The *Coty* Debate: Can the Luxury Sector Re-fragment the Democratic Web?

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MARKETPLACE BANS HAVE SPARKED off considerable debate in the European Union in the past decade, reflecting mounting tension between brand owners and online retailers, and, on a larger scale, also between the online and offline economy. After numerous conflicting judgments from various national courts, the debate finally reached the European Court of Justice (CJ) in *Coty Germany GmbH v. Parfümierie Akzente GmbH*. The long-awaited judgment was expected to provide an answer to the question whether and in what circumstances marketplace bans can be viewed as a restriction of competition. However, to the disappointment of some, the CJ decided to err on the side of caution and issued a very narrow judgment addressing only one of the many scenarios in which marketplace bans occur, i.e., a scenario in which a retailer imposes a partial and insubstantial ban on online sales of luxury goods.

In this article, we put the *Coty* judgment in the context of the existing case law of the EU courts and Commission Regulation (EU) No. 330/2010, explaining the application of Article 101(3) to categories of vertical agreements and concerted practices (Vertical Block Exemption) and we contrast it with the current reality of e-commerce. The purpose of this exercise is to answer two questions which still linger after the *Coty* ruling, namely: (1) can the *Coty* ruling be extended to scenarios other than the one directly addressed by the CJ; and (2) what does the *Coty* judgment mean in practice for companies involved in or affected by online sales.

Origins of the Coty Dispute

The *Coty* dispute originated in Germany. Coty Germany, a supplier of cosmetics, was seeking an order from the German courts prohibiting one of its distributors, Parfümierie Akzente, from distributing products bearing the “Coty Prestige” brand via the marketplace “amazon.de.” Parfümierie Akzente had refused to approve amendments to the distribution agreement between the two parties, which stated that internet sales of Coty Prestige goods were to be conducted through an “electronic shop window” of the authorized store, in order to preserve the luxury image of the goods. A footnote to the amendments stated that “the authorized retailer is prohibited from collaborating with third parties if such collaboration is directed at the operation of the website and is effected in a manner that is discernible to the public.” In other words, the supplier was effectively imposing a ban on the use of third-party e-commerce platforms.

On July 31, 2014, the Landgericht Frankfurt am Main, the German court of first instance, dismissed Coty’s application on the ground that the contractual clause was contrary to Article 101(1) TFEU, and to paragraph 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition). First, relying on the judgment in *Pierre Fabre Dermo-Cosmétique*, the court stated that a selective distribution system, which by definition restricts competition, could not be justified by the objective of preserving a prestige brand image. Second, the court went on to rule that the marketplace ban clause was a hard core restriction of competition under Article 4(c) of the Vertical Block Exemption (a restriction on passive sales), and as a result the agreement as a whole could not benefit from the safe harbor for vertical agreements. Furthermore, the court stated that no individual exemption could apply because it was not shown that any claimed efficiency gains entailed by excluding internet sales via third-party marketplaces would offset the exclusion’s disadvantages to competition. It was finally stated that there would have been other, equally appropriate means of maintaining Coty Prestige’s luxury brand image, which would be less restrictive of competition—such as the application of specific quality criteria for third-party marketplaces.

Upon Coty Germany’s appeal to the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main), that court of appeal stayed the proceedings and referred a number of questions to the CJ under the preliminary ruling procedure (a procedure designed to obtain rulings on points of legal interpretation of EU law):

(1) Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a “luxury image” for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?
(2) If the first question is answered in the affirmative:

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

(3) Is Article 4(b) of Regulation [No 330/2010] to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of the retailer’s customer group “by object”?

(4) Is Article 4(c) of Regulation [No 330/2010] to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of passive sales to end users “by object”?

On July 26, 2017, Advocate General Wahl (AG) delivered his opinion in the case, and on December 6, 2017, the CJ delivered its final judgment responding to the questions of the court of appeal in Germany. While the legal aspects of the case are now in principle resolved, the German appeals court will still have to apply the Coty judgment to the specific facts in the case.

Under the preliminary ruling procedure, the CJ’s role is to give an interpretation of European Union law or to rule on its validity. However, applying the law to the factual situation underlying the main proceedings is the task of the national court. In other words, the German national court is not bound by the statements of facts made by the CJ in the Coty judgment (which are numerous—see, for example, paragraphs 54, 56, and 67) and could reach a different conclusion on certain facts addressed by the CJ. The same applies to any other national court which might consider these issues in the future.

Conclusions of the Advocate General and Court

The AG opinion significantly disagreed with the German first instance court. Moreover, although AG opinions are only advisory, it was (as is often the case) largely followed by the CJ in the final judgment, though there are certain notable differences, which we discuss below. Most importantly, it appears that the AG had envisaged a judgment which could apply beyond the luxury sector, while the CJ sought to answer more pointed questions focusing squarely on luxury products. This apparent difference in the AG’s and CJ’s approach is important because it demonstrates that the CJ intentionally chose to avoid a judgment which would have a wider application.

In response to the first question (which is formulated in the same manner in the AG opinion and in the CJ judgment), both the AG and the CJ concluded that selective distribution systems such as the one found in the contract between Coty Germany and Parfümerie Akzente were potentially compatible with Article 101(1) TFEU, if they were mainly intended to preserve the “luxury image” of the products and provided that “the Metro criteria are satisfied.” Metro provided that selective distribution systems could be justified, as long as resellers are chosen on the basis of objective, qualitative criteria, determined uniformly for all, and applied in a non-discriminatory manner. The criteria also demand that the nature of the product in question, and its image, require selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and that any restrictions do not go beyond what is necessary to ensure that this happens.

The wording of the second question, and therefore the response to it, differs in the opinion and in the judgment. Following the referring German Court, the AG focused on the question: “Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system . . . are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales . . . ?” In response the AG argued that, in order to determine the lawfulness of a contractual clause prohibiting authorized distributors from using online third-party platforms, the referring court should go on to examine whether the contractual clause is “dependent on the nature of the product, whether it is determined in a uniform fashion and applied without distinction and whether it goes beyond what is necessary.” It is important however to note that, while the AG focused largely on luxury goods, he did make some observations that could be capable of wider application (see paragraphs 87 and 91–92, where the AG refers to “prestige image” and “quality” and “prestige” products).

Unlike the AG, the CJ rephrased the second question asked by the German Court to confine it to luxury goods: “By its second question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as precluding a contractual clause, such as that at issue in the main proceedings, which prohibits authorised distributors in a selective distribution system for luxury goods . . . .” With regard to this question, the CJ found that Article 101(1) TFEU does not preclude a contractual clause which prohibits authorized distributors of luxury goods from using, in a discernible manner, third-party platforms for internet sales of such goods, provided that the Metro conditions are met.

With regard to the third and fourth questions, the AG addressed the situation of members of a selective distribution system in general rather than those for luxury goods: “Is Article 4(b) [and 4(c)] of Regulation No 330/2010 to be...
interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system . . . constitutes a restriction of the retailer’s customer group [and a restriction of passive sales to end users] by object. In response, the AG advised that in terms of practical impact the prohibition on third-party platforms did not preclude all online sales (unlike in Pierre Fabre), and online platforms could not be considered “a significant distribution channel.” Also, the AG argued that it could not be said that users of third-party platforms constituted a “definable customer base.” As such, the advice of the AG in relation to the third and fourth questions was that a selective distribution system prohibiting distributors from making use “in a discernible manner of third-party platforms for internet sales” should not be considered to constitute a customer restriction within the meaning of Article 4(b) of the Vertical Block Exemption. Nor should it be considered to constitute a restriction of passive sales within the meaning of Article 4(c) of the Vertical Block Exemption.

In contrast with the AG, the CJ rephrased the third and the fourth question to once again shift the focus to luxury products: “By its third and fourth questions . . . the referring court asks, in essence, whether Article 4 of Regulation No 330/2010 must be interpreted as meaning that . . . the prohibition imposed on the members of a selective distribution system for luxury goods . . . constitutes a restriction of their customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.” With regard to Article 4(b) of the Vertical Block Exemption, the CJ argued that this provision could be applied to the clause in question only if the marketplace ban on online sales of luxury goods affected a specific and identifiable group of customers. However, the CJ considered that customers using online platforms do not constitute a specific customer group to whom distributors would be prevented to sell under the clause. Therefore, the clause in question does not restrict the customer to which a distributor of luxury goods can sell within the meaning of Article 4(b) of the Vertical Block Exemption.

With regard to Article 4(c) of the Vertical Block Exemption, the CJ merely made several statements of fact but offered no compelling legal interpretation of this provision (see paragraphs 65–69 of the judgment). Despite this omission, the CJ concluded that the clause in question does not restrict passive sales of luxury goods within the meaning of Article 4(c) of the Vertical Block Exemption. Consequently, Coty’s selective distribution system could theoretically benefit from the Vertical Block Exemption.

It is particularly striking that neither the opinion nor the CJ judgment deal with the paragraph of the Guidelines on Vertical Restraints, that one would have expected to be at the heart of this case. Paragraph 54 of the Vertical Guidelines provides that a supplier may require quality standards for the use of the internet site to resell its goods (just as a supplier may require quality standards for a brick and mortar shop). The last sentence of paragraph 54 (often referred to as the “logo clause”) states: “For instance, where the distributor’s website is hosted by a third party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform.” Manufacturers have in recent times increasingly relied on the “logo clause” to restrict their distributors from selling on any online marketplace, simply because marketplaces display their logo on the website. However, the final sentence of paragraph 54, although it begins “for instance,” potentially goes beyond the proposition in the preceding sentence of paragraph 54 that it is intended to illustrate, which is that restrictions may be imposed online that are equivalent to those permitted in the brick and mortar world. Given the unclear wording of the “logo clause” and its impact on practice, the AG’s and CJ’s guidance in this regard would have been of particular value for companies involved in or affected by online sales.

Also, both the AG opinion and the CJ judgment demonstrate a rather limited understanding of the current state of e-commerce. In the AG’s and CJ’s view, online marketplaces are not an important distribution channel and distributors rely mainly on their own online shops. This conclusion, however, directly contradicts the findings of the Commission’s Final Report on the E-Commerce Sector Inquiry, which found that in several countries distributors heavily rely on online marketplaces (in Germany 62 percent of retailers use marketplaces, in the United Kingdom 43 percent, and in Poland 36 percent). Further, while it may be relatively easy to launch a very simple web store, scaling an online business and increasing visibility remains extremely difficult even for the most seasoned e-commerce experts. Online marketplaces allow distributors to become visible and sell their products to a large customer base and in multiple Member States. Finally, the majority of small and mid-size distributors cannot afford the expenses involved with effective advertising on search platforms. Many of them may not be able to pay large sums to ensure that their website appears amongst consumers’ top search results. In other words, online stores can hardly be viewed as substitutes for online marketplaces in the same way as local grocery stores with limited inventory cannot seriously challenge hypermarkets.

The national court can always come to its own assessment of factual matters. However the rulings on the law provided by the CJ are distorted by these factual misconceptions which led it to view the marketplace ban as amounting in context to a relatively minor restriction of online sales, which is not capable of limiting competition. Given this, the Coty judgment should be read as addressing only those situations involving luxury goods, where a marketplace ban imposed on online sales is partial and insubstantial. However, Coty does not provide for a general test to be applied to all marketplace bans regardless of market circumstances.
Is the Coty Judgment About Luxury?
The publication of the CJ judgment inevitably led to a debate on whether the judgment should be confined to luxury goods or whether it could possibly be extended to other categories of goods.

Notably, and rather surprisingly, the European Commission’s Competition Directorate-General (DG COMP) decided to provide its written interpretation of the CJ judgment. In the Competition Policy Brief published on April 4, 2018, DG COMP asserted:

"The CJ 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. . . . Some of the Court’s considerations in this regard appear to be equally applicable to those other product categories." 26

In our view, DG COMP’s position is, however, difficult to justify. As explained above, it is crystal clear that the CJ intended to limit its judgment only to luxury products and exclude other product categories from its scope.

First, according to the header of the judgment, its subject is explicitly confined to “Selective distribution of luxury products.” In this respect the judgment differs from the opinion of the AG, which uses the broader header “Selective distribution.” Also, numerous paragraphs of the judgment confirm its narrow focus. 27

Second, as explained above, the CJ proceeds to answer different questions to those that have been asked by the referring court. The German court had asked questions about “members of a selective distribution system.” However, the CJ quite deliberately rephrased these questions (see paragraphs 37 and 62), saying that they are “in essence” about “a selective distribution system for luxury goods.”

Third, the CJ differentiates “luxury” products from “branded” and “quality” products. For example, at paragraph 32 of the judgment, the CJ states that Coty has to be distinguished from Pierre Fabre 28 because the goods considered in Pierre Fabre were “cosmetic and body hygiene goods,” which the CJ says are not luxury goods. The DG COMP Brief makes an attempt to dismiss this distinction and argues that the differentiation made by the CJ in paragraph 32 of the Coty judgment is “of limited relevance” 29 because a clear delineation between luxury goods and cosmetic and body hygiene goods “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.” 30 It is surprising to witness DG COMP so bluntly disagreeing with the EU’s highest court on a point where a distinction had been so deliberately made. The assertion in the DG COMP Brief is also misleading because the quality of the goods has always been a relevant factor and non-luxury goods, due to their different nature, are less likely to necessitate potential restrictions on online sales (i.e., they do not possess the aura of luxury which would justify the special protection). In other words, with regard to non-luxury goods, it is significantly less certain that the Metro criteria would be fulfilled.

Finally, the CJ very deliberately preserves the effect of Pierre Fabre for non-luxury goods. Under Pierre Fabre, the nature of the product in question is relevant for the application of Article 101(1) TFEU. 31 In other words, the nature of the product is one of the factors which may justify (or not) the use of a restrictive clause. In Pierre Fabre, the prestigious nature of the product was still insufficient to justify the absolute ban on online sales. The same principle is confirmed in Coty, where the nature of the products (luxury goods) remains relevant for the application of Article 101(1) TFEU and is capable of justifying a partial (and, in the CJ’s view, insubstantial) ban on online sales.

In sum, in Coty the CJ took pains to confine its judgment to certain very limited circumstances (partial and insubstantial ban on online sales of luxury goods). At the same time, the CJ also narrowed Pierre Fabre to certain very limited circumstances (absolute ban on online sales of non-luxury goods). This means that any alternative scenario involving a partial but substantial ban on online sales (of both non-luxury and luxury goods) remains unaddressed and untested before the CJ.

This untested scenario could still be qualified as a restriction by object of Article 101 TFEU or a restriction of passive sales under Article 4(c) of the Vertical Block Exemption. The Coty judgment does not preclude such legal outcomes. In this context, the DG COMP Brief, which could encourage companies to apply the Coty judgment beyond its clearly defined scope for luxury goods, represents at best an indication of enforcement policy (or administrative convenience) rather than the law as clarified by Pierre Fabre and Coty.

Do We Need to Extend Coty to Non-Luxury Scenarios for the Sake of Legal Certainty?
The main function of the block exemptions under EU competition law is to create a legal safe harbor for certain categories of agreements, which can safely be presumed to be legal. Where a distribution agreement is not covered by the Vertical Block Exemption it must be analyzed individually for possible exemption under Article 101(3) TFEU.

The DG COMP Brief argues that the broad interpretation of the Coty judgment (i.e., beyond the category of luxury goods) is justified by the need to apply the Vertical Block Exemption in a uniform manner to all categories of products and the need to provide companies with legal certainty. 32 In our view, however, this justification is not well founded.

It is true that the Vertical Block Exemption applies in principle to all categories of products. In this respect, however, the Vertical Block Exemption is no different from Article 101 TFEU, which also applies to all categories of products. Still, the general wording of Article 101 TFEU did not stop the courts from carving out special rules for distinct groups of goods. In particular, the nature of the product was includ-
ed in the *Metro* test, under which it can be decided whether restrictions affecting a given product deserve to fall outside the prohibition of Article 101(1) TFEU. The *Metro* test requires that the nature and image of the product in question justifies the use of a selective distribution system. Therefore, if we were to assume that the nature of the product matters for the application of Article 101(1) TFEU but has no significance when we come to the Vertical Block Exemption, we would end up with inconsistent sets of norms applicable to the same distribution agreement.

Moreover, the argument of administrative convenience that legal certainty under the Vertical Block Exemption requires ignoring the nature of the product can be tested by going to the opposite extreme. Does every single product, however basic, merit selective distribution, block exemption, and a blanket ban on certain sales channels? If that were the case, it would be clear that the Vertical Block Exemption is too broad and is ultra vires the powers devolved to the Commission.33

We should recall that the Vertical Block Exemption was meant to create a safe harbor only for vertical agreements falling under the 30 percent market share, which itself requires an analysis of product market, competing products etc. Even this “safe harbor” is, however, subject to a number of caveats.

First of all, it is rarely easy to determine with certainty the product and geographic markets affected by a vertical agreement. Often it will be necessary to consider the potential effect of an agreement by reference to various alternative relevant markets. A supplier might satisfy the 30 percent threshold by reference to one market analysis, but a narrower market definition may mean that the threshold is exceeded. In those cases, the benefit of the Vertical Block Exemption will remain uncertain and a more detailed assessment of the applicability of Article 101(1) and (3) TFEU will be necessary.

Second, the Commission or the competition authority of a Member State may by decision withdraw the benefit of the Vertical Block Exemption if it finds in a particular case that an agreement, whether in isolation or in conjunction with other similar agreements, has certain effects which are incompatible with the Article 101(3) TFEU exemption criteria. Indeed, the AG specifically noted the possibility of withdrawal in paragraph 16 of his opinion. In other words, the benefit of the Vertical Block Exemption can be lifted at any time even in cases where the 30 percent market share threshold is not exceeded.

Finally, the benefit of the Vertical Block Exemption is limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) TFEU (see Recital 5 of the Vertical Block Exemption). The fact that an agreement contains a restriction “by object,” and thus falls under Article 101(1) TFEU, does not preclude the parties from demonstrating that the conditions set out in Article 101(3) TFEU are satisfied. However, practice shows that restrictions by object are unlikely to ful-

fil the four conditions set out in Article 101(3) TFEU and therefore, should not qualify for a block exemption. Hence, it is unjustified to extend the Vertical Block Exemption to a restriction which is likely to restrict Article 101(1) TFEU by object (for example, a clause in a selective distribution agreement which substantially restricts online sales via certain platforms without any reference to objective criteria that they might satisfy).

As it follows from the discussion above, the Vertical Block Exemption could not ever have been expected to offer comprehensive legal certainty but merely a presumption of legality.34 By artificially stretching the application of the *Coty* judgment beyond the category of luxury goods, the DG COMP Brief does not provide more clarity and legal certainty to market participants but simply misleads them as to the actual meaning of this judgment.

**What the Coty Judgment Means in Practice for Companies Involved or Affected by Online Sales**

The Higher Regional Court in Frankfurt will have to decide whether the particular restrictions imposed were lawful. Interestingly, the German court of first instance saw the marketplace ban imposed by *Coty Germany* on Parfümerie Akzente as a substantial limitation of online sales. The appeals court in Germany will, therefore, have to reconcile this view with the opposing one of the CJ.

We also note that the judgment by the appeals court in Germany will be issued during the ongoing sector inquiry by the Bundeskartellamt into the online advertising sector. As signaled by the Bundeskartellamt, the competitive environment in this market is difficult. Also, this agency’s opposition to marketplace bans is well-known. The findings of this sector inquiry might well, therefore, contradict the CJ’s conclusion in paragraph 67 of the judgment that visibility of online sellers is not restricted by marketplace bans because authorized distributors can “advertise via the internet on third-party platforms and . . . use online search engines” with the result that “customers are usually able to find the online offer of authorised distributors by using such engines.” The *Google Shopping* decision questions whether expensive advertising is genuinely a viable alternative.35

It will also be interesting to see how the German appeals court will deal with the luxury theme of the *Coty* judgment. In this context, it is worth recalling another case considered by the Higher Regional Court of Frankfurt, namely *Deuter Sport GmbH v. an authorised dealer*. In *Deuter*, concerning online distribution of quality backpacks, the Higher Regional Court of Frankfurt drew a very clear distinction between luxury and branded goods. In particular, the court rejected Deuter’s argument that the accumulation of similar product images and prices on price comparison websites suggests the mass availability of the product, which, in turn, could damage the high quality image of the product.36 In the court’s view, this argument would only be valid if the brand had a luxury image evoking an impression of exclusivity.37 Accord-
ing to the court, the Deuter brand did stand for high-product quality but could not be considered luxury. Given this, it was not evident that the image of its product was affected simply because the potential buyer could see on price comparison websites that different models of the product were offered by numerous retailers.38

Of course, the Coty judgment is likely to have an impact beyond Germany, and we may see some discrepancies at a national level in the interpretation of the notion of “luxury” products or in the assessment of the actual effect of marketplace bans on distributors’ visibility on the internet. One thing is clear, though: brand owners will need to demonstrate on a case-by-case basis that the nature of their products deserves the same level of protection as luxury goods in the Coty case. It remains to be seen where this line will be drawn by each national court and enforcement agency.

Finally, the role of online marketplaces for distribution of goods is likely to become more prominent in the near future. As the importance of marketplaces increases, any restrictions imposed on their access can be expected to be kept under regular review by competition authorities across the EU.

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1 Case C-230/16, Coty Germany GmbH v. Parfümerie Akzentte GmbH (Coty) (CJ 2017) (not yet reported).
5 Opinion of AG Wahl, Coty, ¶ 27.
7 For example, the German national court could consider marketplaces as an important distribution channel, which, in the context of the German market, would be justified. The German court could also conclude that distributors have insufficient access to the internet when confronted with marketplace bans or that their ability to advertise their offer is limited due to significant costs of advertising on the internet.
9 For example, in paragraph 92 of the opinion of AG Wahl in the Coty case, the AG found that “both so-called luxury products and so-called quality products” could, subject to the satisfaction of the “Metro criteria,” justify the use of a distribution system which is compatible with Article 101(1) TFEU.
11 Opinion of AG Wahl, Coty, ¶ 122.
12 Coty, ¶ 37.
13 Opinion of AG Wahl, Coty, ¶ 29.
14 Id. ¶ 149.
15 Id. ¶ 150.
16 Coty, ¶ 62.
18 Paragraph 54 of the Vertical Guidelines states: “Under the Block Exemption the supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general.”
19 Opinion of AG Wahl, Coty, ¶ 149.
20 Coty, ¶ 54.
22 Id. ¶ 39(ii).
23 Id. ¶ 14. Through marketplaces, small- and mid-size sellers can reach around 169 million potential buyers worldwide and access the kind of support with marketing, traffic, delivery, translation, technology development, and payments that had previously been out of reach for firms of their size. See http://inside-ebay.eu/en/inside-ebay#inside-ebay.
24 And, as the Commission demonstrated in Case AT-39740—Google Search (Shopping), Comm’n Decision (June 27, 2017), ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf, companies not appearing on the first two search result pages are not really able to attract consumers’ attention. In addition, the Commission also found that purchasing rankings using AdWords was not an economically viable solution long-term due to the relatively high cost of AdWords.
25 DG COMP Brief, EU Competition Rules and Marketplace Bans: Where Do We Stand After the Coty Judgment? (2018), http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enm.pdf. In the disclaimer provided in this policy brief, DG COMP explains: “Competition policy briefs are written by the staff of the Competition Directorate-General and provide background to policy discussions. They represent the author’s view on the matter and do not bind the Commission in any way.” However, despite this explanation, the author of the brief is not disclosed and in some paragraphs the brief refers directly to “DG Competition’s view.” See, for example, DG COMP Brief, supra, at 4.
26 Id. at 3.
28 Where the Court held, at paragraph 46, that “the aim of maintaining a [pres-tige] 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.”
29 See DG COMP Brief, supra note 25, at 2 (emphasis added).
30 See id.
31 According to paragraph 47 of the Pierre Fabre judgment, a ban on the use of the internet amounts to a restriction by object where, following an individual and specific examination of the content and objective of a clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified. See Pierre Fabre, 2011 E.C.R. I-9419, ¶ 47. “In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.”
32 See DG COMP Brief, supra note 25, at 4.
33 The legal basis of the Vertical Block Exemption is Council Regulation No. 19/65/EEC, 1965 O.J. 36, 0533–0535 (on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices), as amended by Council Regulation No. 1215/1999, 1999 O.J. (L 148) 1–4 (on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices). Under these regulations, the Commission’s power to decide which agreements will be covered by the block exemption is limited by Article 101(3) TFEU. For example, recital 8 of Regu- lation 19/65/EEC states that “there can be no exemption if the conditions
set out in Article 101(3) are not satisfied.” In other words, the Vertical Block Exemption would be too broad if it exempted agreements which normally would not be exempted under Article 101(3) TFEU.

34 See, e.g., Vertical Guidelines, supra note 17, ¶ 23: “Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer.” See also id., ¶ 74: “The presumption of legality conferred by the Block Exemption Regulation may be withdrawn where a vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, comes within the scope of Article 101(1) and does not fulfil all the conditions of Article 101(3).”

35 Case AT.39740—Google Search (Shopping), Comm’n Decision (June 27, 2017).


37 Id.

38 Id.