INTERNET DISTRIBUTION OF LUXURY PRODUCTS: IS THERE A DELUXE VERSION OF EU COMPETITION LAW?

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Summary

Owing to its particular features, the market of luxury goods is a point of interest to lawyers as much as to other professions such as economists or sociologists. These features play an important role in legal regulation of the market. While the starting point is competition law, the assessment of anti-competitive conduct under Article 101 of the TFEU cannot be complete without resorting to intellectual property law policies and rules. With the rise of the importance of internet sales, novel issues have been put before the competition authorities and reviewing courts, such as legality of various types of online restrictions in the selective distribution systems. Employing a combined IP law and competition law approach to these issues, this paper offers insights and comments on EU case law, with primary focus on the recent CJEU judgment in Coty. The intricacies of the interplay among different competition law rules and exemptions is particularly evidenced in this case. However, limited by its fact-pattern, the Coty judgment may serve as a clarification about the deluxe competition law treatment only of certain online sale prohibitions within the SDSs, while there will certainly be continuing discussions and national case law developments on other internet related competition law restrictions awaiting further elucidations by the CJEU.

Keywords: *EU law; competition law; intellectual property; trademark; luxury products; internet; selective distribution; vertical agreements.*

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1. INTRODUCTION

Luxury goods market is growing fast. According to Delloite, in the fiscal year 2015 the top 100 luxury brand companies generated sales in the amount of US$212 billion,[1] while in 2017 Bain and Co. reporters estimate that the overall sales of luxury goods reached €1.2 trillion.[2] In this apparently huge market, it is important to maintain and possibly improve one's market position. These economic considerations needs to be adequately regulated, which is currently achieved through several branches of law. Luxury goods, recognisable to consumers by their brands, are legally protected mostly as trademarks. Trademark law and intellectual property (hereinafter: IP) law in general, confer exclusive rights to trademark holders, which means that the rightholder may prevent certain acts of third parties, such as producing, importing, and distributing of goods bearing the trademark in question. This exclusivity may be seen to stand in opposition to protecting free competition, one of the objectives of competition law. However, the flipside is true, as both IP law and competition law strive to promote consumer welfare and efficient allocation of resources. The history of relationship between these two branches of law has been very intense and dynamic. With the technological and economic developments, new issues are raised requiring a profound understanding of the underlying principles of both disciplines.

Most recently the CJEU has rendered its judgment in the *Coty* case on the topical issue of European Union competition law treatment of a selective distribution system (hereinafter: SDS) as employed by the luxury brand producers.[3] This paper thus intends to offer a combined IP-law and competition-law analysis showing how the two disciplines can work hand in hand to produce both economically and legally sound results. In doing so, the following section deals with the main features and functions of trademarks, especially when they serve as a legal protector of a luxury brand. The subsequent section focuses on the rationale of the luxury brand producers when deciding to opt for the SDS, while the next one is concerned with the competition-law framework for the SDSs in the EU. The remainder of the paper discusses in details the most recent CJEU case law on the topic, in particular the judgment in *Coty*, with the concluding remarks summarised in the end.

2. TRADEMARK FUNCTIONS AND JUSTIFICATIONS

Trademarks, along with other IP rights, are recognised as one of the human rights by the Charter of Fundamental Rights of the European Union,[4] in its Article 17(2). It is also accepted as one of the justifiable restrictions to trade among MSs under the

1 Deloitte Luxury Multicountry Survey for Global Powers of Luxury Goods 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf (last visited 2 August 2018).

2 Bain and Co. Luxury Goods Worldwide Market Study, Fall–Winter 2017, http://www.bain.de/Images/BAIN_REPORT_Global_Luxury_Report_2017.pdf (last visited 2 August 2018), p. 1.

3 CJEU, C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, 6 December 2017, EU:C:2017:941.

4 OJ C 326, 26 October 2012, pp. 391-407.

Treaty on the Functioning of the European Union (hereinafter: TFEU)[5] in its Article 36. The early proclamation of the CJEU about the IP rights was in the context of the principle of non-discrimination, free movement of goods (in particular with regard to the doctrine of exhaustion) and competition.[6] In several cases, the CJEU developed the concepts of "essential function" and "specific object" ("specific subject-matter").

"Essential function" of the trademark has been defined by the aim "to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin".[7] This is traditionally the most important function of trademark and consists in clearly marking the source or origin of the goods (or services) in relation to which the trademark is being used.[8] As may be concluded from the use of the adjective "essential", the function of indicating the origin is not the only trademark function recognised in EU law.[9] Besides function of origin which "the trademark is always supposed to fulfil", recent CJEU case law has repeatedly emphasised the advertising and investment functions as well.[10] While advertising function is activated when the rightholder is "using its mark for advertising purposes designed to inform and persuade consumers",[11] the investment function comes into

5 Codified version, OJ C 202, 7 June 2016, pp. 47-197.

6 Toth, A. G., Intellectual Property Rights, in: Oxford Encyclopaedia of European Community Law, Volume II: The Law of the Internal Market, (Oxford: Oxford University Press, 2005), pp. 504-506.

7 CJEU, C-102/77, *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, 23 May 1978, EU:C:1978:108, para 7; C-119-75, *Terrapin (Overseas) Ltd. v Terranova Industrie CA Kapferer & Co*., 22 June 1976, EU:C:1976:94, p. 1049 and 1054; CJEU, C-3/78, *Centrafarm BV v American Home Products Corporation*, 10 October 1978, EU:C:1978:174, para. 12; CJEU, C-10/89, *SA CNL-SUCAL NV v HAG GF AG*, 17 October 1990, EU:C:1990:359, para. 14

8 Tritton, G., *et al.*, Intellectual Property in Europe, 2nd ed., (London: Sweet & Maxwell, 2002), p. 506. This is confirmed in the recital 10 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11.2.1989, pp. 1–7, which is equivalent to recital 11 of the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version), OJ L 299, 8 November 2008, pp. 25–33, as well as in the *Memorandum on the Creation od the EEC Trade Mark*, SEC (76) 2462 final, 6 July 1976), Bulletin of the European Communities, Suppl. 8, 1976., para. 68.

9 Advocate general Ruiz-Jarabo Colomer has qualified as "simplistic reductionism" the view limiting the function of the trademark to an indication of origin. Opinion of Advocate General Colomer in CJEU case C-206/01, *Arsenal Football Club plc v Matthew Reed*, 12 November 2002, EU:C:2002:373, para. 46. It is interesting to see that Advocate General Jacobs perceived the other functions as derivatives of the function of origin and merit not too wide an interpretation. See Opinion of the Advocate General Jacobs in CJEU case C-337/95, *Christian Dior SA and Parfums Christian Dior BV v Evora BV*, 29 April 1997, EU:C:1997:222, para. 42.

10 CJEU, C-323/09, *Interflora Inc. and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd.*, 22 September 2011, EU:C:2011:604, paras. 38-40.

11 CJEU, joined cases C-236/08 to C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)*, 23 March 2010, EU:C:2010:159, para. 91.

play when the rightholder is using its trademark "to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty".[12]

One of the contemporary approaches to viewing the plurality of functions of the trademark is known as the theory of information. The trademark is seen as a means to convey information to consumers, at the same time improving the efficiency on the market.[13] According to this theory, the functions of trademark may be divided into several subfunctions where a crucial one is the traditional essential function of communicating the origin of goods (or services). Other, more recently recognised functions, came about as a result of the transformation in trade practices, where consumers are distanced from the producers because the distribution channels are increasingly diverse. An important secondary function is the information about the quality, according to which a trademark guarantees the quality (and price) level, which the consumer expects from the product (or service) bearing that trademark.[14] There is also a descriptive function, which may sometimes exist although in principle descriptive trademarks are not registrable. However, some trademarks suggest certain characteristics of goods (or services) in relation to which they are used.[15] An increasingly important function in the todays' commercial practices is the advertising function enabling the consumer to connect a specific overall image, aura or lifestyle with an individual trademark, which occurs as a result of the way in which the trademark is being advertised.[16] Griffiths describes this as a physiological possessing

12 CJEU, C-323/09, *Interflora*, EU:C:2011:604, para. 60.

13 On trademarks as a means of communication of information see, Opinion of the Advocate General Ruiz-Jarabo Colomer in CJEU case C-273/00, *Ralf Sieckmann*, 6 November 2001, EU:C:2001:594, paras. 16-21. See also Schreiner, R., Die Dienstleistungsmarke, Typus, Rechtsschutz und Funktion (Munich: Heymanns, 1983), pp. 448 et seq.; Strasser, M., Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context, 10 Fordham Intellectual Property Media & Entertainment Law Journal (1999–2000), pp. 375-432, especially p. 382.

14 On this issue see more Griffits, A., Trade Marks and Quality Assurance, in: Dinwoodie, G. B. (ed.), Methods and Perspectives in intellectual Property, (Cheltenham: Edward Elgar, 2013), pp. 129-150.

15 Kitchin D. *et al.* (eds.), Kerly's Law of Trade Marks and Trade Names, 14th ed., (London: Thomson Sweet & Maxwell, 2005), p. 143.

16 Opinion of Advocate General Colomer in CJEU case C-206/01, *Arsenal Football Club plc v Matthew Reed*, 12 November 2002, EU:C:2002:373, para. 47: "The messages it sends out are, moreover, autonomous. A distinctive sign can indicate at the same time trade origin, the reputation of its proprietor and the quality of the goods it represents, but there is nothing to prevent the consumer, unaware of who manufactures the goods or provides the services which bear the trade mark, from acquiring them because he perceives the mark as an emblem of prestige or a guarantee of quality. When I regard the current functioning of the market and the behaviour of the average consumer, I see no reason whatever not to protect those other functions of the trade mark and to safeguard only the function of indicating the trade origin of the goods and services." (notes omitted). The idea of protection of image of the trademark has been present in national case law, see e.g. *L´Oréal S.A. & others v. Bellure & others, Perfume Smell-Alikes*, 4 October 2006, [2006] EWHC 2355 (Ch), accessible at http://www.bailii.org/ew/cases/EWHC/Ch/2006/2355.html (last visited 25 August 2018), where High Court for England and Wales, Chancery Division explained that brand is a wider concept than trademark and that it is intended to convey the message about its distinctiveness to the consumer, where the

of the consumer's mind, which attributes to the trademark the market power above the one that would be consistent to its reputation.[17] On the other side, Chronopoulos argues that the advertising function is justified by welfare aspects of dynamic competition with differentiated products, meaning that it ultimately benefits the consumers.[18] Hence, the functions of trademarks are inseparably related to the consumer society and enable the consumer to make an informed choice among a variety of goods (and services) on the market. Besides, trademarks are an indispensable means of promoting trade, and in the EU they also facilitate inter-MS trade and further interpenetration of MS national markets.[19]

From the perspective of the rightholder, the trademark, being an exclusive right, induces the rightholder to promote the reputation of its trademark, and of goods (and services) in relation to which it is used, resting assured that others will not be able to free-ride on that reputation.[20] This corresponds to the concept of the "specific subject-matter" recognised in the CJEU case law. It means "in particular the guarantee to the proprietor of the trademark that he has the exclusive right to use that trademark for the purpose of putting a product into circulation for the first time and therefore his protection against competitors wishing to take advantage of the status and reputation of the mark by selling products illegally bearing that trademark."[21] This may be explained under the utilitarian theory because exclusiveness of the trademark provides incentives for rightholders to maintain and improve goods (and services) offered to the public and set appropriate price, by giving them property rights in what they create. If captured by the ethical argument based on the principle of justice and fairness, persons other than rightholders should not be able to benefit from reputation and other attributes of the trademarks. This is also an element of the wider protection which traders should be able to acquire based on the competition rules,[22] leading to the above statement that the IP law and competition law may not only be in opposition to each other but may also overlap. Whatever the case, both sets of rules reflect an attempt to establish the balance between public and private interests. In trademark law, the notions of "essential function" (but also other functions) and "specific subject-matter" serve as a measure.[23]

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trademark is just one element of the brand structure. Therefore, the trademark holder has the right to protection of the image represented by the trademark.

17 Griffiths, A., The Impact of the Global Appreciation Approach on the Boundaries of Trade Mark Protection, (2001) Intellectual Property Quarterly 5, pp. 326-360, especially p. 329.

18 Chronopoulos, A., Legal and economic arguments for the protection of advertising value through trade mark law, (2014) Queen Mary Journal of Intellectual Property (4)4, pp. 256-276, especially 267.

19 Memorandum on the Creation of the EEC Trade Mark, SEC (76) 2462 final, 6 July 1976), Bulletin of the European Communities, Suppl. 8, 1976, para. 21.

20 See, defining the "specific subject-matter", CJEU, C-10/89, *SA CNL-SUCAL NV v HAG GF AG (Hag II)*, 17 October 1990, EU:C:1990:359, para, 14; Opinion of Advocate General Jacobs in CJEU case C-10/89, *SA CNL-SUCAL NV v HAG GF AG (Hag II)*, 13 March 1990, EU:C:1990:112, para. 19.

21 CJEU, C-3/78, Centrafarm, EU:C:1978:174, para. 11.

22 Bently, L., Sherman, B., op. cit., pp. 700-702.

23 CJEU, C-10/89, *Hag II*, EU:C:1990:359, para. 18. See also, CJEU, C-102/77, *Hoffmann-La*

3. WHY CHOOSE THE SDS FOR LUXURY PRODUCTS?

Because of these trademark functions and economic conditions in which the luxury brands in particular operate in an optimum level, luxury products have always been under special distribution regimes controlled by their producers. Despite global digitalisation of the market and developing e-commerce models, a few producers prefer to retain full control by maintaining their own distribution network and some even refuse to sell over the internet.[24] Many others wish to capitalise on the fast-growing online sale of luxury goods[25] and have embraced e-commerce to improve accessibility of their products.[26] Having said that, accessibility is actually at odds with the definition of luxury, which is basically revolving around (very) high price and unavailability to (vast) majority of consumers. With that comes prestige as a more important feature than the product's functionality.[27] For this reason, luxury brand producers are extremely concerned about preserving the image of their brands by maintaining the high-end experience and exclusivity perception also in the digital environment. They wish to create an internet distribution system which would mirror their brick-and-mortar distribution strategy, but at the same time to create an omnichannel approach with synergic effect among all communication and distribution channels resulting in a single brand presence. In order to accommodate these goals, luxury brand producers often rely on the selective distribution system (hereinafter: SDS).

In competition law, SDS is defined as "a distribution system where the supplier undertakes to sell the contracts goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system."[28] Such a system seems to accommodate well the suppliers' need to differentiate between luxury products and potentially competing non-luxury products, because it enables them to control the distribution network, both online and offline, by way of setting up quality criteria that a distributor has to fulfil in order to become an authorised distributor. In order to preserve the "aura of luxury" in the context of online sales, the supplier may, for instance, want to impose quality standards relating to the high-end look and feel of

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Roche v Centrafarm, 23 May 1978, EU:C:1978:108, para. 7; CJEU, C-3/78, *Centrafarm*, EU:C:1978:174, paras. 11-12; CJEU, C-10/89, *Hag II*, EU:C:1990:359, para. 14; CJEU, C-317/91, *Deutsche Renault v Audi*, 30 November 1993, EU:C:1993:908, para. 21.

24 For instance, Chanel is not selling its fashion items over the Internet, merely marketing them. See at www. chanel.com (last visited 22 August 2018).

25 Online sales continued to climb, increasing by 24% in 2017 according to Bain and Co. Luxury Goods Worldwide Market Study, Fall–Winter 2017, http://www.bain.de/Images/BAIN_REPORT_Global_Luxury_Report_2017.pdf (last visited 2 August 2018), p. 15.

26 Major retailer sites include, for instance, www.24sevres.com, www.net-a-porter.com, www.farfetch.com and www.bonobos.com (last visited 22 August 2018).

27 See Eastman, J. K., Goldsmith, R. E., Flynn, L. R., Status Consumption in Consumer Behavior: Scale Development and Validation, (1999) Journal of Marketing Theory and Practice 7, pp. 41-52, especially p. 41.

28 Article 1(e) of the VBER (see fn. 54).

the website; product presentation and website design, criteria for the domain name, the use of navigation tools, the use of banners and the like. These are the online counterparts of the traditional offline quality standard, which include a certain size of the bricks-and-mortar shops, a specific geographic location, well-designed interior using particular fixtures, furnishing, and lightening all of which reflect the luxury image of the product in question, or imposing some specific criteria linked to the nature of the product.[29]

With the purpose of fully controlling the distribution network, in addition to setting up the distribution network criteria, the supplier will normally also impose to the appointed distributors a prohibition not to sell the products in question to non-approved distributors (cross-selling). As such, an SDS is of closed character. Not only that the luxury brand producers avoid price pressure from low-cost retailers or discounters, they also protect their investment in the brand's reputation and prevent its dilution because they are able to ensure that sales are carried out within conditions which benefit the prestige of their luxury goods.[30] In explaining his economic arguments in favour of the SDS for branded products, Winter reiterates the conflict of interests between producer of the luxury products and downstream distributors. While the former is interested in the profitability of its overall distribution system, the distributors are concerned only about their own sales. Not having a sufficient share in the profits to invest in the brand's image, sales conditions with individual retailers need to be controlled by the producer.[31] If the producer would be denied the control over the entirety of the distribution system, it would run the risk of some retailers free-riding off the investment of other participants in the system.[32] By restricting sales only to authorised distributors, luxury brand suppliers succeed in controlling market positioning, distribution quality and information flows in addition to the core brand integrity. SDS also facilitates client specific investment and know-how transfers which make two important factors in maintaining the reputation of a luxury brand.[33] Already in the 1990s, the GCEU recognised that preserving an "aura of luxury" in distributing luxury products is a legitimate interest of the luxury brand owners. The two *Lecrec* judgments[34] dealt respectively with Yves Saint Laurent and Givenchy luxury products and for its eloquence, the Court's reasoning merits being cited in full:

> "[I]t is in the interests of consumers seeking to purchase luxury cosmetics that the luxury image of such products is not tarnished, as they would otherwise no longer be regarded as luxury products. The

29 European Commission, Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, SWD (2016) 312 final, para. 216 (b).

30 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46, para. 178.

31 Winter, R. A., Pierre Fabre, Coty and Restrictions on Internet Sales: An Economist's Perspective, (2018) Journal of European Competition Law & Practice 9(3), pp. 183-187, especially 187.

32 Waelbroeck, D., Davies, Z., Coty, Clarifying Competition Law in the Wake of Pierre Fabre, (2018) Journal of European Competition Law & Practice 9(7), pp. 431-442, p. 435.

33 See in details Ezrachi, A. The Ripple Effects of Online Marketplace Bans, (2017) World Competition 40(1), pp. 47-65, chapter 3.

34 GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192.

> current segmentation of the cosmetics sector between luxury and non-luxury cosmetics reflects the varying needs of consumers and thus is not improper in economic terms. Although the 'luxury' nature of luxury cosmetics also derives, inter alia, from their high intrinsic quality, their higher price and manufacturers' advertising campaigns, the fact that they are sold through selective distribution systems which seek to ensure that they are presented in retail outlets in an enhancing manner also contributes to that luxury image and thus to the preservation of one of the main characteristics of the products which consumers seek to purchase. Generalized distribution of the products at issue, as a result of which Yves Saint Laurent would have no opportunity of ensuring that its products were sold in appropriate conditions, would entail the risk of deterioration in product presentation in retail outlets which could harm the 'luxury image' and thus the very character of the products."[35]

The GCEU thus confirmed that the luxury image of a product is not only linked to its quality, but to other factors as well, and that it is in the interest of consumers to enable manufacturers to safeguard the luxury image of their branded goods through a qualitative SDS, which might enhance competition. There are also other potential benefits to an SDS from the competition-law standpoint.[36] For one, it promotes non-price competition and improves the quality of services;[37] it brings about uniformity and quality standardisation on the distributors, thereby making the product in question more attractive to buyers which increases its sales;[38] it provides protection from free-riding and hold-up problems;[39] and by helping to create a brand image of luxury, it may foster inter-brand competition.[40] Having in mind all these benefits, SDS is often selected as the means of distributing branded products.[41]

4. EU COMPETITION LAW FRAMEWORK FOR SDS

Distribution contracts, including those on selective distribution, have always been an issue of interest to competition lawyers due to their potential negative effects on the market. Designed to restrict the number of authorised distributors and

35 GCEU, T-19/92, Leclerc v Commission (YSL), EU:T:1996:190, para. 120.

36 For a detailed analysis of SDS in the context of Internet sales in particular see, Iacobucci, E., Winter, R. A., European Law on Selective Distribution and Internet Sales: An Economic Perspective, (2016) Antitrust Law Journal 81, pp. 47-64.

37 Guidelines on Vertical Restraints, para. 106.

38 Guidelines on Vertical Restraints, para. 107(i).

39 Guidelines on Vertical Restraints, para. 107(a)-(e). A more detailed discussion on effects of SDS see, Buccirossi, P., Vertical Restraints on E-Commerce and Selective Distribution, (2015) Journal of Competition Law & Economics 11(3), pp. 747-773.

40 Rose V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., (Oxford: Oxford University Publishing, 2013), p. 453.

41 Guidelines on Vertical Restraints, para. 174.

the possibilities of resale[42] they risk reducing intra-brand competition,[43] foreclosing some type of distributors, softening competition and facilitating collusion between suppliers or buyers,[44] all of which are very serious competition concerns. For these reasons, such contracts might be qualified as anti-competitive under EU primary law, i.e. Article 101 of the TFEU.

Article 101(1) is one of the cornerstones of EU competition law, prohibiting agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. This very broadly worded provision is by no means simple or self-explanatory, as the TFEU does not even attempt to define any of the concepts used within it – that was left to the CJEU, which has developed a vast body of case law on this complex topic. For the purposes of this paper, it is important to stress only a few basic features of the functioning of Article 101 TFEU.

In order to be caught by the prohibition of Art 101(1), the conduct in question must amount to an agreement between two or more independent undertakings, a concerted practice or a decision by the association of undertakings as defined by the CJEU.[45] Such an agreement must be restrictive either by *object* or *effect* which should not be read in conjunction, as it is settled case law, that agreements are examined for their effects on competition only insofar as their object is not the restriction of competition.[46] This divide will prove to be important in cases of SDS as will be explained below. In addition, such agreements must threaten to restrict competition in an appreciable manner,[47] and must affect trade between Member States.[48] Article 101 offers a non-

42 Guidelines on Vertical Restraints, para. 174.

43 Intra-brand competition is competition among retailers or distributors of the same brand. Intra-brand competition may be on price or non-price terms. Glossary of Industrial Organisation Economics and Competition Law, compiled by Khemani, R. S., and Shapiro, D. M., commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, (1993), available at https://stats.oecd.org/glossary/detail.asp?ID=3153 (last visited 10 September 2018).

44 Guidelines on Vertical Restraints, para. 175.

45 For a more detailed discussion see, Rose, V., Baily, D. (eds.), op. cit., pp. 99 et seq.

46 CJEU, C-56/65, *Société Technique Minière v Machinenbau Ulm*, 30 June 1966, EU:C:1966:38, p. 249. In other words, if it is found that the object of the agreement is to restrict competition, it is not necessary to carry out a detailed market analysis to examine its actual effects on competition. See CJEU, joined cases 56 and 58-64, *Consten and Grundig v Commission*, 13 July 1966, EU:C:1966:41, p. 342; and other (for a more detailed discussion see Rose, V., Baily, D., (eds.), op. cit., pp. 149 et seq.). Conversely, where the object is not restrictive it is necessary to undertake a full competition analysis, which in the context of vertical agreements such as selective distribution agreements, imply taking into account a number of factors such as the nature of the agreements, market position of the parties, competitors and buyers, entry barriers, maturity of the market, level of trade, nature of products and other factors. See Guidelines on Vertical Restraints, paras. 111 et seq.

47 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (Text with EEA relevance), OJ C 368, 22.12.2001, pp. 13-15.

48 If an agreement does not affect trade between MSs, Article 101 of the TFEU will not apply. However, it is likely that such a conduct will fall under the scope of the comparable competition law provision of the affected MS.

exhaustive list of types of agreements covered by prohibition which includes examples of both horizontal and vertical restraints, the latter covering the SDSs.[49] By wording of Article 101(2) such agreements are *ex lege* void and undertakings involved may as a result be subject to high administrative fines.[50] Having regard to the fact that most market conducts rarely bring about only negative effects on the market, Article 101(3) sets out an exception rule to the above-described prohibition in cases where the benefits outweigh negative effects on competition.[51] Exemption criteria of Article 101(3) are presumed to be fulfilled in cases of agreements falling under any of the block exemption regulations[52] enacted by the Council or the Commission, in which case the prohibition in Article 101(1) does not apply.[53]

Falling under the category of vertical agreements, selective distribution agreements may be exempt from application of competition law under the Vertical Block Exemption Regulation (hereinafter: VBER),[54] which creates a general presumption of legality for vertical agreements, provided that the market share of

49 The respective part of Article 101(1) of the TFEU reads:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

50 CJEU, C-230/96, *Cabour SA and Nord Distribution Automobile SA v Arnor "SOCO" SARL, supported by Automobiles Peugeot SA and Automobiles Citroën SA.*, 30 April 1998, EU:C:1998:181, para. 48; CJEU, C-39/92, *Petróleos de Portugal – Petrogal SA v Correia Simões & CO. Ld[a] and Correia Sousa & Crisóstomo Ld[a]*,10 November 1993, EU:C:1993:874, para. 68.

51 The exception rules serve as a defence against the finding of an infringement if the parties involved successfully prove that the agreement in question: a) contributes to improving the production or distribution of goods or to promoting technical or economic progress, b) allows consumers a fair share of the resulting benefit, and which does not c) imposes on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; d) affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

52 Block exemption regulations are "Regulations, issued by the Commission or by the Council pursuant to Article 101(3) of the TFEU specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) of the TFEU. When an agreement fulfils the conditions set out in a block exemption regulation, the agreement is automatically valid and enforceable. Block exemption regulations exist, for instance, for vertical agreements, R&D agreements, specialisation agreements, technology transfer agreements and car distribution agreements." Glossary of competition terms available at https://www.concurrences.com/en/glossary-of-competition-terms/Block-exemption-regulation (last visited 16 September 2018).

53 Rose, V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., Oxford: Oxford University Publishing, 2013, p. 214.

54 Commission Regulation (EU) No 330/2010 of 20 April 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 L 102, 2010, 23.4.2010, p. 1.

each of the parties of the agreement does not exceed the 30% threshold and that the agreement does not contain any of the listed hard-core restrictions to competition.[55] Undertakings themselves have to verify whether the agreement that they have entered into is covered by the presumption of legality set out in the VBER. Very helpful in that regard are the Guidelines on Vertical Restraints,[56] a soft law document issued by the Commission which is meant to help undertakings in self-assessing their vertical agreement under EU competition law. Guidelines explain that even if the agreement does not fall within the exemption of VBER, this does not automatically imply that such an agreement is void. If covered by Article 101(1), the agreement may still benefit from an individual exemption under Article 101(3).[57] Following the structure of Article 101, the undertakings of a selective distribution agreement will usually take the following self-assessment steps: (a) They establish their respective market shares. (b) They have to make sure the agreement does not contain any of the hard-core and excluded restrictions set out in VBER. If the relevant market share of each party does not exceed the 30 % threshold and there are no hard-core and excluded restrictions, the agreement is covered by the safe harbour of VBER and the agreement is presumed to be legal. (c) If the 30 % market share threshold is exceeded for either and/or both of the parties, the undertakings should assess whether their agreement falls within Article 101(1). (d) If falling under Art 101(1), it is necessary to examine whether the agreement fulfils the conditions for exemption under Article 101(3).[58]

Whether an SDS will be caught by Article 101 depends on a variety of factors. To begin with, it depends upon the type of SDS put in place. Guidelines on Vertical Restrains differentiate between purely qualitative and quantitative selective distribution, the latter referring to the selection of "dealers only on objective criteria required by the nature of the products," and the application of such criteria does not limit the number of dealers.[59] It is generally considered that purely qualitative selective distribution falls outside the application of Article 101(1) when the criteria developed by the CJEU in cases *Metro I*[60] *and Metro II*[61] have been met.

The first Metro criterion refers to the characteristics of the product. The CJEU ruled that the nature of goods must necessitate setting up an SDS to maintain the quality of products and ensure their proper use.[62] Second, the dealers must be chosen on the ground of objective qualitative criteria applicable to all potential dealers equally and non-discriminatory. Third, the selection criteria must be proportionate, i.e. they should not go beyond what is necessary to achieve the legitimate objective.[63] Almost

55 Article 3(1) of the VBER.

56 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46.

57 Guidelines on Vertical Restraints, para. 96.

58 Guidelines on Vertical Restraints, para. 110.

59 Guidelines on Vertical Restraints, para. 175.

60 CJEU, C-26/76, *Metro v Commission (Metro I)*, 25 October 1977, EU:C:1977:167

61 CJEU, C-75/84 *Metro v Commission (Metro II)*, 22 October 1986, EU:C:1986:399

62 The most typical category of such products are hi-technology items requiring specialist advice and appropriate after-sale service, such as cars, cameras, certain electronic equipment, clocks and watches and computers. Whish, R., Baily, D., Competition Law, 7th ed., Oxford: Oxford University Press, 2012, p. 642.

63 CJEU, C-26/76, *Metro I*, EU:C:1977:167, paras. 20-21; Guidelines on Vertical Restraints, para.

a decade into this judgment, the CJEU in *Metro II*[64] acknowledged a limitation to the presumptive legality of an SDS upon the fulfilment of the named criteria. Namely, the CJEU found that an SDS might nevertheless be restrictive where the number of such distribution systems operating on the market negatively influences competition by way of their collective effect. In such a situation, there might be no room left for other forms of distribution systems or, it might result in rigidity of the price structure.[65] With that in mind, the CJEU formulated the fourth requirement to the presumptive legality of an SDS under Article 101(1) – the cumulative effect of SDSs must not preclude other forms of distributions on the market.[66] Although some have criticised the Metro criteria for being, *inter alia*, overly formalistic,[67] they continue to be successfully applied as demonstrated by the structure of the CJEU judgments that followed, including the recent ones discussed below.

However, prior to dealing with those judgments one needs to keep in mind the background to part of the current controversy related to the justification of the SDS for luxury products, which becomes relevant under the first Metro criterion. As already mentioned,[68] back in the 1990s, in the two *Lecrec* judgments[69] the GCEU ruled that the characteristics and the "aura of luxury" of branded products justify setting up an SDS. Its reasoning mentions sophistication and high-quality of luxury cosmetics, and in particular luxury perfumes, and their distinctive "luxury image" which is important in the eyes of consumers. The characteristics of those products cannot be limited to their material characteristics, but also encompass the specific perception that consumers have of them, in particular their "luxury image", which thus arises from their very nature. In the GCEU's view, it is in the interests of consumers seeking to purchase such products that they are appropriately presented in retail outlets and that their luxury image is preserved in that way. The Court reasoned that "criteria aimed at ensuring that the products are presented in retail outlets in a manner which is in keeping with their luxury nature constitute a legitimate requirement of such a kind as to enhance competition in the interests of consumers within the meaning of the case-law."[70] Therefore, in the luxury cosmetics sector, qualitative criteria for the

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64 CJEU, C-75/84, *Metro II*, EU:C:1986:399.

65 CJEU, C-75/84, *Metro II*, EU:C:1986:399, para. 40.

66 Subsequently, the GCEU held that where most suppliers use qualitative SDS that does not necessarily mean they are covered by Article 101(1), as this will depend on the existence of the barriers to entry on the relevant market and the strength of price competition. See GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190, para. 182; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192, para. 174. For a more detailed account see, Rose, V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., Oxford: Oxford University Publishing, 2013, pp. 461-462.

67 Witt, A. E., Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods, (2016) European Competition Journal 12, pp. 435-461, especially p. 442 and fn. 35.

68 See Chapter 3.

69 GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192.

70 GCEU, T-19/92, *Leclerc v Commission (YSL),* EU:T:1996:190, para. 120.

selection of retailers which do not go beyond what is necessary to ensure that those products are suitably presented for sale are in principle not covered by what today is Article 101(1) of the TFEU, in so far as they are objective, laid down uniformly for all potential retailers and not applied in a discriminatory fashion.

While the two *Lecrec* judgments dealt with SDS in the context of offline sales of luxury products, with the rise of the importance of online selling, more recently the CJEU explored the extent to which manufacturers may restrict online sales as a legitimate means of protecting the luxury image of their goods. Particularly important in that regard are judgments in *Pierre Fabre*[71] and, more recently, *Coty*.[72] The former judgment, dealing with an SDS for branded cosmetics and personal care products which contained a clause *de facto* banning internet sales by limiting the sales to pharmacies with the pharmacist present, prompted vivid debates as it appeared to have reversed the findings in the *Lecrec* judgments. What soon proved to be a controversial part of CJEU reasoning in *Pierre Fabre* states that "[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."[73] This one-sentence paragraph has triggered many reactions. Because it fails to take account of the consumers' interest in having the option of purchasing prestigious products at higher price, and not necessarily in promotion of lower prices over the product image, the judgment in *Pierre Fabre* has been criticised as a "paternalistic decision".[74] That the focus of the consumers of the luxury products is on the prestigious image of that product (inducing happiness and confidence, being first to have it, having the latest trend, showing off, distinguishing from common), rather than simply on the quality of the product may be concluded based on some consumer behaviour research.[75] In addition, the critics of the *Pierre Fabre* emphasised the more theoretical problem with the lack of logic in the argument that the general internet sale prohibition is restriction by object if not objectively justified, and at the same time, maintaining prestigious image may not constitute justification despite being the foremost reason for putting an SDS in place.[76] In a view of potentially adverse effects the cited paragraph in *Pierre Fabre* could have had upon the future of the luxury brands, the judgment in *Coty* is seen as a welcome step towards recognising the economic arguments and softening down the hardness of *Pierre Fabre*. Along these lines is also the comment that competition law should be dealing with IP rights in a way to protect their substantive core from the scrutiny of

71 CJEU, 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*, 13 October 2011, EU:C:2011:649.

72 CJEU, C-230/16, *Coty*, EU:C:2017:941.

73 CJEU, C-439/09, *Pierre Fabre*, EU:C:2011:649, para. 46.

74 Winter, R. A., *Pierre Fabre, Coty* and Restrictions on Internet Sales: An Economist's Perspective, (2018) Journal of European Competition Law & Practice 9(3), pp. 183-187, especially 187.

75 According to the Deloitte Luxury Multicountry Survey for Global Powers of Luxury Goods 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf (last visited 2 August 2018).

76 Buccirossi, P., op. cit., pp. 768-769.

competition law.[77] Therefore, the following pages discuss *Coty* in detail. The analysis evolves around the question of whether a producer of luxury products may by virtue of the SDS prohibit its distributors from selling these products through a third-party internet platform without infringing Article 101 of the TFEU. The answer given by the CJEU suggests that the internet sales of luxury goods need deluxe competition law treatment in order to enable the producers to preserve the deluxe image. However, the situation is not without complexity as explained below.

5. THE FACTS IN COTY

The dispute has arisen out of the long-term business relationship between the company Coty Germany GmbH, which is one of the leading producers of luxury cosmetic products in Germany, and company Parfümerie Akzente GmbH, which acts as an authorised distributor for those products. Distribution on the German market and markets of some other MSs is traditionally carried out in physical stores, and more recently over the internet.[78] Internet sales are made through Parfümerie Akzente's online store[79] and through the platform amazon.de managed by several companies belonging to the Amazon group of companies established in Luxembourg.[80] Coty Germany was not in agreement with the retail via Amazon and requested Parfümerie Akzente to cease using this distribution channel.

Prior to that, the two companies concluded a selective distribution contract which provides that each of the distributor's sales locations must be approved by Coty Germany, which implies compliance with a number of requirements relating to their environment, décor and furnishing. The contract also states that "the décor and furnishing of the sales location, the selection of goods, advertising and the sales presentation must highlight and promote the luxury character of Coty Prestige's brands", what was the earlier company name of the plaintiff.[81] In addition, the contract included a supplemental agreement on internet sales according to which "the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised".[82] Subsequent to entry into force of the VBER,[83] Parfümerie Akzente refused to accept the modifications to the selective distribution contract and the supplemental agreement whereby "the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an 'electronic shop window' of the authorised store and the luxury character of the products is preserved". Likewise,

77 Schmidt-Kessen, M. J., Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension, (2018) Journal of European Competition Law & Practice, 9(5), pp. 304-316,

78 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 8 and 9.

79 See https://www.parfumdreams.de/ (last visited 15 August 2018).

80 See https://www.amazon.de/gp/help/customer/display.html?ie=UTF8&nodeId=505050 (last visited 15 August 2018).

81 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 11 and 12.

82 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 14.

83 OJ L 102, 23 April 2010, p. 1.

the supplemental agreement expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige.[84]

In the wake of disagreement between the companies, Coty Germany logged a lawsuit against the Parfümerie Akzente before the Regional Court, Frankfurt am Main (*Landgericht Frankfurt am Main*), seeking an order prohibiting the defendant from distributing products bearing the brand at issue via the platform amazon.de. The court of first instance dismissed the application holding that a contractual clause in supplemental agreement is in violation of the German law against the restriction of competition (*Gesetz gegen Wettbewerbsbeschränkungen*) or Article 101(1) of the TFEU, and in particular in the light of the earlier CJEU judgment in *Pierre Fabre*.[85] The national court explained that the aim of preserving a prestige brand image does not justify the introduction of an SDS which by definition restricts competition. It further stated that not only that it does not merit block exemption, but also does not qualify for an individual exemption, since it has not been shown that the general exclusion of internet sales via third-party platforms entails efficiency gains of such a kind as to offset the disadvantages for competition that result from the clause at issue. The national court also considered that such general prohibition was not necessary because there are alternative means less restrictive of competition, such as the application of specific quality criteria for the third-party platforms.[86]

Deciding on the plaintiff's appeal, the Higher Regional Court, Frankfurt am Main (*Oberlandesgericht Frankfurt am Main*) stayed the proceedings seeking assistance by the CJEU in the preliminary ruling proceedings.

6. THE JUDGMENT IN COTY

6.1. The compatibility of SDS for luxury goods with Article 101(1) of the TFEU

The first question addressed by the CJEU related to the compatibility of SDSs, having as their aim the distribution of luxury goods and primarily serving to preserve a "luxury image" of the goods, with Article 101(1) of the TFEU. Essentially, the CJEU ruled in the affirmative. Its reasoning recalls that although an SDS necessarily affects competition, it may nevertheless be compatible with Article 101(1) provided the Metro criteria described above are fulfilled. This entails that dealers are chosen on the ground of qualitative, objective criteria laid down in a non-discriminatory manner, that the nature of the product in question necessitates an SDS to preserve the quality of products and ensure their proper use and, finally, that the selection criteria are proportionate to this objective.[87]

84 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 15.

85 CJEU, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, 13 October 2011, EU:C:2011:649.

86 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras.16-18.

87 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 24.

The CJEU found those criteria to have been met. In particular, in relation to the third Metro criterion, it analysed the necessity of an SDS for luxury goods, invoking its judgment in *Copad*,[88] stemming from trademark protection context, rather than competition law. According to *Copad*, "the quality of luxury goods […] is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury. Since luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods. Therefore, an impairment to that aura of luxury is likely to affect the actual quality of those goods."[89] It is on these grounds that the CJEU found that "the characteristics and conditions of a selective distribution system can, in themselves, preserve the quality and ensure the proper use of such goods,"[90] again referring to *Copad* which relied on a former case law on negative clearance under Article 101(3) and by applying the Metro criteria.[91]

Following that, the CJEU dealt with the controversial paragraph in the *Pierre Fabre*. It attempted to limit that statement to the facts in *Pierre Fabre*, which distinguish that case from *Coty*. Namely, in *Pierre Fabre* a specific contractual clause imposing on authorised distributors in SDS a comprehensive prohibition on the online sale of the contract goods was at issue,[92] while in *Coty* the clause precluded retailers only from selling the contract goods online on third-party platforms which are discernible to the customers. Besides, in *Pierre Fabre* the goods were ordinary hygiene and body cosmetics, whereas in *Coty* the goods were luxurious.[93] In a view of this CJEU's technical manoeuvre, the *Coty* judgment may be seen as a consolidation of the established case law,[94] but the possible understanding might be that second factual distinction reveals CJEU intention to limit the benefits of the *Coty* judgment to luxury goods only.

6.2. The compatibility of the online marketplace ban with Article 101(1) of the TFEU

Having found that the SDS of luxury goods, designed to preserve the luxury image of those goods, is compatible with Article 101(1), provided Metro criteria are fulfilled, the CJEU turned to the legality of the clause prohibiting authorised distributors from using, in a discernible manner, third-party platforms for online sale of those goods.

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88 CJEU, C-59/08, *Copad SA v Christian Dior couture SA and others*, 23 April 2009, EU:C:2009:260.

89 CJEU, C-59/08, *Copad*, EU:C:2009:260, paras. 24-26, cited in CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 25.

90 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 26, citing CJEU, C-59/08, *Copad*, EU:C:2009:260, para. 28.

91 CJEU, C-31/80, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"*, 11 December 1980, EU:C:1980:289, para. 16.

92 Such general prohibition of online sales is considered a hard-core restriction. See e.g. Buccirossi, P., op. cit., pp. 763 and 767.

93 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 31-34.

94 Waelbroeck, D., Davies, Z., op. cit., p. 432.

The CJEU applied the same analytical structure to the assessment of the named contractual clause as for the entire SDS. In other words, here again the Metro criteria played the central role. Most sensitive in that regard was the analysis of the proportionality of the measure with the pursued aim. It was necessary to explore whether the prohibition to use third-party marketplaces as online selling points is appropriate prohibition for preserving the luxury image of the goods, and not going beyond what is necessary to achieve that goal. [95]

Noting that an evaluation of the facts of the case is still indispensable,[96] the CJEU found that such a prohibition is in principle appropriate[97] for a number of reasons. Firstly, it noted that such a prohibition provides the supplier with an assurance that his luxury goods will be linked solely with the authorised dealers[98] allowing him to verify that the goods are sold online under the agreed qualitative conditions.[99] Rightly, the CJEU pointed that such a possibility would not exist in relation to third-party platforms due to the lack of a direct contractual relationship between them. This fact prevents the supplier from requiring compliance with the SDS quality conditions,[100] risking the deterioration of the online presentation of the products, which in turn might "harm their luxury image and thus their very character."[101] The CJEU as well pointed out that because such marketplace platforms regularly sell all kinds of goods, they cannot preserve the luxury image of luxury goods. This aim, on the other hand, is achieved when luxury goods are being sold in the online shops of authorised distributors.[102] In addition, as AG Wahl noted, such prohibition serves the purpose of assuring the "identification of origin of the products", which is very important "in the face of the phenomena of counterfeiting and parasitism, which are likely to restrict competition".[103] Although not specifically endorsed by the CJEU, the opinion of AG Wahl remains a valid supportive argument to the CJEU's finding. In fact, a recent OECD study shows that e-commerce is a „major enabler for the distribution and sale of counterfeit and pirated tangible goods as it opens new possibilities to get access to such goods in areas that were traditionally beyond the scope of counterfeiters."[104] This is so because counterfeiters can operate across a number of jurisdictions without being caught, and are able to switch websites instantly without losing their customer base.[105]

Furthermore, the CJEU's motives largely revolve around recognising that the

95 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 43.
96 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 41.
97 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 51.
98 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 44.
99 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 47.
100 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 48.
101 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 49.
102 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 50.
103 AG Wahl, *Coty Germany GmbH v Parfümerie Akzente GmbH*, 26 July 2017, EU:C:2017:603, para. 102.
104 OECD/EUIPO, Trade in Counterfeit and Pitted Goods: Mapping the Economic Impact. (OECD Publishing Paris 2016), p. 35 available at https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf (last visited 23 September 2018).
105 Loc. cit.

prestigious image is the most important feature of luxury goods in the eyes of the consumers.[106] This conclusion has to be viewed also against the backdrop of the current online market situation. Thus, the CJEU, referring to the results of the 2016 Preliminary Report on the E-commerce Sector Inquiry, confirmed in the 2017 Final Report on the E-commerce Sector Inquiry, sided with the arguments of the Commission and Advocate General Wahl pointing out that, regardless of the growing importance of online marketplaces operated by third parties, the main distribution channel is still the retailers' own online shops.[107]

When it comes to the analysis of proportionality, the CJEU took into account in particular the fact that, under the restriction at issue, the authorised distributors were still allowed to use internet as a selling means. This included selling though their own websites, on condition they have an electronic shop window for the authorised store and they preserve the luxury character of the products. Likewise, unauthorised third-party platforms could have been used as well, so long as the use of such platforms was not discernible to the consumer.[108] It is on this ground that the CJEU distinguished the clause at issue from the absolute ban on online sales found to be incompatible with Article 101 of the TFEU in the *Pierre Fabre* judgment.[109] While *Pierre Fabre* related to a *de facto* absolute ban on online sales, in *Coty* that was not the case. It is clear that both rulings are fact-sensitive and with that in mind, the finding of CJEU in *Coty* should not be understood as endorsing a blanket ban on the use of third-party platforms, as the latter might not always be proportionate to the objective pursued. However, the main proportionality objection that comes to mind – the authorisation to use third-party platforms subject to their compliance with predefined quality conditions – has been rejected by the CJEU as not being equally effective as the prohibition actually used by Coty due to the lack of direct contractual relationship between the suppliers and third-party platforms. The argument used is not all that persuasive, as there might be platforms specializing in the sale of luxury goods and which are consequently likely to meet the qualitative criteria imposed on authorised dealers.[110] All considered, the CJEU found the identified vertical restraint presumably lawful under Article 101(1).

6.3. The legality of the online marketplace ban under the VBER

Lastly, the referring Court asked whether the clause at issue might benefit from the exemption under VBER. In order to fully appreciate the practical implications of the interpretation given by the CJEU, it is necessary to reemphasise that the VBER

106 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 50.

107 Commission Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, Brussels, 15.9.2016, SWD(2016) 312 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf (last visited 15 September 2018), para. 48; Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, Brussels, 10.5.2017, COM(2017) 229 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (last visited 15 September 2018), para. 39.

108 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 53.

109 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 52.

110 For a more detailed discussion on this issue, see Witt, A., op. cit., p. 456.

applies only to agreements caught by the prohibition of Article 101(1) TFEU.[111] Because the CJEU in the previous two questions answered that an SDS for luxury products as well as the clause restricting the use of third party platforms are compatible with Article 101(1) as long as Metro criteria are fulfilled, VBER would be applicable only when these criteria would not be met. In other words, if all the conditions were satisfied, the VBER would not be applicable at all and the vertical agreements would be considered compatible with EU competition rules. Conversely, if caught by Article 101(1), an agreement such as the present SDS would be covered by the VBER and could benefit from the block exemption if the parties to the agreement do not exceed the market share threshold defined by the VBER and do not contain any of the hard-core restrictions listed therein.

In relation to SDS, and in particular in the context of online sales, the hard-core restrictions prone to produce most severe damage to competition are listed in Article 4 of the VBER, particularly relevant to the case at hand, are points (b) and (c). Article 4(b) relates to clauses partitioning the market either by territory or by consumer group which may be done through an obligation not to sell the products in question to a certain group of costumers or in certain territories.[112] Article 4(c) on the other hand, relates to a restriction of active[113] or passive[114] sales to end users by members of an SDS operating at the retail level of trade. With that in mind, the referring Court asked whether the clause prohibiting the use of third-party platforms for the distribution of contracted luxury goods, partitions the market by costumer group, or whether it restricts passive sales to end consumers.[115]

The problem underlining these questions arises from the generally accepted understanding that internet sales are a form of passive selling and thus most types of restriction to internet sales are likely to be considered as hard-core restraints invalidating the safe harbour of the VBER.[116] It is in this regard that various forms of restrictions on internet sales become very intriguing, and questionable as to their compatibility with EU competition law. For instance, the Guidelines on Vertical

111 Guidelines on vertical restraints, para. 8.

112 In this regard, an exception is a restriction of sales by the members of SDS to unauthorised distributors within a territory reserved to the supplier, which is considered to be justified by the objectives of an SDS. See Article 4(b)(iii) of the VBER.

113 Guidelines on vertical restraints, para. 51, states: Active sales mean actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group by for instance direct mail or visits; or actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in media or other promotions specifically targeted at that customer group or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor's exclusive territory."

114 Guidelines on vertical restraints, para. 51: "Passive sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion in media or on the Internet that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in non-exclusive territories or in one's own territory, are passive sales."

115 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 64.

116 See Guidelines on Vertical Restraints, para. 52.

restraints state that "within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick-and-mortar shop as a hard-core restriction."[117] The CJEU first made it clear that this was not the case of an online selling ban, such as the one in *Pierre Fabre*. Further, it found that it was impossible for a producer to identify the third-party costumers among the entirety of its online customers."[118] In addition, it held that under certain conditions, the SDS permitted authorised dealers to advertise on third-party platforms, and to use online search engines. Using such search engines, buyers were usually able to find online offers of authorised dealers.[119] With these arguments in mind, the CJEU found that the prohibition at issue does not amount to either the hard-core restriction of the customers, or a restriction on online sales within the meaning of Articles 4(b) and (c) of the VBER.

This finding raised an important question: Is the above exemption under VBER applicable only in cases of SDS of luxury goods? This is not surprising, as the compatibility of the SDS with Article 101(1) rested mainly on the nature of goods, i.e. the appropriateness and proportionately of the measures with the objective of safeguarding the luxury image of goods. Because of that, one may easily be misguided into reading too narrowly the CJEU's judgment in respect of VBER, limiting its exemption to the nature of goods, which "may generate litigation over the prestige of some goods".[120] However, such an interpretation would be incorrect.

First, it should be noted that the Guidelines on Vertical Restraints expressly state that the VBER exempts both qualitative and quantitative SDS irrespective of the nature of the product or the selection criteria.[121] This position is very logical for a variety of reasons, well explained by the Commission in its brief on the *Coty* case. Because the main purpose of the VBER is to provide legal certainty to parties as to the validity of their agreement in relation to Article 101(1) of the TFEU, the assessment of hard-core restrictions should not be dependent upon the nature of goods. In addition, the Commission points out that while Article 4(c) applies specifically to SDS, Article 4(b) applies to other types of vertical agreements as well, and thus the nature and category of goods cannot be of relevance for its application.[122] The repercussions are great, as it may be concluded that online marketplace bans, irrespective of the nature of the goods concerned and, potentially, irrespective of non-selective distribution

117 Guidelines on Vertical Restraints, para. 56.

118 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 66.

119 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 67.

120 Colangelo, G., and Torti, V., Selective Distribution and Online Marketplace Restrictions under EU Competition Rules after Coty Prestige, (2018) European Competition Journal 14 (1) pp. 81-109, p. 104.

121 Guidelines on Vertical Restraints, para. 176.

122 EU Commission, EU competition rules and marketplace bans: Where do we stand after the *Coty* judgement? (2018) Competition policy brief 4, p. 4.

schemes,[123] are in CJEU's view, not hard-core, i.e. restrictions by object under the VBER.[124] Because marketplace bans are not considered restrictions by object where market share threshold does not exceed 30%, even where parties exceed the market threshold of 30%, such bans will in all likelihood not constitute restrictions by object under Article 101 either.

7. CONCLUSION

In the context of online retail sales of luxury products, economic policies underlying the IP law seem at first sight to run contrary to economic policies inspiring competition law. This is because the control exercised by the producer within its SDS limits the potential for competition. However, upon careful consideration of the fact that in the market segment concerned with luxury product a low price is not the measure of competition, the policies seem perfectly aligned. Maintaining prestige and "aura of luxury" is a form of effective non-price competition benefiting the consumers. Hence, it is desirable to allow SDSs and clauses prohibiting third-party sales via discernible platforms as they well-accommodate present needs of the luxury brand producers in preserving their investment and successfully operating in the current e-commerce environment.

Due to their intrinsic nature, the distribution of luxury goods is best accommodated by establishing an SDS. While for decades this was confirmed by CJEU's case law in both competition and trademark fields, *Pierre Fabre* broke the sequence causing uncertainty to the luxury brand producers. In *Coty*, the CJEU re-established the previous case law by limiting the findings in *Pierre Fabre* to concrete facts of that case, i.e. overall internet sale prohibition. The *Coty* judgments clarifies that when Metro criteria are met, SDS and online marketplace prohibition for luxury goods are not contrary to competition law and fall outside Article 101(1) of the TFEU, not being restrictive either by object or by effect. If Metro criteria are not met, exemption under the VBER is available provided the market share threshold is not exceeded since the clause is not a hard-core restriction. This rule applies irrespective of the nature of the goods. In cases where the 30% market share threshold is exceeded, an individual assessment becomes necessary. At this point one may argue that if an online marketplace ban is not a restriction by object under VBER, no matter the nature of goods, it should not be a restriction by object under 101(1) either, again no matter the nature of goods. Turning to the question in the title of this paper about the deluxe version of competition law

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123 Clerckx, S., et al., CJEU Issues Long-Awaited Coty Decision on Luxury Goods Supplier's Online Platform Ban, (2018) *The Licencing Journal* 2, p. 4.

124 Colomo, P., Case C-230/16, Coty Germany GmbH: Common sense prevails, Chillin' Competition blog, 6 December 2017, https://chillingcompetition.com/2017/12/06/c%E2%80%91230-16-coty-germany-gmbh-common-sense-prevails/ (last visited 7 September 2018); Buccirossi, P., op. cit.; Clerkx, S., op. cit.; Wealbroeck, D., Davies, Z., *Coty*, Clarifying Competition Law in the Wake of Pierre Fabre, (2018) Journal of European Competition Law & Practice, 9(7), pp. 431-442; Wijckmans, F., *Coty Germany GmbH v Parfümerie Akzente GmbH*: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms, (2018) Journal of Competition Law & Practice 9(6), pp. 373-375.

for luxury products, it is apparent that no straightforward answer may be given at this point. Such understanding would practically erase a distinct competition law treatment of luxury and non-luxury goods, contrary to what *Coty* seems to suggest. However, the conundrum created is rather a theoretical concern. For all practical purposes, it is may be seen as a hands-off competition policy approach to luxury goods. This should ideally benefit the luxury brand producers who will attempt to put in place a carefully designed SDS intended to preserve its brand prestige. However, the issue of online sales in competition law is far from being solved as demonstrated by recent *Asics* case before the German *Bundeskartellamt* and *Bundesgerichtshof* finding the prohibition on the use of price comparison sites to be restrictive by object, due to the fact that the goods were non-luxury.[125] This brings us back to our initial question about the deluxe version of competition law for luxury products. It became apparent by now that no straightforward answer may be given. After *Coty*, it is certain that only luxury goods enjoy the deluxe competition law treatment in relation to third-party online platform bans. For eventual spill-over effects, we will have to wait for new rulings.

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Sažetak

INTERNETSKA DISTRIBUCIJA LUKSUZNIH PROIZVODA: POSTOJI LI *DE LUXE* INAČICA PRAVA TRŽIŠNOG NATJECANJA EU-A?

Zbog svojih posebnih odlika, tržište luksuznih proizvoda područje je zanimanja pravnika kao i drugih stručnjaka poput ekonomista ili sociologa. Te odlike imaju ključnu ulogu u pravnom uređenju toga tržišta. Polazeći od prava tržišnog natjecanja, valja imati na umu da je analiza u okviru članka 101. UFEU-a nepotpuna nedostaje li osvrt na politike i pravila prava intelektualnog vlasništva. S porastom važnosti internetske prodaje, nova pitanja postavljaju se pred tijela nadležna za tržišno natjecanje, poput zakonitosti raznih vrsta *online* ograničenja u okviru sustava selektivne distribucije. Oslanjajući se na pristup koji kombinira pravo intelektualnog vlasništva i pravo tržišnog natjecanja, ovaj rad nudi uvid i komentar prakse EU-a s prvenstvenim fokusom na noviju presudu Suda EU-a u predmetu *Coty*. Kompleksnost interakcije među različitim pravilima i izuzetcima u pravu tržišnog natjecanja posebno je očigledna u tom predmetu. S obzirom na ograničenost presude na konkretne okolnosti, presuda u predmetu *Coty* može poslužiti kao razjašnjenje situacije u odnosu na *de luxe i*načicu prava tržišnog natjecanja samo za određene zabrane online prodaje unutar sustava selektivne distribucije, dok će se rasprava i razvoj nacionalne prakse nastaviti u očekivanju novih pojašnjenja sa Suda EU-a.

Ključne riječi: *pravo EU-a; tržišno natjecanje; intelektualno vlasništvo; žig; luksuzni proizvod; internet.*

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Zussamenfassung

LUXUSPRODUKTE IM ONLINE-VERTRIEB: GIBT ES EINE DELUXE VERSION DES EU-WETTBEWERBSRECHTS?

Der Markt für Luxusgüter ist aufgrund seiner Besonderheiten interessant sowohl für die Juristen als auch für andere Berufe, wie Wirtschaftler und Soziologen. Die Charakteristiken der Luxusgüter spielen eine wichtige Rolle bei der rechtlichen Regulierung des Marktes. Obwohl man dabei immer vom Wettbewerbsrecht ausgeht, die Bewertung des unter Art.101 AEUV fallenden wettbewerbswidrigen Verhaltens kann nicht vorgenommen werden, ohne auf die Grundsätze und Regeln des Rechts des geistigen Eigentums zurückzugreifen. Mit dem Anstieg des Umsatzes im *Online*-Handel wurden Wettbewerbsbehörden und Berufungsgerichte mit neuen Fragestellungen konfrontiert, beispielsweise mit der Legalität verschiedener Restriktionen im Internet bezüglich des selektiven Vertriebssystems. Durch den kombinierten Ansatz, der das Recht des geistigen Eigentums und das Wettbewerbsrecht einbezieht, bietet dieser Beitrag eine Einsicht in und einen Kommentar der EU-Rechtsprechung, wobei man auf die *Coty*-Entscheidung des EuGH besonderen Wert legt. Die Probleme des Zusammenspiels von Regeln und Ausnahmen des Wettbewerbsrechts kommen im Fall *Coty* besonders in den Vordergrund. Wegen des beschränkten Sachverhalts kann das *Coty*-Urteil zur Erklärung der Deluxe Wettbewerbsrechtbehandlung nur bei manchen *Online*-Verkaufsverboten im Rahmen des selektiven Vertriebssystems dienen. Es wird sicherlich weitere Diskussionen und nationale Rechtsprechungen bezüglich anderer wettbewerbsrechtbezogenen Restriktionen im Internet geben, die der EuGH erläutern wird.

Schlüsselwörter: *EU-Recht; Wettbewerbsrecht; geistiges Eigentum; Marke; Luxusprodukte; Internet; selektiver Vertrieb; vertikale Vereinbarungen.*

Riassunto

LA DISTRIBUZIONE VIA INTERNET DEI PRODOTTI DI LUSSO: ESISTE UNA VERSIONE *DE LUXE* DEL DIRITTO DELLA CONCORRENZA IN UE?

In ragione delle sue forme particolari, il mercato dei prodotti di lusso è un campo di interesse per i giuristi come per altri esperti, quali gli economisti ed i sociologi. Tali specificità giocano un ruolo centrale nella disciplina di tale mercato. Partendo dal diritto della concorrenza, occorre tenere in conto che l'analisi nell'ambito dell'art.

101 del TFUE è parziale, se manca una riflessione sulle politiche e le regole del diritto della proprietà intellettuale. Con il crescere dell'importanza della vendita in rete nuove questioni si presentano dinanzi agli organi competenti per la concorrenza, come quella della legalità di alcuni tipi di limitazioni *online* nell'ambito del sistema della distribuzione selettiva. Appoggiandosi all'approccio che combina il diritto della proprietà intellettuale ed il diritto della concorrenza, il presente lavoro offre accesso e commento della prassi dell'UE con primaria attenzione per la recente decisione della Corte di Giustizia dell'UE nel caso *Coty*. La complessità dell'interazione tra le diverse regole ed eccezioni nel diritto della concorrenza è particolarmente evidente in questo caso. In ragione della limitazione della decisione alle circostanze concrete, la sentenza nel caso *Coty* può servire a chiarire la situazione rispetto alla versione *de luxe* del diritto della concorrenza soltanto con riguardo a certi divieti di vendita online all'interno del sistema di distribuzione selettiva; mentre, il dibattito e lo sviluppo della prassi nazionale continueranno rispetto alle altre limitazioni relative agli acquisti in rete, rimanendo in attesa di nuovi chiarimenti della Corte dell'UE.

Parole chiave: *diritto dell'UE; concorrenza; proprietà intellettuale; marchio; prodotto di lusso; internet; distribuzione selettiva; accordi verticali.*