COMPETITION FORUM
LAW & ECONOMICS

February 19, 2025

Luxottica and the Limits of Selective Distribution: An Analysis of the Paris Court of Appeal's Judgment on Price Restrictions and Online Sales Prohibition

Chama Ould Abbou

To quote this paper: **C. OULD ABBOU, "Luxottica and the Limits of Selective Distribution: An Analysis of the Paris Court of Appeal's Judgment on Price Restrictions and Online Sales Prohibition",** ***Competition Forum,*** **2025, n° 0065 https://competition-forum.com.**

Resume: *In a judgment dated September 15, 2023, the Paris Court of Appeal upheld Decision No. 21-D-20 of the French Competition Authority, which had fined Luxottica for implementing two anticompetitive practices between 1999 and 2014. First, the Court confirmed that Luxottica had established a vertical price maintenance system through recommended prices accompanied by monitoring and pressure mechanisms. Second, it maintained that Luxottica had illegally prohibited online sales in its selective distribution agreements. The Court rejected Luxottica's arguments regarding brand image protection and the specific nature of optical products, while adopting a nuanced approach to the analysis of online sales restrictions. This case is particularly noteworthy as it reinforces established jurisprudence on resale price maintenance while contributing to the evolving framework for analyzing online sales restrictions in selective distribution networks.*

In this case[1], the Luxottica Group, now Essilor Luxottica, the global and European leader in the eyewear and eyeglass frames industry, filed an appeal before the Paris Court of Appeal against Decision No. 21-D-20 of July 22, 2021[2], issued by the French Competition Authority and the penalty imposed for implementing anticompetitive practices in the sector. These practices consisted of, firstly, imposing restrictions on distributors' pricing freedom, and secondly, implementing prohibitions on online sales of their products.

The Authority found that between 2005 and 2014, Luxottica implemented a system of resale price maintenance by disseminating 'recommended prices' to its distributors and exerting pressure to maintain specific retail price levels.

This practice was enforced through selective distribution agreements that effectively restricted distributors' ability to offer discounts and promotions during sales periods. Luxottica established a monitoring system and imposed retaliatory measures against non-compliant distributors,

[1] Paris Court of Appeal, 12 Dec. 2024, 21/16134, Luxottica

[2] FCA, July 22, 2021, Decision No. 21-D-20

occasionally enlisting other distributors to help enforce the pricing network.

Additionally, from 1999 to 2014, Luxottica incorporated clauses in its selective distribution agreements – some of which were embedded in brand licensing agreements with luxury brands – that expressly prohibited the online distribution of these products. These practices were characterized as restrictions by object and deemed ineligible for exemption under either block exemption regulations or individual exemption provisions.

As a result of these infringements of Article 101 of the Treaty on the Functioning of the European Union (TFEU), the Authority's sanctions were twofold: it imposed a fine of €124,477,000 on Luxottica France SASU as the direct perpetrator of the practices, and on Luxottica Group SpA in its capacity as parent company, for resale price maintenance practices. The online distribution restrictions resulted in a €697,000 fine.

Following these sanctions, Luxottica appealed the decision, requesting the Paris Court of Appeal to overturn the decision on the grounds that the conditions of Article 101(1) TFEU and Article L.420-1 of the French Commercial Code were not satisfied. Subsidiarily, Luxottica sought a preliminary reference to the Court of Justice of the European Union (CJEU) regarding whether an agreement imposing a 'certain price level' without setting a minimum or maximum price could qualify as a restriction by object. Finally, in the alternative, Luxottica requested a reduction of the imposed fines.

Two central legal issues emerged for the Court's consideration, which frame the substantive analysis of this case.

First, one issue concerns the applicability of the prohibition of agreements to a practice that does not seek to impose a fixed or minimum resale price, but rather 'recommended prices' and to control commercial operations to protect brand image, particularly that of luxury brands.

Second, the other issue is whether the prohibition of online sales imposed in selective distribution agreements can be justified by an uncertain legal and economic context, or by the nature and characteristics of the products involved.

In addressing these issues, the Paris Court of Appeal rejected the appeal in its entirety. Regarding the practice aimed at restricting distributors' pricing freedom, the Court found sufficient evidence of an agreement between the parties, confirmed the scope and purpose of the agreement as constituting a generalized vertical agreement across the entire network, and classified the practice as restrictive by object, ineligible for either categorical or individual exemption.

Regarding practices restricting distributors' pricing freedom, the Paris Court of Appeal found sufficient evidence to establish the existence of an agreement between the parties, confirmed its scope and purpose as constituting a network-wide vertical agreement, and classified the practice as restrictive by object, ineligible for either categorical or individual exemption.

The Court reaffirmed that a vertical agreement could restrict a distributor's pricing freedom without explicitly establishing a fixed or minimum price. The mere fact that a distributor cannot freely set its prices in accordance with an agreement with its supplier constitutes an anti-competitive practice[3]. Furthermore, the Court ruled that protecting luxury brand image could not justify a supplier directly or indirectly controlling product resale prices, including through promotional operations[4].

Concerning the prohibition of online sales, the Court determined that the legal context was not uncertain[5], and that neither the economic context, the sector in question, nor the products involved could objectively justify such a prohibition[6]. Indeed, the Court rejected two key arguments: first, the modest level of market penetration in online eyewear sales did not indicate that this expanding channel had exhausted its potential; second, customer dissatisfaction upon receiving online-purchased eyewear should be attributed to the specificities of corrective lenses rather than the frame brand and should not be conflated with the products at issue.

For clarity, intelligibility, and conciseness, this article adopts a binary approach. Without claiming to be exhaustive on all points addressed by the Court of Appeal, it will focus on the two main aspects that arise from the analysis of this case and propose a critical analysis: the principled severity in treating restrictions on pricing freedom **(I)** and the nuanced approach to prohibitions on online sales **(II).**

I. The principled severity in treating restrictions on pricing freedom: recommended prices or ineffective safeguards against qualifying as a vertical resale price maintenance agreement

While maintaining a stringent analytical framework to qualify vertical price agreements as restrictive by object and characterized (**A**), the Court has simultaneously developed a more flexible evidentiary approach by introducing the subsidiarity of the triple test method in proving such agreements (**B**).

[3] *Ibid.*, para. 216.
[4] *Ibid.*, para. 228.
[5] *Ibid.*, para. 363.
[6] *Ibid.*, para. 372.

A. The traditional substantive severity: the retained qualification of a vertical agreement as both restrictive by object and characterized

The Court recalls that price is a fundamental parameter of competition, as emphasized in Article 101(1) TFEU, which prohibits agreements aimed at 'directly or indirectly fixing purchase or selling prices.'

In this case, the Court identifies a two-sided practice: on one hand, the binding nature of prices recommended by Luxottica to its distributors through continuous distribution of price lists and multiplier coefficients, and on the other hand, the control exercised over price reductions subject to Luxottica's prior approval for any promotional and advertising operations. While considering the sector marked by frequent commercial promotions, it concludes that these practices are interdependent and aim at the same objective: maintaining branded products' prices at a certain level and limiting price fluctuations[7].

The applicant company attempts to justify this control through the protection of brand image, particularly in the case of luxury goods in selective distribution, or through the Veblen effect, suggesting that luxury products owe their attractiveness to price increases. Indeed, this theoretical effect reflects inverse demand elasticity, where higher prices increase demand by signaling exclusivity and status through conspicuous consumption.

However, the Court counters that protecting luxury brand image does not solely rely on pricing strategy but involves many other factors, such as product quality, service, and shopping experience. It also recalls European Court of Justice's (ECJ) case law[8] stating that *"the requirement of a price commitment is manifestly foreign to the needs of a selective distribution system, and such a requirement affects free competition"*.

Furthermore, although a vertical agreement is generally less harmful to competition than a horizontal one, the Parisian Court of Appeal takes care to recall that it can still constitute a restriction of competition by object if its harmfulness is sufficiently serious, considering its content, objectives, and context[9].

Indeed, far from the American 'rule of reason' and the analysis of pro-competitive effects supported by the Chicago School regarding resale price maintenance, the Court unsurprisingly maintains the European tradition of this prohibition - almost 'per se'

[7] *Ibid.,* para. 221.

[8] ECJ, Case C-107/82, *AEG-Telefunken*, October 25, 1983.

[9] ECJ, Case C-211/22, *Super Bock,* June 29, 2023

according to some doctrine[10] - presented in the guidelines as eliminating intra-brand[11]

Finally, while recommended resale prices are not in principle constitutive of a characterized restriction ineligible for block exemption, they become so when the supplier associates this recommendation with incentive or even coercive measures to prevent deviation. Thus, the prohibited agreement cannot benefit from block exemption, and is naturally denied individual exemption, still mythological in practice to date.

B. The confirmation of a 'new' evidentiary flexibility: the subsidiarity of the triple test method in proving agreement

An anticompetitive vertical agreement or understanding requires proof of a meeting of minds materialized by an invitation and acquiescence, and proof of the anticompetitive scope of this agreement.

Regarding resale price maintenance and in the absence of direct evidence, such as contractual clauses imposing recommended resale prices or concerted practices fixing resale prices upstream, the Competition Authority has previously adopted the 'triple test'[12] method involving the following three evaluation criteria: the mention of public sale prices or maximum discount rates, the implementation of monitoring systems, and the significant application of recommended prices.

In the present case, though not unprecedented, the Court of Appeal seems to reinforce the subsidiarity of this three-pronged body of evidence theory. Indeed, Luxottica argues, among other things, insufficient evidence and a reversal of the burden of proof to its detriment as the Authority does not demonstrate the effective application of recommended prices.

It should be noted that the Minister of Economy responds on this matter, stating that the 'three-pronged' body of evidence theory was not required in this case, given the existence of documentary evidence, and that proof of significant price application is not a necessary condition for demonstrating the facts[13]. The Court of Appeal, without naming this method, aligns with this reasoning and confirms the Authority's evidentiary methodology. It affirms that the existence of an agreement can result from the combination of different pieces of evidence, whether contractual or behavioral, particularly in the presence of sophisticated practices based on mechanisms which, taken

[10] N. PETIT, 'The Application of EU Law on Vertical Restrictions to Distribution Agreements,' in P. Hollander (ed.), *Commercial Distribution Law*, Anthémis, 2009, Louvain-la-Neuve, p. 334

[11] European Commission, Guidelines on Vertical Restraints (2022/C 248/01), para. 196.

[12] F. WATAR, L. REYNE, 'Vertical restrictions and brand image of networks: the fair distribution established by European law', *Lamy Concurrence*, No. 137, April 2024

[13] *Ibid.,* para. 67.

in isolation, could appear unilateral, provided that together they constitute a body of serious, precise, and concordant evidence establishing both the supplier's invitation and the distributors' acquiescence to the disputed practice.

While the treatment of resale price maintenance is not unprecedented, the treatment of the prohibition of online sales is a more contemporary issue whose regime has been refined since its emergence at the heart of the Vertical Restraints Block Exemption Regulation No. 330/2010.

II. A nuanced severity in treating the prohibition of online sales: towards a more neutral treatment of this practice?

If the Court reaffirms its seminal case law on online sales prohibition (**A**), it nevertheless crafts a framework increasingly receptive to manufacturers' market interests, paving the way for a more contextual approach (**B**).

A. A solution in agreement with the established case law regarding the absolute prohibition of online sales

The present case falls within the jurisprudential line on the prohibition of online sales. The Court concludes that, in accordance with the doctrine of the Pierre Fabre[14] and Coty[15] judgments, the clauses inserted by Luxottica must be considered prima facie, subject to examination of the agreement's context, as restrictions of competition by object, as they result in an absolute prohibition of online sales, regardless of the brand of products concerned. Thus, as in the Pierre Fabre judgment, it concludes that a prohibition of Internet sales in a selective distribution contract constitutes a restriction by object, contrary to Article 101(1) TFEU, unless there is an objective justification related to the product's properties, and that in this case, brand image protection does not constitute a legitimate objective.

When Luxottica invokes the Coty judgment, which recognizes the freedom for network heads to insert a clause in their selective distribution contracts prohibiting the marketing of their products on an unauthorized platform, the Court recalls that this judgment is not a reversal of jurisprudence but merely clarifies the Pierre Fabre judgment in that the preservation of products' prestigious image in this specific case did not constitute a legitimate requirement justifying a total and absolute prohibition of their online sale.

A question remains: if brand image protection is not a legitimate objective, what

[14] ECJ, Case C-439/09, *Pierre Fabre Dermo-Cosmétique,* October 13, 2011

[15] ECJ, Case C-567/18, *Coty Germany GmbH*, December 6, 2017

could be? Don't luxury products' characteristics include, beyond their quality, their appearance and image, which form the foundation of this luxury sensation[16] ? Some scholars note a lack of coherence in this matter: *"brand image protection constitutes a legitimate reason for accepting distribution networks for branded products. What is valid for the selective distribution contract is not valid for a clause".*[17]

In this case, the Court of Appeal explicates its mistrust of opening the way to this justification as the demarcation between luxury brands and others is evolving and sometimes uncertain, such a practice, if admitted, could be extended to all products of a supplier, according to their will. Thus in this case, the criterion of the practice's harmfulness is not mitigated by the mere "technical" characteristics of the products that the Court limits itself to retain (glasses and frames), which—without assimilating them to corrective lenses presenting a certain complexity—obviously do not justify such a restriction by themselves[18].

B. A solution opening the way to a more nuanced contextual approach

Regarding the legal context, the judges dismiss this justification and establish a very clear distinction between the online sale of prescription and sunglasses and the online sale of contact lenses. The confusion of genres desired by Luxottica attempted to introduce a public health aspect, which although providing for opticians' obligation to provide advice and the organization of the profession arising from the Hamon law, the legal context in this judgment is not considered uncertain or ambiguous.

Regarding the economic context, the Court makes a clear distinction between different segments of the optical market, separating prescription glasses (which include frames and corrective lenses) from frames and sunglasses sold independently. This segmentation is relevant as it recognizes that constraints on online sales are not uniform for all types of products. While purchasing corrective lenses requires precise measurements and optimal centering, potentially justifying obstacles to online commerce, these technical considerations do not affect the sale of frames alone or sunglasses in the same way.

In challenging Luxottica's argumentation, which tended to amalgamate these different product categories to justify online sales restrictions, the Court adopts a position that favors a more refined analysis of competitive effects. This approach reinforces the case-by-

[16] P. LE MORE, [Chronicle] Competition Law and Distribution Chronicle - December 2017, *Lexbase Affaires*, No. 534.
[17] L.VOGEL, (2017, May 5). *Vertical restrictions in online sales*, M.VIGNAL, *Contrats, Concurrence, Consommation*, 2011, comment 257, note on CJEU, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*
[18] *Ibid.* ,para. 372.

case examination of commercial practices and avoids an overly broad justification of restrictions on online distribution but suggests, through reasoning by contradiction[19], that the economic context could justify a total and absolute prohibition of online sales.

The Court also highlights the evolution of online commerce in the optical sector, emphasizing the progression of market penetration rate from 2% in 2013 to 4% in 2020. Although this market share remains modest, the Court recalls that the emerging nature of a distribution channel should not be a pretext to minimize the potential impact of an anticompetitive restriction.

Finally, the Court thus adopts a dynamic perspective by rejecting the idea that existing barriers (technical or behavioral) are sufficient to neutralize the anticompetitive effects of a restriction. It emphasizes that these barriers do not mean that the growth potential of online commerce is exhausted, nor that other anticompetitive practices could not have slowed its development.

OULD ABBOU CHAMA

[19] L.VOGEL, (2017, May 5). *Vertical restrictions in online sales* reference to the Paris Court of Appeal, 13 March 2014, Bang & Olufsen, 2013/00714.