

Dutch Court Affirms Ban on Nonauthorized Online Resellers



IN SHORT

The Ruling: On October 4, 2017, the Amsterdam District Court upheld Nike's ban on authorized distributors selling Nike products on the online platforms of unauthorized resellers.

The Result: Under this Dutch ruling, a luxury goods supplier's ban on sales by authorized retailers on unauthorized online marketplaces is deemed consistent with Article 101(1) TFEU when satisfying certain criteria. In particular, protecting brand image is a valid justification.

Looking Ahead: The controversy continues over prohibiting distributors from such online sales, pending a ruling by the EU's highest court in the *Coty* case.

On October 4, 2017, Nike prevailed before the Amsterdam District Court in its ban on authorized distributors selling its products on the online platforms of nonauthorized resellers. The court ruled that Nike's selective distribution system in Europe did not contravene Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits agreements restricting competition.

This national-level ruling is of particular interest, as bans or restrictions on web sales are currently under scrutiny in Europe, including by the Court of Justice of the European Union ("CJEU") in the pending *Coty* case (Case C-230/16) and the European Commission (as previously reported in our June 2017 *Commentary* on the [Commission's findings in the e-commerce sector inquiry](#)).

The District Court's ruling arose out of a dispute between Nike European Operations Netherlands ("NEON," Nike's subsidiary responsible for distributing Nike products in Europe) and Action Sport, a former authorized distributor of Nike products based in Italy.

Action Sport had ordered Nike products from NEON for resale on Amazon, which is not a NEON-authorized distributor. This violated NEON's Selective Retailer Distribution Policy, which prohibited, among others, authorized retailers from selling products on websites of sellers that were not NEON-authorized retailers. As NEON required retailers to comply with its policy terms in order to become or remain NEON customers, NEON terminated its commercial relationship with Action Sport.

Action Sport argued before the District Court that NEON's termination of the commercial relationship was unlawful, since the policy itself was void under Article 101(1) TFEU.

To establish the policy's compatibility with Article 101(1) TFEU, the court examined whether: (i) NEON chose resellers on the basis of objective criteria of a qualitative nature; (ii) the nature of the product necessitated a selective distribution system; and (iii) the criteria laid down did not go beyond what is necessary for a selective scheme.

The District Court held that all three conditions were satisfied. NEON had objective technical and quality requirements that were not applied in a discriminatory fashion. The court further found that Nike products must be considered luxury products and that the policy aimed at maintaining the brand image.

Most importantly, regarding the third requirement—the necessity of a selective scheme and the potential exclusion of nonauthorized online platforms—the District Court referred extensively to the recent Opinion of Advocate General Wahl of July 26, 2017, in the currently pending *Coty* case.

Advocate General Wahl indicated that a luxury goods supplier's ban on sales by authorized retailers on third-party online marketplaces is consistent with Article 101(1) TFEU. While the Opinion is not binding and the CJEU has not yet ruled in *Coty*, the District Court endorsed Advocate General Wahl's views and held that NEON's policy did not contravene Article 101(1) TFEU.

The District Court's findings are also in line with the Dutch government's intervention before the CJEU in *Coty*, in which it contended that a ban that resembled NEON's should not be prohibited under Article 101(1) TFEU. The District Court's ruling, therefore, signals that the Dutch courts are favorably disposed toward the Dutch government's policy stance in support of selective distribution practices that restrict the use of third parties for online sales.



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[Read the Amsterdam District Court's October 4, 2017 judgment.](#)

THREE KEY TAKEAWAYS

1. EU and national developments demonstrate support for luxury goods suppliers that seek to control online sales channels, under certain conditions.
2. In finding Nike's policy compatible with Article 101(1) TFEU, the District Court determined that the policy satisfied all three of the following criteria: (i) NEON chose resellers on the basis of objective criteria of a qualitative nature; (ii) the nature of the product necessitated a selective distribution system; and (iii) the criteria laid down did not go beyond what is necessary for a selective scheme.
3. Whether this national-level ruling will stand will depend on the outcome of the pending proceedings before the CJEU, which has yet to decide on whether to endorse the Opinion in *Coty* in favor of these bans. We will be tracking and reporting on these developments.

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