Where do we stand after *Coty*?

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Abstract: An area of uncertainty, and with differences of approach between competition authorities, is whether brand owners can prevent distributors from reselling their products via online marketplaces such as Amazon. This article considers the European Court of Justice's judgment in *Coty* and its implications for distribution arrangements, as regards both the application of Article 101 TFEU and the Vertical Restraints Block Exemption Regulation to selective distribution arrangements and restrictions on internet sales via third-party platforms. It also considers the European Commission's response to the *Coty* judgment (including its application to non-luxury goods) and the approach taken by national courts and competition authorities.

Keywords: Article 101 TFEU, Vertical Restraints Block Exemption Regulation, selective distribution, online marketplaces, online sales bans, luxury goods

1. Introduction

On 6 December 2017, the European Court of Justice ('CJEU') delivered its judgment in the *Coty*¹ case. *Coty* was a much anticipated judgment because it not only clarifies the CJEU's judgment in *Pierre Fabre*² on whether selective distribution systems aimed at protecting the prestigious image of certain products are restrictive of competition by nature, but also determines whether a limitation on the use of online marketplaces is equivalent to an outright ban on internet sales, which under *Pierre Fabre* constitutes a restriction by object.

The *Pierre Fabre* and *Coty* cases differ in scope and degree. *Pierre Fabre* concerned a *de facto* 'absolute' ban on internet sales which, as is explained below, goes against the very essence of the EU internal market. The *Coty* case, on the other hand, concerned a restriction on the use of online marketplaces (such as Amazon) and, strictly speaking, the CJEU's judgment applies only to luxury products. On this latter point, the European Commission ('Commission') considers that the *Coty* judgment does not necessarily prevent owners of other, non-luxury, product categories, such as high-quality and high-technology products from also restricting the use of marketplaces.³

In this article we examine the *Coty* judgment and its implications for distribution agreements, as well as the Commission's recent response. We also explore the

potential economic justifications that suppliers put forward in support of online marketplace bans and the apparent diverging views in some Member States, most notably Germany, on this issue.

2. The *Coty* case

Coty Germany, a subsidiary of the US company *Coty Inc.*, sells luxury cosmetics in Germany through a selective distribution network of authorized distributors. *Parfümerie Akzente* is a longstanding authorized distributor of *Coty*'s products, which it sells both through its 'bricks-and-mortar' stores and online through both its own online store and also via Amazon's marketplace, 'amazon.de'.

Coty established a selective distribution network of authorized retailers, with the aim of protecting and supporting the luxury image of its brands. It imposed a number of qualitative criteria on its retailers through:

- a selective distribution agreement, that obliged retailers to comply with certain qualitative criteria relating to the environment, décor and furniture of its 'bricks-and-mortar' stores; and
- a supplemental agreement on internet sales, whereby the retailers were allowed to sell *Coty*'s luxury products through their own 'electronic

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1 Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941.

2 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECLI:EU:C:2011:649.

3 See 'EU Competition Rules and Marketplace Bans: Where Do We Stand after the *Coty* Judgment?' Competition Policy Brief (2008-01, April 2018), available at: <http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

shop windows'. However, the retailers were not allowed to sell the products online using a different business name or through third-party online platforms, in a discernible manner to consumers.

Following Parfümerie Akzente's refusal to sign the supplemental internet agreement (which was amended after the entry into force of Regulation 330/2010⁴) *Coty* brought a claim before a German court of first instance to seek an order prohibiting Parfümerie Akzente from selling *Coty*'s products on 'amazon.de'. On 31 July 2014, the German court, relying on *Pierre Fabre*, dismissed *Coty*'s action on the ground that such a ban constitutes an infringement of German (*Gesetz gegen Wettbewerbsbeschränkungen*) and EU competition law.

Coty appealed this decision before the Higher Regional Court (*Oberlandesgericht*) of Frankfurt am Main ('OLG Frankfurt am Main'). The OLG Frankfurt am Main, uncertain about the interpretation of selective distribution and related online sales restrictions under EU competition law, stayed the proceedings and referred four questions to the CJEU under Article 267 TFEU. We consider below the CJEU's responses to these questions.

2.1. Question 1: is a selective distribution system compatible with Article 101(1) TFEU?

The first question asked by the OLG Frankfurt am Main was 'Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a "luxury image" for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?'

This question stemmed from the confusion caused by *Pierre Fabre*, in which the CJEU stated that selective distribution agreements 'are to be considered restrictions by object', unless objectively justified. In that regard, the CJEU considered that '[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition'.⁵ This raised the question whether selective distribution, which is very often imposed by suppliers to convey an image of quality and to ensure uniform pre- and/or after-sale services to consumers, would be in jeopardy.

In *Coty*, the CJEU relied on well-established case law to confirm that selective distribution systems are compatible with Article 101(1) TFEU provided that certain criteria

are satisfied (the so-called '*Metro* criteria'⁶). By extension, selective distribution systems that comply with the *Metro* criteria, designed primarily to preserve the luxury image of goods, would also be compatible with Article 101 TFEU.⁷

2.1.1. The *Metro* criteria

In *Coty*, the CJEU first confirmed that the organization of a selective distribution network is not prohibited under Article 101(1) TFEU provided that the following criteria are satisfied: (i) resellers must be chosen on the basis of objective criteria of a qualitative nature; (ii) these criteria must be laid down uniformly for all potential resellers and not be applied in a discriminatory manner; (iii) the product in question must require such a network in order to preserve its quality and ensure its proper use; and (iv) the criteria do not go beyond what is necessary to achieve the objective pursued.⁸

2.1.2. The *Copad* judgment

Second, the CJEU examined, in light of its judgment in *Copad*, whether a selective distribution system for luxury goods is compatible with Article 101(1) TFEU. It held that 'the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury'. According to the CJEU, the protection of that aura of luxury is essential because it enables consumers to distinguish luxury goods from other goods and an impairment of that aura is likely to affect the quality of the goods.⁹

In that regard, the CJEU confirmed that a carefully drafted selective distribution system, aimed at preserving the luxury image of the goods, may contribute to the reputation of those goods and to their aura of luxury.¹⁰ A selective distribution system, such as the one at issue in *Coty*, is therefore compatible with Article 101 TFEU provided that the *Metro* criteria are satisfied.

Ultimately and crucially, the CJEU clarified that the assertion made in *Pierre Fabre* that 'the aim of maintaining a prestigious image is not a legitimate aim for restricting competition'¹¹ should not be applied to the compatibility with Article 101(1) of a selective distribution agreement as such. Rather, it held that this assertion must be read in the context of a specific contractual clause which imposed an absolute *de facto* internet ban on resellers of cosmetic and body hygiene products (which the CJEU

4 Commission Regulation (EU) No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L 102/1 ('Vertical Restraints Block Exemption Regulation').

5 *Pierre Fabre* (fn 2), para 46.

6 Case C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, ECLI:EU:C:1977:167.

7 Case C-59/08 *Copad SA v. Christian Dior Couture SA, Vincent Gladel and Société industrielle lingerie*, ECLI:EU:C:2009:260.

8 *Coty* (fn 1), para 24, citing *Pierre Fabre* (fn 2), para 41.

9 *Coty* (fn 1), para 25, citing *Copad* (fn 7), paras 24–26.

10 *Coty* (fn 1), paras 26–29, citing *Copad* (fn 7), para 28.

11 *Pierre Fabre* (fn 2), para 46.

oddly determined to be non-luxury goods, such that the preservation of their image was not a legitimate requirement justifying a comprehensive prohibition on internet sales).¹²

2.2. Question 2: is a prohibition on authorized distributors selling on third-party online platforms compatible with Article 101 TFEU?

The second question asked by the OLG Frankfurt am Main was:

Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case?

Once the CJEU concluded affirmatively on the compatibility of Coty's selective distribution system under Article 101(1), it went on to examine the specific clause in the supplemental internet agreement imposing a ban on its retailers from using third-party online platforms in a discernible manner.

Here, the CJEU made a logical extension of its conclusion under the first question: in the same way that a selective distribution system which is primarily designed to preserve the luxury image of the goods and satisfies the *Metro* criteria is not prohibited by Article 101(1), a specific contractual clause which pursues the same objective is also lawful, provided that the prohibition on the use of third-party platforms also satisfies the same criteria.¹³

While the CJEU held that it was for the OLG Frankfurt am Main to assess whether a specific contractual clause complies with the *Metro* criteria,¹⁴ it nonetheless went on to provide its own observations on the matter. Since it was clear from the national proceedings that the clause in the supplemental agreement on internet sales is objective and was uniformly applied without discrimination to all authorized distributors, the CJEU examined whether the clause was proportionate, i.e. (i) whether it was appropriate in light of the objective pursued and (ii) whether it was not excessive in the sense that it does not go beyond what is necessary to achieve the desired outcome.

2.2.1. Is the clause appropriate to protect the luxury image?

According to the CJEU, a contractual clause which requires authorized distributors to only sell through their own online shops and prohibits them from using different business names when selling online or using, in a discernible manner, third-party online platforms, provides a guarantee to the supplier that those luxury goods will be exclusively associated with the authorized distributor.¹⁵

Given that one of the objectives of a selective distribution system is precisely to ensure such a close association, the CJEU concluded that the prohibition at hand was coherent with the overall objective and characteristics of the entire system¹⁶ and preserved the quality and luxury image of the goods.¹⁷

In addition, the CJEU noted that this prohibition enables the supplier to check that the qualitative criteria agreed with the authorized distributors are fulfilled when the latter are engaged in online sales.¹⁸ It is precisely the contractual relationship between the supplier and the retailers that allows the supplier to take action in case of non-compliance with those criteria. In the Court's view, the absence of such a contractual link between the luxury brand supplier and the third-party online platforms would constitute an obstacle to enabling the supplier to ensure strict adherence to and compliance with the qualitative conditions and generate a risk of the luxury image of the goods quickly and irreparably deteriorating in the online space.¹⁹ The prohibition on the use of third-party internet platforms was thus appropriate to preserve the luxury image of the goods.²⁰

This raises an interesting, yet unresolved, question: if the supplier of luxury goods has a contractual relationship with the online marketplace, would that render the above reasoning moot, i.e. casting doubt as to the appropriateness of the prohibition on sales via that platform? Presumably, it will depend on the nature and extent of the contractual link between the supplier and the platform. If the platform is itself admitted to the selective distribution network, one would be quite sceptical about a platform ban that the supplier would impose on its other authorized distributors prohibiting their use of that specific platform. A similar conclusion would apply if the supplier is itself using the platform, e.g. using a dedicated space within the marketplace that it would design and operate in accordance with its own specific requirements, as, in this case, the online

¹² *Coty* (fn 1), paras 30–36.

¹³ *Ibid*, para 40.

¹⁴ *Ibid*, para 41.

¹⁵ *Ibid*, para 44.

¹⁶ *Ibid*, para 45.

¹⁷ *Ibid*, para 46.

¹⁸ *Ibid*, para 47.

¹⁹ *Ibid*, paras 48–50.

²⁰ *Ibid*, para 51.

marketplace would merely be providing web and logistical services to the supplier.

2.2.2. Does the clause go beyond what is necessary?

To answer this question, the CJEU addressed three points. First, contrary to the impugned clause in *Pierre Fabre*, the issue in *Coty* did not concern an absolute ban on retailers selling online. Instead, retailers were only precluded from selling the contracted luxury goods online through third-party platforms, which are discernible to customers,²¹ such as Amazon, eBay or Zalando. Authorized distributors were still allowed to sell online through their own websites – provided that they operated an electronic shop window and the luxury character of the goods was preserved – or through unauthorized third-party platforms that are not discernible to the consumer²² (which we fail to identify in practice). Further, as discussed below, *Coty* did not impose other limitations on the use of the internet, e.g. the use of price comparison websites and referencing tools such as search engines was allowed.

Second, and surprisingly, the CJEU relied on the preliminary findings of the Commission's E-commerce Sector Inquiry,²³ which revealed that, despite the growing importance of third-party platforms as a channel for online sales, the main online sales channel was still the distributors' own online shops.²⁴ While this data point is probably correct at a macro EU-wide level, it is unclear how it helps in justifying the necessity of an online marketplace ban in the specific circumstances of the case. In particular, it begs the question as to the relevancy of this information in light of the fact that the distributor in *Coty* was established in Germany and sought to access amazon.de, which in Germany is a very popular tool for retailers to gain easy visibility and access to consumers. The CJEU considered that, from the Commission's preliminary findings, it could be inferred that the prohibition on the use of online marketplaces did not go beyond what was necessary to preserve the luxury image of luxury goods.²⁵

Finally, the CJEU underlined once again that, in the absence of a contractual relationship between the supplier of luxury goods and third-party platforms, the prohibition on the use of marketplaces was a more effective means to protect the selective distribution system than if retailers were to be free to use marketplaces subject to

further checks by the supplier to verify compliance with predefined quality conditions.²⁶

Taking account of all these factors, the CJEU concluded that the prohibition on the use of third-party marketplaces was appropriate, and did not go beyond what was necessary, to ensure the objective of preserving and supporting the luxury image of *Coty*'s brands and, therefore, was compatible with Article 101(1).²⁷

2.3. Questions 3 and 4: is a prohibition on the use of third-party online platforms a hardcore restriction under the Vertical Restraints Block Exemption Regulation?

The CJEU dealt with the OLG Frankfurt am Main's third and fourth questions together:

[Are] Articles 4(b) and 4(c) of Regulation No 330/2010 to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of the retailer's customer group [or] a restriction of passive sales to end users 'by object'?

This question concerns the interpretation of the 'hardcore' restrictions set forth in Articles 4(b) and 4(c) of the Vertical Restraints Block Exemption Regulation. According to Article 4(b), the block exemption does not apply to distribution agreements – selective or not – which have as their object the limitation of passive sales to end users. Under the Vertical Restraints Block Exemption Regulation, the sale of products via online shops is deemed to be a passive mode of distribution.²⁸ Further, pursuant to Article 4(c), the block exemption is inapplicable to clauses limiting the authorized retailer's ability to sell the contract products to certain categories of end-users.

Again, the CJEU noted that contrary to the agreement considered in *Pierre Fabre*, the clause in *Coty*'s distribution agreement prohibiting the use of online marketplaces did not amount to an absolute ban on online sales, as it still allowed authorized distributors to sell passively through other online channels, including their own websites.²⁹ Accordingly, it was not a hardcore restriction prohibited by Article 4(b).³⁰

21 Ibid, para 52.

22 Ibid, para 53.

23 Commission Staff Working Document, 'Preliminary Report on the E-commerce Sector Inquiry' (15 September 2016), SWD (2016) 312 final, available at: http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf.

24 *Coty* (fn 1), para 54.

25 Ibid, para 55.

26 Ibid, para 56.

27 Ibid, paras 57 and 58.

28 See Commission, 'Guidelines on Vertical Restraints' OJ 2010 L 130/1, paras 51–54.

29 *Coty* (fn 1), para 65.

30 Ibid, paras 68 and 69.

Finally, the CJEU considered that it was not possible to circumscribe and discern a specific group of customers of third-party online platforms within the universe of online buyers. Specifically, Coty's selective distribution allowed authorized distributors, under certain conditions, to engage in online advertising on third-party platforms and to use online search engines, so that customers were able to easily find retailers in the online space.³¹ Accordingly, it was not a hardcore restriction prohibited by Article 4(c).³²

3. Beyond luxury goods: the Commission's interpretation of *Coty*

In his Opinion in *Coty*,³³ AG Wahl referred on ten separate occasions, to 'high-quality', 'high-technology' and 'high-end' products or to their 'high-quality/technological' nature, while also referring to 'luxury' goods. AG Wahl was minded to confer a wider product scope to when the use of selective distribution (including restrictions on online sales) may be compatible with Article 101(1). By contrast, the CJEU stuck to luxury goods and did not refer once to high-quality, high-technology or high-end products. Presumably, AG Wahl was advocating for a wider exception for online marketplace bans that would include non-luxury goods.

The Commission follows the same apparent logic. In its latest *Competition Policy Brief*,³⁴ the Directorate General for Competition ('DG COMP') expressed its view that a prohibition on sales of non-luxury goods through online marketplaces would also not infringe Article 101(1), provided that the *Metro* criteria are satisfied.

Regarding the first question considered by the CJEU in *Coty*, DG COMP considers that the CJEU merely clarified that selective distribution systems that are primarily designed to preserve the luxury image of goods are compatible with Article 101(1) since, according to DG COMP, such selective distribution systems for other non-luxury goods such as 'high-quality' and 'high-technology' products also fall outside of Article 101(1), as has been confirmed by previous case law.³⁵

DG COMP also takes the view that the distinction made in *Coty* between luxury and cosmetic and body hygiene goods (referring to *Pierre Fabre*)³⁶ is of limited

practical relevance and is, arguably, specious. According to DG COMP, selective distribution networks for 'high-quality' and 'high-technology' products should also fall outside of Article 101(1), again provided the *Metro* criteria are satisfied.³⁷

Regarding the second question considered by the CJEU in *Coty*, which examined the legality of online marketplace bans, DG COMP considers that *Coty* does not necessarily exclude the compatibility with Article 101(1) of similar online sales bans applying to 'high-quality' and/or 'high-technology' (i.e. non-luxury) goods. It considers that online marketplace restraints should be allowed provided they satisfy the *Metro* criteria under the specific circumstances of each case.³⁸

Finally, the Commission considers that the CJEU's conclusion in *Coty* that the ban on sales of luxury products via online marketplaces is not a 'hardcore' restriction under the Vertical Restraints Block Exemption Regulation (VBER) can also be extended to similar restrictions applied to sales of non-luxury products. In DG COMP's view, which is sound, the assessment of whether a marketplace ban has the object of restricting competition should not depend on the nature of the products concerned, provided that the *Metro* criteria for selective distribution are complied with.³⁹ That is, to the extent that the VBER is solely concerned with (a) protecting the right of distributors to engage in passive sales and (b) preventing customer allocation within the network, an online marketplace ban should be exempted where the market shares of the parties to an agreement are under the relevant 30% market share threshold.⁴⁰

If the parties' market shares are above 30%, the assessment under Article 101(3) should be effects-based driven. The effects analysis would arguably focus on the market power of both the supplier and its selective distributors and consider the applicable theory of harm. Presumably, harm to competition would arise where the ban considerably inhibits passive sales, thereby generating significant market-partitioning effects. This would be the case when the brand-owner enjoys significant market power, i.e. inter-brand competition is weak and the supplier operates a tight selective distribution system with small-scale online retailers, with limited online visibility and resources to engage in cross-border trade.⁴¹

31 Ibid, para 67.

32 Ibid, paras 68 and 69.

33 Case C-230/16 *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Opinion of Advocate General Wahl, ECLI:EU:C:2017:941.

34 See fn 3.

35 *Metro SB-Großmärkte GmbH & Co. KG v. Commission* (fn 6) and Case C-107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission*, ECLI:EU:C:1983:293.

36 *Coty* (fn 1), para 32.

37 See fn 3, p. 2.

38 See fn 3, p. 3.

39 See fn 3, p. 4.

40 Vertical Restraints Block Exemption Regulation (fn 4), Article 3.

41 See 'Guidelines on Vertical Restraints' (fn 28), paras 174–188.

4. Why do suppliers seek to ban online sales?

DG COMP's position is welcome. Setting aside the difficulty of classifying a product as 'luxury', 'high-quality' or 'high-technology', its position is soundly based in economics. Specifically, while imposing online sales restraints may at first glance look anti-competitive – particularly because the internet is such a ubiquitous sales channel nowadays – an online marketplace ban (such as the one in *Coty*) aims at protecting the reputation and the aura of luxury of a product. Some products, not only luxury ones, but arguably also high-quality and high-technology products, can be differentiated through *inter alia* their brand reputation and the consumers' perception that these products are high quality or valuable. Product differentiation is an important parameter of competition. Therefore, from an economic perspective, one could argue that suppliers should be allowed to protect that reputation and goodwill from unauthorized behaviour. The ability to contractually control and restrict how such products are sold online arguably creates incentives for suppliers to innovate and introduce high-value products (i.e. it promotes inter-brand competition). If such restraints were illegal under EU competition law, suppliers may be discouraged from investing in their products out of fear that undisciplined and/or free-riding distributors would diminish the value of their products by placing the products for sale on poorly run or low-quality marketplaces.

Unless pre-existing inter-brand competition is significantly weakened in a given market, online marketplace sales bans (such as the one in *Coty*) would not be capable of generating material anti-competitive effects. This is because any adverse effects on consumer welfare associated with a reduction in intra-brand competition would likely be offset by the pro-competitive benefits that the restraint is purported to achieve, i.e. to inform consumers about the product's quality and protect the differentiated value proposition of the brand owner.⁴² In sum, *Metro*-type limitations on online sales should help brand owners compete better against their rivals, thereby reinforcing inter-brand competition in terms of both price and quality.

The above economic rationale would arguably also apply to 'absolute' online retail bans, such as in *Pierre Fabre*. In theory, if inter-brand competition remains vigorous, the restriction in intra-brand competition should

not harm competition in the market in any significant way. In this regard, the prohibition of 'absolute' online sales bans (as 'hardcore' restrictions of EU competition law) does not necessarily rest on pure economic arguments, but instead on broader EU policy objectives, in particular the objective contained in the EU treaties of furthering and maintaining the integrity of the EU internal market to allow consumers to purchase goods and services anywhere in the EU at the best price.⁴³

5. Where do we stand after *Coty*?

Following *Coty*, one area of concern raised by many commentators is whether there will be a divergent application of the judgment in the various EU Member States. To some extent, this has already happened, with the important caveat that national infringement decisions that were adopted either prior to *Coty* and the Commission's recent *Competition Policy Brief* and/or their factual background brings them significantly closer to an 'absolute' ban *à la Pierre Fabre* as opposed to a partial restraint on online trade.

For example, only a few days after the *Coty* judgment was handed down on 6 December 2017, on 12 December 2017 the German Federal Court of Justice (*Bundesgerichtshof*) upheld a decision of the German Federal Cartel Office (*Bundeskartellamt*) against Asics.⁴⁴ In August 2015, the *Bundeskartellamt* had adopted a decision that a general prohibition on authorized retailers using price comparison websites was a 'hardcore' restriction under the Vertical Restraints Block Exemption Regulation.⁴⁵ In upholding the *Bundeskartellamt*'s decision, the Federal Court obviously took inspiration from *Pierre Fabre*.

One of the differences between the *Asics* and *Coty* cases was that the German Federal Court considered that sports and running shoes were not products that warrant special protection because they are not luxury goods. However, whilst this argument was only made in passing, the main reason for considering that a ban on the use of price comparison websites was a 'hardcore' restriction was that Asics' selective distribution system, taken as a whole, was closer to imposing an 'absolute' ban on internet sales.⁴⁶

Andreas Mundt, President of the German *Bundeskartellamt*, noted in a speech in December 2017 at the Annual Meeting of the German *Studienvereinigung*

42 Ibid, para 102.

43 OECD, 'Vertical Restraints for On-line Sales' (2013), background note by Paolo Buccirossi, at p. 39, available at: <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>.

44 BGH, KVZ 41/17, 12 December 2017.

45 Bundeskartellamt, Case B2-98/11, *Unlawful restrictions of online sales of ASICS running shoes* (26 August 2015). An English-language summary is available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2.

46 KVZ 41/17 (fn 45), paras 28–30.

Kartellrecht in Bonn that the *Coty* judgment does not affect the *Bundeskartellamt*'s decisional practice, which is focused on branded, as opposed to luxury, goods. As a result, it can be expected that, in Germany, marketplace bans will continue to be considered as a restriction of competition by object. These statements clearly show the *Bundeskartellamt*'s intention to treat luxury and non-luxury goods differently, which is in contradiction with DG COMP's current views.

More recently, in October 2017, the Amsterdam District Court (*Rechtbank*) confirmed that Nike's selective distribution system, which allowed online sales only via certain authorized online retailers (such as Zalando and Otto) did not infringe EU competition law, mainly because Nike did not ban online sales completely and because the Dutch Court qualified Nike's products as 'luxury goods'.⁴⁷

As we can see, six months after the *Coty* judgment, there is a tension as to how *Coty* would apply beyond luxury goods and whether marketplace bans for non-luxury goods would be treated as *by object* restrictions by

national authorities. In our view, subject to meeting the *Metro* criteria, an important factor that emerges from the case law at national level in considering online restraints under competition law is whether such bans are either 'absolute' (*à la Pierre Fabre*) or whether retailers are still allowed a reasonable degree of freedom to sell and advertise online and gain sufficient online visibility (e.g. through comparison websites and search engines).

DG COMP's attempt to expand the *Coty* judgment to other non-luxury goods is welcome – and actually finds a basis in the *Coty* judgment itself when the CJEU considers the applicability of the Vertical Restraints Block Exemption Regulation – because it would make no sense at the same time to (a) permit suppliers of luxury goods to prohibit sales of their products on online marketplaces and (b) prohibit manufacturers of non-luxury items from doing so, especially if their selective distribution networks comply with the *Metro* criteria. At this point, however, it is not yet entirely clear whether this position will be followed by national courts and competition authorities and, ultimately, by the CJEU itself.

⁴⁷ Case C/13/615474 / HA ZA 16-959, *Nike European Operations Netherlands B.V. v. Action Sport Soc. Coop. A.R.L.* (4 October 2017).