled case law, that they restricted competition by object within the meaning of Article 101(1) TFEU. (§135)
- Resale price maintenance: The Commission reiterated that resale price maintenance restricts competition by object and goes beyond the requirements pursued by a selective distribution system. The restrictions imposed on resellers were accordingly found to restrict competition by object within the meaning of Article 101(1) TFEU. (§136-137)

B.3 - Article 101(3) TFEU – no block or individual exemption

In view of the hardcore nature of the restrictions, Guess' conduct did not qualify either for a block exemption under Regulation 330/2010 or an individual exemption under Article 101(3) TFEU. (§157-164)

B.4 - Fines – vertical restraints less harmful and 50% reduction for cooperation

When determining the level of the fine, the Commission noted that vertical agreements and concerted practices are generally less damaging to competition than horizontal agreements. (§193)

The Commission granted a fine reduction of 50% for Guess' cooperation. Guess cooperated beyond its obligation to do so by:

- revealing a restriction of competition which was not yet known to the Commission;

- providing additional evidence representing significant added value;
- acknowledging the infringement of Article 101 TFEU and Article 53 of the EEA Agreement; and
- waiving certain procedural rights. (§199-200)

2. QUOTES

"By severely curtailing the use of online search advertising by its authorised retailers, Guess limited the "findability" and ultimately the viability of retailers selling its products online. While Guess' retailers were – subject to the authorisation requirement – in principle able to sell online, they were deprived of the ability to effectively generate traffic to their own websites by means of online search advertising. This restricted their ability to sell the contractual products to customers, in particular outside the contractual territory or area of activity.

An exclusive right reserved for Guess Europe to use the Guess brand names and trademarks in online search advertising provided Guess with a considerable competitive advantage over its retailers with whom it competed online and restricted intra-brand competition.

Another aim of the policy was to reduce advertising costs. In this regard the Court of Justice has held, in a judgement related to trademarks, that internet advertising using a referencing service on the basis of keywords corresponding to another person's trademark(s) constitutes a practice inherent to competition as it offers internet users alternatives to the trademark proprietor's goods or services even if it leads to the trademark proprietor having to intensify its advertising in order to maintain or enhance its profile with consumers. In the light of this reasoning, it cannot be said that the online search advertising restriction constitutes an aspect of competition that is compatible with Article 101(1) of the Treaty." (§120-122)

"This position has been confirmed by the Court of Justice in Pierre Fabre. In this judgement, the Court held that a contractual provision prohibiting de facto the internet as a method of marketing amounts to a restriction of competition by object within the meaning of Article 101(1) of the Treaty. It has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system." (§128)

"[...] the written authorisation requirement was not linked to any specified quality criteria. In line with Guess' e-commerce strategy, which aimed at promoting its own website (online shop), that requirement had as its main object to restrict sales on authorised retailers' websites. It protected Guess' own online sales activities from intra-brand competition by its authorised retailers and facilitated market partitioning as it limited the authorised retailers' ability to sell the contract products to customers, in particular outside their authorised area of activity." (§131)

"[Some] contractual provisions [...] aimed at restricting sales of Guess products among members of the selective



distribution network, albeit in different ways. Some of the provisions prevented solicitation of customers outside the allocated territory (active sales restrictions). Other provisions restricted unsolicited sales to other network members and prevented or provided disincentives for purchases from other network members (passive sales restrictions). All cross-selling restrictions aimed at ensuring that only Guess Europe and/or the appointed national wholesaler could supply the retailers operating on a national market and that wholesalers purchased only from Guess Europe and did not resell the contract products to other wholesalers or retailers outside their allocated territory. These restrictions mutually reinforced each other." (§132)

"[Some] provisions [...] individually and in combination restrict active and passive sales by members of a selective distributions system to end users located outside the allocated territory of those members and, therefore, are capable of creating, maintaining or restoring national divisions in trade between Member States so as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of an internal market. In accordance with established case-law, those provisions restrict competition by object with the meaning of Article 101(1) of the Treaty." (§135)

"The Court of Justice has held on several occasions that agreements that impose upon retailers' minimum or fixed retail prices, thereby restricting the ability of those retailers to determine their resale prices independently, restrict competition by object within the meaning of Article 101(1) of the Treaty. More specifically, with regard to selective distribution agreements, the Court has held that in a selective distribution system, which by its very nature inherently restricts price competition, the imposition of fixed or minimum sales prices goes beyond the requirements of such a distribution system." (§136)

"In order to reflect that [Guess has] effectively cooperated with the Commission beyond [its] legal obligation to do so, the fine that would otherwise have been imposed should, for the following reasons and pursuant to point 37 of the Guidelines on fines, be reduced by 50%." (§199)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Regulation 330/2010
- Vertical Guidelines
- Article 53 EEA Agreement

4. RELEVANT LITERATURE

For more guidance on territorial and customer restrictions in selective distribution, see [F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018](#), §9.14 and following. For RPM, see §6.50 and following.

5. PRACTICAL SIGNIFICANCE

Guess is a follow-on decision to the 2017 Commission's e-commerce sector inquiry. It shows a renewed interest of the Commission in vertical restraints. Given the variety of infringements, it also gives a good overview of selective distribution under EU competition law. Finally, the decision provides guidance about the cooperation procedure in non-cartel cases, which the Commission set out in a follow up [factsheet](#) pertaining to the decision. In that respect, Guess is a precedent decision.