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The EU Court of Justice rules in favour of restrictions on the use of platforms in a selective distribution system *(Coty)*

ANTICOMPETITIVE PRACTICES, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, VERTICAL RESTRICTIONS, EUROPEAN UNION, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT, INTERNET, ONLINE PLATFORMS

EU Court of Justice, Coty, C-230/16, 6 December 2017

Peter Alexiadis, Jens-Olrik Murach, Balthasar Strunz

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This article considers how much the **Coty** Ruling has shed light on the extent to which a manufacturer can restrict the sales of its products over online platforms, especially in the wake of the recent German Case involving **ASICS** and basic principles developed at EU level to assess obligations imposed on distributors in an SDS context.

In May 2017, the Commission published its much anticipated Final Report on its E-Commerce Sector Inquiry, [***1***] launched as the competition law limb of its Digital Market Strategy. The Commission analysed e-commerce practices across the EU in relation to: (i) consumer goods; and (ii) digital content. In doing so, the Commission assessed prevailing market practices and potential competition barriers that might impede competition by restricting the growth of e-commerce.

Online Distribution of Consumer Goods – Main Findings

In its Final Report, the Commission concluded that, in response to more price competition for consumer goods sold online (especially clothing, shoes, sportswear and outdoor equipment), many manufacturers are increasingly seeking to achieve more control over their distribution channels in order to exert greater influence on pricing levels, quality controls and territorial availability. To this effect, manufacturers often implement SDS with their retailers. That, in turn, sometimes raises questions about the compatibility of those restrictions with competition rules.

Treatment of SDS

In order for distributors to become members of an SDS, they will be required to satisfy certain criteria established by the supplier. These criteria can be both qualitative (*i.e.*, particular characteristics of distributors, facilitating more effective distribution) and quantitative (*i.e.*, limits on the number of authorized distributors) in nature. Generally, an

SDS reduces the number of retailers capable of distributing a certain product. As such, it invariably limits the extent of intra-brand competition. By comparison, the selection process can help in reducing transaction and distribution costs, and in creating efficiencies along the value chain by overcoming coordination problems.

Against this background, in its 1977 **Metro I** Judgment, the ECJ held that an SDS does not infringe Article 101(1) TFEU if the following conditions (the so-called "*Metro* criteria") [*2*] are satisfied: (1) the nature of the product necessitates distribution through an SDS (qualitative element); (2) resellers must be chosen based on objective (*i.e.,* non-quantitative) criteria; and (3) the criteria must not go beyond what is necessary.

Yet, even if an SDS does not fulfil the above criteria (*e.g.*, because the nature of the product does not necessitate distribution through an SDS or the SDS contains a quantitative element), it can still benefit from an exemption to the Article 101(1) TFEU prohibition under the VBER, provided that both the supplier and the distributor have market shares not exceeding 30% (Article 3 of the VBER), and the agreement does not contain a so-called "hard-core" restriction of competition. [*3*]

Hard-core restrictions are defined in Article 4 of the VBER. Most importantly, such restrictions include: the buyer's ability to determine its minimum sales price constitutes a hard-core restriction; more specifically, in an SDS, the restriction of active or passive sales to end users by members of an SDS operating at the retail level of trade; or the restriction of cross-supplies between selected distributors, including supplies between distributors operating at different levels of trade.

If the VBER does not apply, there is still scope for an individual exemption of an SDS under Article 101(3) TFEU if the restraint brings about efficiency gains achieved by indispensable measures which outweigh the restrictive effects of the restraint, and which will be passed on to customers.

The Treatment of Online Sales Restrictions

Some suppliers might be tempted to resort to classic Retail Price Maintenance obligations in an online context, couched in terms which prohibit distributors from reselling the goods below a certain price. However, as mentioned above, given that they are **"hard-core" restrictions**, such provisions are incompatible with the Article 101(1) TFEU prohibition – unless they can be exempted under Article 101(3) TFEU on efficiency grounds, which occurs rarely.

The Commission has also identified non-price restrictions in e-commerce as being problematic under EU competition rules. These restrictions concern particular classes of end user and include **"platform bans"**, which prohibit the distributor from reselling goods on third party online marketplaces such as Amazon and eBay. In this context, it is important to note that the Commission's Guidelines on Vertical Restraints ("Vertical Guidelines") explicitly stipulate that suppliers may require their distributors to use third party platforms only in accordance with conditions agreed on by both parties. [*4*] As an example, the Vertical Guidelines allow the supplier to require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

The Vertical Guidelines also allow the supplier to require quality standards for the use of the Internet site to resell its goods, just as the supplier may require quality standards for a shop or for sales by catalogue, or indeed for advertising and promotion in general. The supplier may, for example, require that its distributors have one or more "brick and mortar" stores or showrooms as a pre-condition to becoming a member of its distribution system.

Other non-price restrictions include the prohibition on distributors from engaging with price comparison websites or from using manufacturers' trademarks for advertising purposes.

Overall, the conclusions of the Sector Inquiry suggest that platform bans should not be considered to constitute hard-core restrictions, given that the most important means of online sales for retailers continues to be through their own respective Internet sites. [*5*]

In contrast to what the Sector Inquiry and the Vertical Guidelines suggest, both the German Bundeskartellamt ("BKartA") and German courts have concluded that third-party platform bans constitute hard-core restrictions of Art 101(1) TFEU by object. As a result, they cannot be block-exempted under the VBER. Before the Commission published its report on the Sector Inquiry in April 2017, the German Court of Appeals in Düsseldorf (Oberlandesgericht Düsseldorf) had confirmed the uncompromising stance of the BKartA against all prohibitions or restrictions imposed in relation to online sales made by traditional distributors. [*6*] It endorsed the BKartA assessment that running shoe manufacturer ASICS had included illegal provisions in its agreements with members of its SDS. [*7*] ASICS' subsequent appeal against its denial of leave to appeal was dismissed by the Bundesgerichtshof (Federal Court of Justice). [*8*] The rationale behind the BKartA's Decision and the Judgment of the Appeal Court are assessed below.

ASICS subjected the distributors falling within its SDS to three distinct obligations, namely, to not: (i) use the ASICS Trademark in online advertising; (ii) engage with price comparison websites; and (iii) sell ASICS shoes on third party online marketplaces. [*9*] Each of these obligations was challenged by the BKartA under German and EU competition rules (Section 1 of the *Act against Restraints of Competition* and Article 101 TFEU).

In its Decision, the BKartA noted that fast Internet connections and the steady growth of online sales were changing the existing dynamics for the sale of consumer goods. New online distribution channels extended the reach of merchants who sell online and allowed them to broaden their range of products. As the Internet also helped to increase transparency for consumers, this development was said to have strengthened competition. [*10*] Yet, in order to benefit from these advantages, merchants were becoming dependent on end users actually locating their offerings, which is why merchants engage in online advertising or work with price comparison websites. [*11*]

The BKartA held that restrictions (i) and (ii) listed above violated the prohibition in Article 101(1) TFEU by object. Despite the fact that ASICS and the retailers did not exceed the 30% market share threshold, these provisions could not benefit from the "safe harbour" provided under the VBER because they constituted hard-core restrictions, which cannot be block exempted. The BKartA also held that the conditions of the efficiency exemption of Article 101(3) TFEU had not been fulfilled.

As regards restriction (i) (*i.e.,* the prohibition on using the ASICS trademark), the BKartA noted that this restriction did not in any event apply to offline-only retailers, thereby undermining the business rationale that it was designed to protect against free riding at the expense of retailers that had invested in a proper sales network for its products. It went on to hold that the restriction also went beyond what even trademark owners might prohibit. [*12*] As regards restriction (ii) (*i.e.,* the prohibition on engaging with price comparison websites), the BKartA held that the ASICS brand did not convey the sort of signalling function necessary for customers to be able to appreciate the *intrinsic* value of the product. Consumers could verify the level of quality of the product prior to its purchase, both through offline and online distribution channels, [*13*] and this was confirmed by the fact that ASICS itself operated an online store.

While the BKartA ultimately left open the question of whether restriction (iii) amounted to a hard-core restriction and, hence, could be capable of being exempted under the VBER, it was implicit from the Decision that this was indeed the view of the BKartA. The BKartA also expressed the view that the ban of third party online marketplaces would not fulfil the conditions of the efficiency exemption under Article 101(3) TFEU.

The BKartA concluded that it was hard to justify any of the restrictions in question, given that they were akin to *per se* prohibitions. In its view, by not being able to advertise their own online shop through the use of the ASICS trademark and by being denied the ability to engage with price comparison websites or by not being allowed to sell via third-party platforms, merchants were essentially barred from extending their customer base, which amounted to a restriction of competition. [***14***] The BKartA expressed the view that ASICS' products did not constitute "luxury products", nor did the ASICS brand have a signalling effect which could justify an individual exemption if one took into account the need to protect its brand image. Accordingly, the BKartA considered the restrictions to be neither necessary to uphold a system of specialized retailers nor to protect the ASICS brand image. [***15***]

The Oberlandesgericht Düsseldorf, while confirming the BKartA's assessment, only examined the prohibition on engagement with price comparison websites, [***16***] holding in effect that the provision reduced merchants' competitive scope for action and that this was indeed the object being pursued by ASICS. [***17***]

In doing so, the Court confirmed that the SDS operated by ASICS did not fulfil the criteria which would otherwise need to be satisfied in order for the SDS to escape scrutiny from competition rules, [***18***] noting that running shoes could neither be considered to be "high-value" nor "luxury" products. [***19***] The relevant obligation therefore did not constitute a restriction that was qualitative in nature in the eyes of the Court because it amounted to the exclusion of an entire distribution channel, thereby preventing retailers (who depend on receiving public exposure from participating successfully in online trading) [***20***] from access to that sales platform.

The restriction was therefore prohibited, largely because ASICS had not even attempted to establish qualitative standards to ensure that merchants would only use price portals that have no negative impact on the manufacturer's brand, [***21***] but also because it was not considered to be a proportionate measure in the circumstances. Comparison sites did not evoke the impression of a "flea market", as ASICS had contended in its defence; rather, a reasonable consumer would be aware that a price comparison website merely served the purpose of displaying price quotations from online merchants and was different from the merchants' own websites. [***22***]

The Court also rejected the relevance of the argument that price comparison websites prevented merchants from consulting with their customers in relation to their products, as this would be true for *all* Internet sales. [***23***] Even assuming that running shoes required a particular advertising environment, the Court took the view that it was unclear why ASICS had not at least stipulated qualitative requirements for comparison websites. [***24***] It also dismissed the argument outright that the use of these sites incurred considerable costs, holding that it was unacceptable to justify such restrictions with the alleged aim of "protecting merchants from themselves". [***25***] In addition, the restriction did not address meaningfully the so-called "free-rider" problem that supposedly occurs when consumers visit "bricks and mortar" stores for consultation purposes, only to then purchase online. In the view of the Court, the free-rider problem concerned *all* online sales, not merely sales made through price comparison websites. [***26***]

The obligation could also not benefit from the exemption available under the VBER. Citing the *Pierre Fabre* Judgment, in which the Court of Justice had held that provisions effectively prohibiting retailers from using the Internet as a distribution channel constituted a hard-core restriction, the Court noted that the ban on retailers

engaging with price comparison websites was in fact no different in its effect because it aimed at limiting sales to end users. [*27*]

When ASICS appealed against the denial of leave to appeal, it was again rebuffed. According to the Bundesgerichtshof, there was no need to clarify the question whether the prohibition to use price comparison websites constituted a hard-core restriction because the answer was clear, as it did limit at the very least passive sales to consumers. [*28*] The problematic nature of such a measure was, according to the Court, generally undisputed. Contrary to ASICS' submission, the Bundesgerichtshof took the view that the Commission's Sector Inquiry had not come to a different conclusion. [*29*] As such, there was held to be no need to have the issue referred to the ECJ – which would otherwise have constituted a reason to grant leave.

The Court held that the case before it was different to *Pierre Fabre* because the restriction did not amount to a *de facto* prohibition of online sales, although it severely limited an online merchant's freedom to sell online. [*30*] The Federal Court concluded that ASICS could not appeal the Düsseldorf Court's Judgment.

Second article : Coty

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In December 2017, the Court of Justice of the European Union ("ECJ") delivered its landmark Judgment in the **Coty**

Case. The Judgment had been preceded by a long debate between the luxury product industry, the European Commission ("Commission") and France, on the one hand, and third party e-commerce platforms, retailers and Germany, on the other.

While the **Coty** Ruling does not bring an end to this debate, it nevertheless provides some clarification of the law for the luxury products industry as regards the robustness of its traditional mode of distribution – selective distribution systems ("SDS"). Whether or not and to what extent the ECJ's Judgment can be extended to other products with special characteristics ("high-end", "high-quality", "ecologically sustainable", "specialist", "ethically sound", *etc.*) will no doubt be the subject of speculation and of litigation before Member State courts.

The ECJ has, in essence, ruled on two issues: *first*, it found an SDS that is directed at preserving the image of a luxury brand does not *per se* violate Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"); and, *second*, by demanding that their selected distributors not sell luxury products on third party platforms (*e.g.,* Amazon, eBay), suppliers (manufacturers) are not necessarily in violation of competition rules.

To this end, the Judgment focuses on online sales, which have been the subject of much upheaval recently. The E-Commerce Sector Inquiry, the results of which were published in 2017, constituted the Commission's first comprehensive analysis of the fast-growing online sales sector. It provided support for the view that the Commission continues to recognise manufacturers' efforts to maintain control over the methods by which their products are sold and reflects the Commission's willingness to support the particular needs of brand-driven industries in the context of Article 101 TFEU. [***36***]

Yet, irrespective of the finer points of the Commission's guidance on such issues, it will inevitably be the national Courts of the EU Member States which will provide the most commonly used fora for the adjudication of disputes concerning the enforceability of obligations in distribution relationships. Courts in France, Germany and the Netherlands have already reached different conclusions as to the types of restrictions on distributors that might be justified and the types of requirements that products need to fulfil to be able to benefit from exemptions to the Article 101(1) TFEU prohibition. [***37***] While Article 101(1) TFEU should in principle apply consistently within the EU, [***38***] different interpretations of this provision have generated tensions as to the consistent assessment of vertical restraints under competition rules, especially where those practices occur in the context of SDS. Whether or not Article 101(1) TFEU applies also determines whether there is a need to rely on an automatic exemption under the so-called Vertical Block Exemption Regulation ("VBER") [***39***] or an individual exemption under Article 101(3) TFEU. [***40***]

Following the **ASICS** Case [***41***], the luxury goods industry waited anxiously as to whether the ECJ would reaffirm a luxury good manufacturer's privilege to prescribe how its selected distributors should sell its products.

The **Coty** Ruling originated from a referral from the Oberlandesgericht Frankfurt. The case concerned a dispute between the German operations of luxury perfume producer Coty and one of the distributors in its selective distribution network, Parfümerie Akzente. Coty sought to prevent Parfümerie Akzente from selling the contract luxury goods over the online platform Amazon.de. In doing so, Coty did not go so far as to prohibit the sale of such products over the Internet via the retailer's own online store ("electronic shop window"), nor did it impose any additional problematic constraints on a distributor's ability to sell via the more traditional "bricks and mortar" distribution chain. However, Coty did seek to prohibit sales via third party websites, given its concern that such third party online sales diminished the premium quality otherwise associated with its products and brand by consumers.

When Parfümerie Akzente did not accept the imposition of such a restriction, Coty brought a case against the reseller, which it lost at first instance. On appeal, the Frankfurt Court of Appeals was unsure whether the contractual prohibition was compatible with Article 101(1) TFEU and the VBER, calling upon the Court of Justice to answer a number of questions, namely: [***42***]

(1) Whether Article 101(1) TFEU must be interpreted as meaning that an SDS for luxury goods designed, primarily, to preserve the luxury image of those goods can comply with that provision.

(2) Whether Article 101(1) TFEU must be interpreted as precluding the prohibition on authorised distributors in an SDS for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the online sale of the contract goods.

(3) In the case of a violation of Article 101(1) TFEU, whether a third-party platform ban for luxury products could benefit from an exemption under the VBER or whether it constituted a hard-core restriction within the meaning of Article 4(b) or 4(c) of the VBER.

In its Judgment, the ECJ largely followed the Opinion of Advocate General Wahl of 26 July 2017. [***43***] As regards the *first* question, the ECJ reiterated the principle that a vertical distribution agreement did not violate Article 101(1) TFEU as long as the so-called '*Metro* criteria' were fulfilled. [***44***] The ECJ confirmed that the quality of luxury goods was to be determined "*by the allure and prestigious image which bestow on them an aura of luxury*" and that the creation and maintenance of this aura was essential insofar as it allowed consumers to distinguish them from similar goods. An impairment of that aura of luxury was also likely to affect the actual quality of the goods in the eyes of the consumer. [***45***] Establishing a distribution system that ensured that the products were presented in a way that reflects their value was thus also considered to contribute to their special aura. [***46***] Based on this logic, the ECJ concluded that a selective distribution system might be necessary to preserve the contract product's luxury image, and was hence compatible with Article 101(1) TFEU. [***47***]

Importantly, the ECJ dismissed the argument that the *Pierre Fabre* Case suggested a different approach. In *Pierre Fabre*, the Court took the view that a *specific clause* banning online sales was incompatible with competition law rules, given that it imposed an *outright ban* on all sales of the manufacturer's product over the Internet. [***48***] The situation in **Coty** was different, as it concerned the fundamental legality of a selective distribution system with regard to luxury products in particular. By contrast, *Pierre Fabre* concerned the sort of cosmetic and body hygiene products that might not be associated with the idea of luxury in the consumer's mind. The need to preserve the goods' prestigious image was therefore found to not constitute a legitimate requirement for the purpose of justifying a comprehensive prohibition on sales via the Internet. [***49***]

As regards the *second* question, the Court held that the clause banning sales over third party platforms had to be measured against the *Metro* criteria. The question at issue was whether such a ban was appropriate to preserve the luxury image of the goods in question and whether it went beyond what was necessary in the circumstances to achieve this objective. [***50***]

Concerning the *appropriateness* criterion, the ECJ stated that an obligation to sell only through the retailers' own online shops provided the supplier with a guarantee that the sold goods would only be associated with the authorized retailer, which would in turn help to preserve the quality and luxury image of those goods. [***51***] This was true also in light of the fact that, on online market platforms, all kinds of goods are being sold. [***52***] Moreover, it is only the direct contractual relationship with the retailer which enables the supplier to enforce quality conditions; if goods were to be distributed over third party platforms, there would be no such relationship. [***53***] Given that

distributors were generally still allowed to sell online through their own webshops (which still constituted the main online distribution channel and which were operated by over 90% of distributors), the prohibition was also found to be proportionate, in that it did not go beyond what was necessary to achieve the object of preserving the luxury image of the contract goods. [***54***] Accordingly, the ECJ responded to the second question by concluding that the outright platform ban did not violate Article 101(1) TFEU in the circumstances, given the widespread availability of luxury goods through the online channel.

Finally, the ECJ ruled that, with regard to the *third* question (which was in fact split up in two separate questions in the proceedings), the ban on sales over a *particular* platform did not constitute a hard-core restriction within the meaning of Article 4(b) or 4(c) of the VBER. Hence, it could in principle benefit from the block-exemption regime. [***55***] The Court concluded that distributors were still able to sell online and that third-party platform *customers* were not circumscribed in their choices. Subject to certain requirements, distributors were also able to advertise on third-party platforms and to use search engines, which still allowed customers to be able to locate a distributor's online offer. [***56***]

The ECJ confirmed that as long as manufacturers respect the *Metro* criteria, their SDS would not be in violation of Article 101(1) TFEU. By reiterating that, in the context of vertical distribution agreements, it may be necessary to protect "*the allure and prestigious image*" of a product (namely, those characteristics of the image which form as much an essential ingredient of the product as its material qualities), the Court re-affirmed its historical position that vertical restraints in an SDS context be tolerated in light of the consumers' expectation (and willingness) to pay a premium for luxury brand products. The Court stressed that third-party platforms constituted a different, lower-quality type of outlet or channel, which manufacturers would not need to accept if, in their view, the sale of their products on these platforms would be detrimental to their brand image. These findings are notable, given that they affirm the Court's previous line of reasoning and develop it further. However, what is arguably most noteworthy about the **Coty** Ruling is that it does not comment on the nature of Coty's products when compared to other manufacturers' products for which consumers may be less inclined to pay an extra price because they lack a special aura. While the ECJ considered the relevance of a luxury brand's image and how this image constitutes an integral element of the product for sale – clearly the ECJ assumed that Coty's products displayed a "luxurious" aura – the Court did not venture to define when a particular product should be identified as being a luxury good.

This omission is all the more surprising given the issues touched upon by Advocate General Wahl's Opinion. The Advocate General had explicitly included a wider range of goods within the exception beyond only "luxury" products. When discussing the aura of luxury, he spoke of prestige goods as "high-end goods", whose sensation of luxury he deemed to be essential for consumers to distinguish from similar but less luxurious products. [***57***] In arguing that an SDS which aimed at preserving the luxury image of prestige goods was compatible with Article 101(1) TFEU, he stressed that this conclusion should apply to both so-called "luxury" products and to "high quality" products. The central determining factor in the legal categorisation of the goods is, according to the Advocate General, the need for the network being used to preserve the prestige image of the contract goods. [***58***]

The fact that the ECJ did not adopt the more inclusive approach envisaged by the Advocate General leaves room for speculation as to why it opted for its narrower stance. A key question is therefore whether the ECJ did not include high-end products because the Judges believed that such products should not benefit from the exemption which the *Metro* criteria and the VBER provide. In the alternative, the Court is just as likely to have limited itself expressly to luxury products because it was the precise issue upon which the **Coty** case turned – namely, the applicability of competition standards to luxury products.

A more expansive reading of the SDS exception, along the lines proposed by the Advocate-General, would have been helpful in resolving the tension between: (i) the findings in the Commission's Sector Inquiry and (high-end) manufacturers' interests, on the one hand; and (ii) the approach in the Germany's **ASICS** Case, which concluded that platform bans violate Article 101(1) TFEU by object (and, as "hard-core" restrictions, cannot benefit from an exemption under the VBER). Instead, the Court limited its Ruling to the precise issue raised in the case, namely, luxury products. In doing so, however, it left open the question of how to distinguish between those high quality products that qualify for an exemption from the Article 101(1) TFEU prohibition, and those that do not.

By the same token, the Judgment leaves some scope for the reconciliation of the German approach with that suggested by the Sector Inquiry and endorsed by the ECJ. If luxury products, due to their particular nature, fall outside the Article 101(1) TFEU prohibition, this does not mean that the same principle should not necessarily extend to other high-end products. In the **ASICS** Case, for instance, the Appeal Court made it clear that in its view running shoes were neither luxury nor high-end products. This conclusion was confirmed by the Bundesgerichtshof also, which explicitly held that the **Coty** Judgment, delivered only a few days earlier, did not warrant any different outcomes under the application of competition rules in Germany. [***59***] Running shoes, in the view of the Bundesgerichtshof, were not luxury goods. [***60***]

It was the particular nature of **Coty's** products which led the ECJ to rule that a platform ban was justified, given that the luxury aura of these products might be otherwise compromised. By comparison, the running shoes in the **ASICS** Case were merely considered to connote a particular level of quality. Thus, it would appear that the Rulings of the ECJ and the German authorities may indeed be capable of being reconciled in individual cases by reference to the distinction drawn between luxury goods and other goods. [***61***] Moreover, it cannot be discounted that the fundamental rationale for the restrictions imposed in the **ASICS** Case was undermined in each instance by the commercial practice of the manufacturer beyond the online space.

It seems the ECJ has missed the opportunity to draw a more explicit line between those products which can benefit from an SDS and those that cannot. One can hardly argue that luxury products, which usually require heavy investments in marketing, skilled staff, breadth of selection of product ranges and décor, do not justify more favourable treatment under EU competition rules. [***62***] Having said that, where does one draw the line between Coty's luxury cosmetics products and the beauty creams considered in the *Pierre Fabre* Case or the running shoes of ASICS assessed by the BKartA (especially given that beauty is supposed to be in the eye of the beholder)? Why not include high-end or high-quality products within the SDS exception also, at least where manufacturers are shown to have taken the necessary steps to preserve the reputation and uniform brand image of their products?

Is the narrow exception created by the elusive concept of "luxury" susceptible to arbitrary distinctions being drawn by national court judges faced with the resolution of competition law disputes in the context of selective distribution? Surely, with the ECJ having provided the rationale for why the contract in **Coty** was not anti-competitive, the question now needs to be asked why the category of SDS exemption cannot embrace all goods with serious connotation of "quality" or "high-end" (which can often be established by reference to a higher price). In a world where increasing market penetration is based on the uniqueness of a product, one would think that the "quality" dimension, which could manifest itself in many different shapes or forms, should in principle justify the same treatment as that of "luxury". [***63***]

By not following the Advocate - General's more expansive view, the ECJ may have succeeded in narrowing the exception to the general rule against sales prohibitions, but may have inadvertently opened up a hornet's nest of fine distinctions needing to be made by national judges across the EU – which they have, as evidenced in the cases to date, already started to do. Perhaps it is the case that the ECJ Judgment, which is notable for its brevity,

may be more helpful in theory than in practice for those operating selective distribution systems in the EU. Given the Commission's more recently announced formal investigations into distribution systems in consumer product markets against Nike (*i.e.,* alleged restrictions on IP licensees to sell merchandise cross-border and online) and Guess (*i.e.*, restricting retailers to sell apparel to consumers online cross-border), it will be interesting to see whether the Commission over time expands the SDS exception to high quality goods or prefers to bolster its enforcement policy by endorsing a narrow interpretation of the *Coty* Judgment. [***64***]

[***1***] The Final Report of the E-Commerce Sector Inquiry can be found at: *http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf* ↗.

[***2***] ECJ in Case C-26/76 *Metro I* [1977] EU:C:1977:167, especially at para. 20.

[***3***] According to Article 2(4) of the VBER, the exemption will not apply to vertical agreements entered into between competing undertakings, unless it is a non-reciprocal vertical agreement and the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or where the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

[***4***] See Guidelines on Vertical Restraints, para. 54.

[***5***] Final Report on the E-Commerce Sector Inquiry at paras. 39-42. The Advocate General also cites these conclusions in his Opinion on the **Coty** Case at para. 111. His Opinion of July 26, 2017 is available at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&pageIndex=0&doclang=EN&%20mode=lst&dir=&occ=first&part=1&cid=654963* ↗.

[***6***] Case VI-Kart 13/15 (V) of April 5, 2017. The reasons can be found in the German language text at: *https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2017/VI_Kart_13_15_V_Beschluss_20170405.html* ↗.

[***7***] Decision B2-98/11 *Bundeskartellamt v ASICS Deutschland GmbH, Neuss et al.* of August 26, 2015. An English summary can be found at: *http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2* ↗. The full Judgment can be found in the German language at: *http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B2-98-11.pdf?__blob=publicationFile&v=3* ↗.

[***8***] Case KVZ 41/17 of December 12, 2017. The reasons can be found in the German language text at: *http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=80673&pos=30&anz=520* ↗.

[***9***] Decision B2-98/11 *Bundeskartellamt v ASICS Deutschland GmbH, Neuss et al.* at paras. 68-70.

[***10***] See also Final Report on the E-Commerce Sector Inquiry at para 15.

[11] Decision B2-98/11, *supra* at paras. 82-95.

[12] Decision B2-98/11, *supra* at paras. 368-370.

[13] Decision B2-98/11, *supra* at paras. 500-505.

[14] Decision B2-98/11, *supra* at paras. 254-255.

[15] Decision B2-98/11, *supra* at paras. 260-267.

[16] Case VI-Kart 13/15 (V) at para. 50.

[17] Case VI-Kart 13/15 (V), *supra* at paras. 53-54.

[18] As mentioned previously, these criteria are: (i) the selection of distributors is to be based on objective criteria of a qualitative nature, laid down uniformly for all potential distributors; (ii) the non-discriminatory application of the criteria; (iii) the criteria are necessary for establishing SDS in light of particular product features in order to preserve quality and ensure proper use; and (iv) the criteria are proportionate.

[19] Case VI-Kart 13/15 (V), *supra* at para. 63.

[20] Case VI-Kart 13/15 (V), *supra* at para. 71

[21] Case VI-Kart 13/15 (V), *supra* at para. 72.

[22] Case VI-Kart 13/15 (V), *supra* at para. 75.

[23] Case VI-Kart 13/15 (V), *supra* at para. 77.

[24] Case VI-Kart 13/15 (V), *supra* at para. 81.

[25] Case VI-Kart 13/15 (V), *supra* at para. 83.

[26] Case VI-Kart 13/15 (V), *supra* at para. 84.

[27] Case VI-Kart 13/15 (V), *supra* at paras. 101-102.

[28] *Supra* at paras. 14 and 23.

[29] *Supra* at para. 15.

[30] *Supra* at para. 25.

[31] The Final Report of the E-Commerce Sector Inquiry can be found at: *http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf* ↗.

[32] ECJ in Case C-26/76 *Metro I* [1977] EU:C:1977:167, especially at para. 20.

[33] According to Article 2(4) of the VBER, the exemption will not apply to vertical agreements entered into between competing undertakings, unless it is a non-reciprocal vertical agreement and the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or where the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

[34] See Guidelines on Vertical Restraints, para. 54.

[35] Final Report on the E-Commerce Sector Inquiry at paras. 39-42. The Advocate General also cites these conclusions in his Opinion on the **Coty** Case at para. 111. His Opinion of July 26, 2017 is available at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&pageIndex=0&doclang=EN&%20mode=lst&dir=&occ=first&part=1&cid=654963* ↗.

[36] Article 101(1) TFEU prohibits horizontal and vertical anti-competitive agreements and concerted practices. The provision applies across all Member States of the European Union ("EU") and is enforced directly by the Commission, the National Competition Authorities and the courts of the Member States.

[37] In November 2015, the French Competition Authority closed an investigation against Adidas, which had prevented its distributors from selling on third-party platforms such as Amazon and eBay. In return, Adidas undertook to change its distribution contracts to allow distributors to sell on the online marketplaces. See Press Release at: *http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=607&id_article=2671* ↗. By contrast, in October 2017, the District Court of Amsterdam rejected a distributor's claim that Nike's distribution policies violated competition law because it had imposed a sales ban on online platforms. The Dutch Court treated Nike's running shoes as luxury products. See Decision in the Dutch language at: *https://www.navigator.nl/document/idf71dc76c4ee24a419f2ae98742ab453e/ecli-nl-rbams-2017-7282-rb-amsterdam-04-10-2017-nr-c-13-615474-ha-za-16-959* ↗. On Germany, see in the following under 2.

[38] See Articles 3 and 5 of Commission Regulation (EU) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.

[39] 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. The VBER confers an automatic exemption upon those vertical distribution arrangements which satisfy the qualification criteria set forth in the VBER, as it will be presumed that such arrangements also satisfy the balancing exercise that would be applied under the efficiency exemption of Article 101 (3) TFEU (in US antitrust jargon, a Block Exemption Regulation provides a "safe harbour" mechanism to insulate certain obligations from antitrust sanctions.)

[40] A range of claims based on efficiency grounds can be raised by parties in the context of Article 101(3) TFEU.

[41] See [references- articles liés]

[42] See the Judgment in the German language text at: *http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7534795* ↗.

[43] See Opinion of July 26, 2017, available at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=193231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=654963* ↗.

[44] Case C-230/16, *supra* at para. 24.

[45] Case C-230/16, *supra* at para. 25.

[46] Case C-230/16, *supra* at para. 27.

[47] Case C-230/16, *supra* at para. 29.

[48] See Case C-439/09 *Pierre Fabre* [2011] EU:C:2011:649.

[49] Case C-230/16, *supra* at paras. 32 and 34.

[50] Case C-230/16, *supra* at para 43.

[51] Case C-230/16, *supra* at paras 44 and 46.

[52] Case C-230/16, *supra* at para 50.

[53] Case C-230/16, *supra* at para 48.

[54] Case C-230/16, *supra* at paras 52-54.

[55] Case C-230/16, *supra* at para 68.

[56] Case C-230/16, *supra* at paras 65-67.

[57] See Opinion, *supra* at para. 72.

[58] See Opinion, *supra* at para. 92.

[59] *Supra* at paras. 28-31.

[60] In addition, the Bundesgerichtshof concluded, the combination of restraints imposed by ASICS (prohibition to use ASICS trademark in advertising; prohibition to engage with comparison sites; and prohibition to sell on third party platforms) was more severe than the obligations that Coty had imposed, thereby drastically impeding merchants' online sales possibilities.

[61] Notably, the BKartA's Chief, Andreas Mundt, has commented that he expects the ECJ's Ruling to have only a limited effect on the policy of his Office, as its Decisions have thus far involved brand manufacturers outside the luxury industries. See at *http://www.wiwo.de/unternehmen/handel/eugh-urteil-zum-online-handel-luxus-muss-nicht-in-die-schmuddelecke/20677432.html* ↗.

[62] In this regard, refer to the Study prepared for the European Commission in 2007, which explains how competition for the supply of luxury cosmetics depends critically on non-price

elements which add to the aura of the brand: Global Insight, Study of the European Cosmetics Industry, October 2007. Indeed, the possibility that selective distribution networks are more likely to promote non-price elements of competition explains why they are also less likely to produce price volatility; in this regard see Case 107/82 *AEG Telefunken v. Commission* [1983] ECR 3151 at paras. 33 *ff*, and Case T-67/01, *JCB v. Commission* EU.T.2004.3 at paras. 131-133.

[***63***] Selective distribution networks are also understood to be appropriate for the distribution of highly technical or industrial quality goods, although the rationale for preventing online sales for such products seems more problematic, given the technical knowledge possessed by the average purchaser of such products, e.g., bath fittings. At the other extreme, the view has been expressed by P. Ibanez Colomo that the exception identified in **Coty** should extend to all products distributed in such networks. See, *e.g.*, blogpost of 6 December 2017 on **Coty** Case at: *https://chillingcompetition.com/* ↗.

[***64***] See Commission Press Releases IP/17/1646 of 14 June 2017, available at: *http://europa.eu/rapid/press-release_IP-17-1646_en.htm* ↗, and IP/17/1549 of 6 June 2017, available at: *http://europa.eu/rapid/press-release_IP-17-1549_en.htm* ↗.