

# Competition policy *brief*

Occasional discussion papers by the Competition Directorate-General of the European Commission

## EU competition rules and marketplace bans: Where do we stand after the Coty<sup>1</sup> judgment?

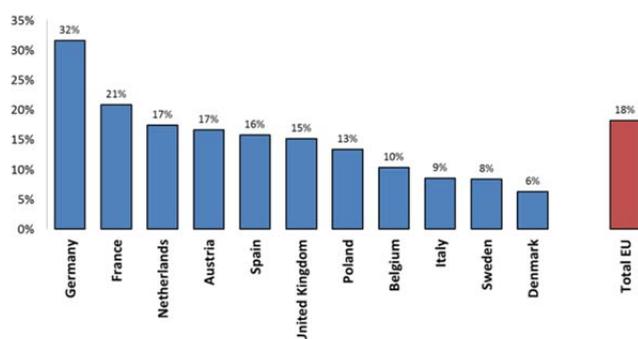
### Introduction

On 10 May 2017, the Commission published the Final Report on the E-commerce Sector Inquiry ("Report").<sup>2</sup> The Report confirms that the growth of e-commerce over the last decade had a significant impact on companies' distribution strategies and customer behaviour.

The Report, inter alia, points to the importance of marketplaces as online sales channels, in particular for smaller and medium-sized retailers. However, the Report highlights that the importance of marketplaces as an online sales channel differs from one Member State to another to a significant extent with a high proportion of retailers using marketplaces in Germany (62 %) and the United Kingdom (43 %) compared to a substantially smaller proportion in Austria (13 %), Italy (13 %) or Belgium (4 %).

According to the Report, 18 % of retailers have agreements with their suppliers that contain restrictions on marketplace sales. The Member States with the highest proportion of retailers experiencing marketplace restrictions are Germany (32 %) and France (21 %).

### Proportion of retailers in each Member State that have agreements containing marketplace restrictions



<sup>1</sup> Judgment of 6 December 2017, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

<sup>2</sup> Final report on the E-commerce Sector Inquiry, COM(2017) 229 final.

Marketplace restrictions encountered in the E-commerce Sector Inquiry range from absolute bans to restrictions on selling on marketplaces that do not fulfil certain quality criteria. Restrictions on the use of marketplaces are mostly found in selective distribution agreements, i.e. closed distribution systems where the supplier distributes its product(s) only through authorized retailers which are chosen based on a number of specified criteria.<sup>3</sup>

With these market developments the question of whether contractual restrictions limiting the ability of retailers to sell via online marketplaces ("marketplace bans" or "platform bans") are compatible with EU competition rules has attracted significant attention and led to different interpretations of the applicable EU competition rules in recent years.

The judgment of the European Court of Justice in case C-230/16, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, of 6 December 2017 ("Coty judgment")<sup>4</sup> was therefore highly anticipated as the Court of Justice was asked about the legal qualification of marketplace bans under Article 101(1) TFEU as well as under the VBER.

### In a nutshell

In its Coty judgment, the Court of Justice confirmed that selective distribution systems designed to preserve the luxury image of products can comply with Article 101(1) TFEU. Analysis of whether or not a marketplace ban in a selective distribution agreement escapes the application of Article 101(1) TFEU must be based on the so-called Metro-criteria. Even if marketplace bans were to restrict competition in individual cases, they do not constitute a hardcore restriction under Articles 4 b) or 4 c) of the Vertical Block Exemption Regulation.

<sup>3</sup> A definition of selective distribution systems under EU competition rules can be found in Article 1(1)(e) of the Vertical Block Exemption Regulation (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, 23.4.2010, p. 1, "VBER").

<sup>4</sup> Judgment of 6 December 2017, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941.

The aim of this policy brief is to follow-up on the Report in relation to marketplace bans and to provide stakeholders with the view of DG Competition in the light of the Coty judgment.

## The facts of the Coty case and the questions referred by the Higher Regional Court of Frankfurt am Main to the Court of Justice

The case concerned a contractual restriction included in a selective distribution agreement between Coty Germany GmbH ("Coty"), which is one of Germany's leading suppliers of luxury cosmetics, and one of its distributors, Parfümerie Akzente GmbH ("Parfümerie Akzente"). The contractual clause prohibited the discernible engagement by Parfümerie Akzente of a third-party undertaking which is not an authorized retailer of Coty. Coty sought to prohibit Parfümerie Akzente from distributing its products on "Amazon.de" through Amazon's marketplace which enables third-party sellers such as Parfümerie Akzente to sell products alongside Amazon's offerings. Coty's claim was dismissed by the German Regional Court of Frankfurt as it considered that the contractual clause restricting the sale via third-party platforms infringed § 1 GWB and Article 101 TFEU and constituted in view of that court a hardcore restriction under Article 4(c) VBER. Coty appealed against that decision before the referring court.

Based on the diverging interpretations of the applicable EU competition rules in Germany, the Higher Regional Court of Frankfurt am Main decided to stay the proceedings and asked the Court of Justice to clarify whether a ban on using third party platforms in a selective distribution agreement for luxury goods may be compatible with Article 101(1) TFEU (Question 2) and whether such a restriction constitutes a hardcore restriction within the meaning of Articles 4(b) and 4(c) of the VBER (Questions 3 and 4). In its first question, the referring Court asked whether following the *Pierre Fabre* judgment<sup>5</sup> selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to preserve a "luxury image" for the goods may as such constitute an aspect of competition that is compatible with Article 101(1) TFEU.

## The judgment of the Court of Justice

### The first question

In its response to the first question the Court of Justice held that a selective distribution system for luxury goods can comply with Article 101(1) TFEU provided that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (often referred to as

the "Metro-criteria"<sup>6</sup>).<sup>7</sup> The Court refers in this context in particular to the *Copad* judgment according to which the quality of luxury goods is not just the result of their material characteristics, but encompasses also their "aura of luxury" which is essential in enabling consumers to differentiate them from similar goods and that an impairment to the aura of luxury is likely to affect the actual quality of those goods.<sup>8</sup>

The Court also explains that the statement contained in paragraph 46 of the *Pierre Fabre* judgment<sup>9</sup> which led to different interpretations was not meant to indicate a departure from settled case-law, but must be read in the light of the context of that judgment and related solely to the goods at issue and the contractual clause in question in that case (i.e. a prohibition of online sales) rather than the selective distribution system in its entirety or selective distribution in general.<sup>10</sup> The differentiation between the different contractual clauses in the two judgments is important as it highlights that each potentially restrictive clause within a selective distribution agreement must be analyzed separately under the Metro-criteria and that this analysis is distinct from the analysis of the compliance of the selective distribution system as such with Article 101(1) TFEU.

In this context, it must be borne in mind that selective distribution systems complying with Article 101(1) TFEU can also be operated for other product categories than luxury goods, as acknowledged by the Court of Justice in previous judgments in relation to "high-quality" and "high-technology" products.<sup>11</sup> The *Coty* judgment therefore only clarifies that a selective distribution system compliant with Article 101(1) TFEU can, subject to the Metro criteria being fulfilled, also be operated for luxury goods in order to preserve the luxury image of those goods.

Against this background the differentiation made by the Court of Justice in paragraph 32 of the *Coty* judgment between luxury goods (at issue in *Coty*) on the one hand and other products such as the cosmetic and body hygiene goods at issue in *Pierre Fabre* should in practice only be of limited relevance, as a clear delineation between one and the other will in many cases neither be possible, nor necessary as high-quality and high-technology products similarly qualify for selective distribution compliant with Article 101(1) TFEU as long as the Metro-criteria are fulfilled.

<sup>5</sup> Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649 ("Pierre Fabre judgment").

<sup>6</sup> Judgment of 25 October 1977, *Metro I*, *Metro SB-Großmärkte v Commission*, 26/76, EU:C:1977:167.

<sup>7</sup> *Coty judgment*, paragraphs 24 and 29.

<sup>8</sup> Judgment of 23 April 2009, *Copad*, C-59/08, EU:C:2009:260, paragraphs 24 to 26.

<sup>9</sup> Paragraph 46 *Pierre Fabre judgment* reads: "The 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."

<sup>10</sup> *Coty judgment*, paragraphs 31 et seq.

<sup>11</sup> Judgment of 25 October 1977, *Metro I*, *Metro SB-Großmärkte*, 26/76, EU:C:1977:167 and Judgment of 25 October 1983, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken*, 107/82, EU:C:1983:293.

## The second question

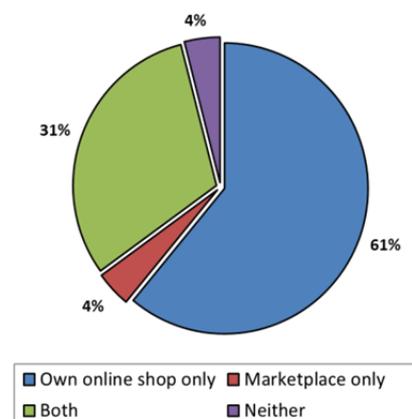
In its response to the second question, the Court of Justice applies the Metro-criteria in relation to the specific contractual clause at stake, i.e. the marketplace ban which prohibits authorised retailers in a selective distribution system for luxury goods from using discernible third party platforms for online sales.

While the Court of Justice ultimately leaves it to the referring Court to determine whether the Metro-criteria are met, it nonetheless provides interpretive guidance for such an assessment.<sup>12</sup> The Court of Justice concretely considers whether the marketplace ban is proportionate in the light of the objective pursued, that is to say, whether such a prohibition is appropriate for preserving the luxury image of the goods at stake and whether or not it goes beyond what is necessary to achieve that objective.<sup>13</sup>

The Court holds that the marketplace ban at stake is appropriate for the legitimate objective of preserving the luxury image of the goods concerned, as it provides the supplier from the outset with a guarantee that the goods in question will only be associated with its authorised distributors.<sup>14</sup> It will allow him to verify that the goods will be sold in an environment that corresponds to the qualitative criteria that the supplier has agreed with its authorised distributors.<sup>15</sup> The Court stresses in this context the lack of a direct contractual link to the third party platform that could allow the supplier to require the third party platform to comply with the quality conditions stipulated in the selective distribution agreements.<sup>16</sup>

The Court also considers the marketplace ban at stake as proportionate as it only limits online sales via discernible third party platforms and does not contain an absolute prohibition to sell online. Authorised distributors remain free to sell via their own websites and any third party platform when the use is not discernible to the consumer.<sup>17</sup> The Court refers to the findings of the E-commerce Sector Inquiry according to which their own online shops remain the main distribution channel operated by over 90 % of the distributors surveyed, despite the fact that the importance of online marketplaces is increasing.<sup>18</sup>

## Proportion of retailers using different sales channels for selling online



The Court concludes that an authorisation to use marketplaces subject to compliance with predefined quality conditions can, in the absence of a contractual relationship between the supplier and the marketplace, not be regarded as being as effective as the marketplace ban.<sup>19</sup>

While leaving it ultimately to the referring court, the Court rules that it may be inferred that a platform ban imposed by a supplier of luxury goods is both appropriate and does not go beyond what is necessary to preserve the luxury image of those goods.<sup>20</sup>

The *Coty* judgment does not exclude that marketplace bans in selective distribution agreements for other product categories such as "high-quality" or "high technology" products could also comply with Article 101(1) TFEU, if the Metro-criteria are fulfilled. Whether this is the case would have to be analyzed on a case-by-case basis taking into account the objective pursued by such a restriction and the considerations expressed by the Court in relation to appropriateness and proportionality. Some of the Court's considerations in this regard appear to be equally applicable to those other product categories.

The Court does not specifically address the question whether marketplace bans that do not comply with the Metro-criteria, which means that they may fall within the scope of Article 101(1) TFEU, are to be considered restrictions of competition "by object" or by "effect". While Advocate-General Wahl has in his Opinion taken the position that marketplace bans are incapable of being classified as a "restriction by object",<sup>21</sup> the Court of Justice has made no explicit statement in this respect.<sup>22</sup>

<sup>12</sup> *Coty judgment*, paragraphs 41 et seq.

<sup>13</sup> *Coty judgment*, paragraph 43.

<sup>14</sup> *Coty judgment*, paragraphs 44 and 45.

<sup>15</sup> *Coty judgment*, paragraph 47.

<sup>16</sup> *Coty judgment*, paragraph 48.

<sup>17</sup> *Coty judgment*, paragraph 53.

<sup>18</sup> *Coty judgment*, paragraph 54.

<sup>19</sup> *Coty judgment*, paragraph 56.

<sup>20</sup> *Coty judgment*, paragraphs 51 and 55.

<sup>21</sup> Opinion of Advocate General Wahl of 26 July 2017, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:603, paragraph 117.

<sup>22</sup> The Court has notably in paragraph 23 of the *Coty* judgment not repeated the statement made in paragraph 39 of the *Pierre-Fabre* judgment, according to which selective distribution agreements "are to

However, in view of the Court's reasoning that marketplace bans neither have the object of restricting customers to which the goods can be sold within the meaning of Article 4(b) VBER nor of restricting passive sales to end users within the meaning of Article 4(c) VBER it would seem that a marketplace ban cannot be qualified as a "passive sales" or "customer group" restriction of competition "by object" under Article 101 TFEU.

### The third and fourth question

Articles 4(b) and (c) VBER stipulate that the exemption laid down in Article 2 thereof does not apply to vertical agreements which have the object of restricting the territory into which, or the customers to whom, a buyer party to the agreement can sell the contract goods or services, or of restricting active or passive sales to end users by members of a selective distribution system operating at the retail level of trade.

In its response to the third and fourth question, the Court of Justice explains that a marketplace ban such as the one at stake neither restricts the customers to whom authorized distributors can sell nor passive sales to end users. The Court explains that a marketplace ban differs from a prohibition of the use of internet sales such as the one at issue in *Pierre Fabre*.<sup>23</sup> In addition, the Court considers it impossible to circumscribe third party platform customers within the group of online purchasers. The Court also mentions that in the case before the Court distributors were allowed to advertise the products via the internet on third party platforms (e.g. price comparison websites) and use online search engines with the result that customers are usually able to find the online offer of authorized distributors.<sup>24</sup> Based on this, the Court holds that marketplace bans neither amount to a restriction of the customers to whom distributors may sell within the meaning of Article 4(b) VBER nor to a restriction of passive sales to end users by authorized distributors within the meaning of Article 4(c) VBER.

The arguments provided by the Court are valid irrespective of the product category concerned (i.e. luxury goods in the case at hand) and are equally applicable to non-luxury products. Whether a platform ban has the object of restricting the territory into which, or the customers to whom the distributor can sell the products or whether it limits the distributor's passive sales can logically not depend on the nature of the product concerned.

In DG Competition's view, marketplace bans therefore do not amount to a hardcore restriction under the VBER irrespective of product category concerned. This view is supported by a number of other considerations:

- First, one of the main purposes of a block exemption is to secure legal certainty for the parties to an agreement as regards the validity of that agreement under Article 101 TFEU.<sup>25</sup> Therefore the assessment of hardcore restrictions should - in order to preserve the benefit of legal certainty - not depend on the product category concerned or an analysis of the market conditions. It is important, in order to allow self-assessment by undertakings, that the exclusion from the VBER on the basis of the hardcore restrictions listed in Article 4 remains predictable and is not based on the particular market conditions or on the restrictive effects in an individual case, on a particular (national) market or for certain categories of products.<sup>26</sup>
- Second, Article 4(b) VBER applies - unlike Article 4(c) VBER - also outside of selective distribution. Given that Article 4(b) VBER is not linked to selective distribution, the product category of the distribution agreement cannot matter for its application. Similarly to Article 4(c), Article 4(b) VBER removes the benefit of the VBER for passive sales restrictions outside selective distribution agreements. A marketplace ban does not - according to the Court - restrict passive sales to end users under Article 4(c) VBER. It therefore cannot be said, within the logic of Article 4 VBER, that the very same restriction (a marketplace ban) would amount to a passive sales restriction under Article 4(b), which applies irrespective of product categories, whilst it would not amount to one under Article 4(c) VBER.

### Conclusion

The *Coty* judgment should be welcomed as it provides more clarity and legal certainty to market participants. The Court confirmed the previous case-law according to which it is possible to operate selective distribution, including for luxury goods, compliant with Article 101(1) TFEU. The Court establishes a clear legal framework for assessing marketplace bans under Article 101(1) TFEU. First, it has to be established whether a marketplace ban escapes the application of Article 101(1) TFEU by fulfilling the Metro-criteria. If this is not the case it has to be established whether a marketplace ban restricts competition under Article 101 TFEU. In practice, this question will however only arise where market shares of the parties are above the 30 % market share threshold of Article 3 VBER. Otherwise marketplace bans are block-exempted as the Court has clarified that marketplace bans do not constitute hardcore restrictions under Article 4(b) or 4(c) VBER.

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*be considered, in the absence of objective justification, as restrictions by object.*"

<sup>23</sup> *Coty judgment*, paragraph 65.

<sup>24</sup> *Coty judgment*, paragraph 67.

<sup>25</sup> Judgment of 10 July 1990, *Tetra Pak Rausing SA v Commission*, T-51/89, EU:T:1990:41, paragraph 37.

<sup>26</sup> See also, Opinion of Advocate General Wahl of 26 July 2017, *Coty Germany GmbH vs Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:603, paragraphs 130 to 132.