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*Case note on the Judgment of the Court of 6 December 2017 in Case C-230/16
Coty Germany GmbH v Parfümerie Akzente GmbH*

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Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

Keti Zukakishvili

“What is a brand in the Amazon age?!”¹

Introduction

The much-awaited *Coty*² judgment did not disappoint. The Court of Justice (“the Court”) shed light on the major question concerning online distribution of luxury products. Drawing on the settled case-law on the selective distribution systems (“SDSs”) the Court provided a new element of clarification: EU competition law allows suppliers of luxury products to prohibit their authorized retailers from selling the contract goods on third-party internet platforms. However, the judgment has to be read in its context and all the conditions stipulated by the Court should be carefully considered while drafting distribution agreements. Although the practical importance of this ruling cannot be overstated, the present note also attempts to analyze *Coty* from a theoretical angle. The judgment will be placed in the context of an ongoing debate over the concept of “by object” restriction of competition under Article 101(1) TFEU and the consequences of the Court’s reasoning, as well as its silence, will be discussed.

(i) Facts of the case

Under the distribution agreement, Coty Germany (“Coty”) supplied Parfümerie Akzente with luxury cosmetics for distribution in Germany. In the course of their contractual relationship Coty decided to alter the conditions of online distribution of its products and introduced the following clause: *“the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an “electronic shop window” of the authorised store and the luxury character of the products is preserved”*³. Besides, the contract precluded Parfümerie Akzente from using a different name and/or engaging a non-authorized third-party undertaking. These modifications to the selective distribution system effectively foreclosed the possibility to sell Coty’s products via online marketplaces and Parfümerie Akzente refused to sign the amended contract.

Coty brought an action before the German court, seeking an order preventing Parfümerie Akzente from marketing its products on “amazon.de”. Relying on the *Pierre Fabre*⁴ jurisprudence, the national court of first instance considered that Coty’s contractual amendments violated EU competition law and ruled against the applicant. On appeal to the Higher Regional Court of Frankfurt am Main, the latter was uncertain about the legality of the agreement in question and referred four questions to the Court of Justice for a preliminary ruling. The referring court sought to clarify whether Article 101 TFEU allows using selective

¹ Farhad Manjoo, *The Hidden Player Spurring a Wave of Cheap Consumer Devices: Amazon*, 6 December 2017, available at: <https://www.nytimes.com/2017/12/06/technology/cheap-consumer-devices-amazon.html> (last accessed: 1.02.2018).

² Judgment of the Court of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16, ECLI:EU:C:2017:941 (hereinafter “*Coty*”).

³ Clause I(1) of that supplemental agreement between Coty Germany and Parfümerie Akzente.

⁴ Judgment of the Court of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l’Autorité de la concurrence*, Case C-439/09, ECLI:EU:C:2011:649 (hereinafter “*Pierre Fabre*”).

distribution systems aimed at ensuring a “luxury image” of the underlying product; the national court further inquired whether a ban on sales via online marketplaces within such a system is compatible with the said article. In addition, the Higher Regional Court of Frankfurt am Main requested the Court’s guidance on the status of the contractual clauses at hand under Article 4, subparagraphs (b) and (c), of the Regulation No 330/2010⁵ (“VBER”).

(ii) Legality of the platform bans

One may disagree with Karl Lagerfeld who blames high-speed economy for the crisis of the European luxury industry⁶. Yet it does not take a high-end fashion guru to spot the challenges that e-commerce poses to the distribution of premium goods. Luxury products are usually distributed via SDSs whereby the supplier limits sales of goods⁷ to distributors selected on the basis of specified criteria, on the condition that the latter do not sell those goods to unauthorized third parties within the pre-agreed territory.⁸ Such a distribution model has enabled suppliers to control the identity of their retailers and quality of the service downstream.

However, over the past few years the internet has become an inevitable means of distribution even for expensive, branded products⁹ and has altered the way the luxury goods industry operates. Although alternative online distribution channels (such as online marketplaces like Amazon and e-Bay) have enabled relatively small retailers to access customers across various Member States, they have conflicted with suppliers’ brand strategies.¹⁰ The latter opted for increasing use of SDSs¹¹, fearing that selling high-end goods alongside their mass-market alternatives on online marketplaces could threaten the “aura of luxury”¹² that their products aim to convey. Consequently, many luxury suppliers have prohibited their authorized distributors from selling the contract goods on third-party online platforms.

Such new policies, prone to minimizing distributors’ sales, led to multiple actions before national courts and competition authorities throughout the European Union¹³ (“EU”). In

⁵ 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. 1–7); Commonly referred to as “Vertical Agreements Block Exemption Regulation” (“VBER”).

⁶ Jo Ellison, *Karl Lagerfeld on the crisis in luxury*, 25 February 2016, available at: <https://www.ft.com/content/94b54892-dbcc-11e5-98fd-06d75973fe09> (last accessed: 1/02/2018).

⁷ For the purposes of this note, and unless provided otherwise, references to “goods” also comprise “services”.

⁸ Article 1 (e) of the EC Regulation 330/2010. NB: this legal definition is generic and does not distinguish between qualitative and quantitative selection criteria. It also does not mention the nature of the product. See also, Frank Wijckmans, Filip Tuytschaever, *Vertical Agreements in EU Competition Law*, 2nd edition, Oxford University Press, 2011, p. 206.

⁹ As early as 2009, European Commission (“EC”) recognized the particularities of online distribution that warranted special attention during the review of competition rules on vertical restraints (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions on Cross-Border Business to Consumer E-Commerce in the EU, COM(2009) 557 final, para. 44).

¹⁰ Report from the Commission to the Council and the European Parliament - Final report on the E-commerce Sector Inquiry {SWD(2017) 154 final}, 10.5.2017 COM(2017) 229 final, para. 14; available at: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (last accessed: 1/02/2018).

¹¹ *Ibid.* para. 15.

¹² Judgment of the Court of 23 April 2009, *Copad SA v Christian Dior couture SA*, C-59/08, ECLI:EU:C:2009:260, (hereinafter “COPAD”), paras. 24-26 and the case-law cited.

¹³ Recent development in Germany includes the judgment of the Higher Regional Court of Berlin of 19 September 2013, in *Scout* (U 8/09 Kart), judgment of the Higher Regional Court, Frankfurt am Main of 22 December 2015 in *Adidas* 2015 in *Deuter* (U 84/14), as well as the decisions of the Federal Competition Authority of 27 June 2014 in (B3-137/12) and of 26 August 2015 in *ASICS* (B2-98/11), finally confirmed by the decision of 12 December 2017 of the German Federal Court of Justice (KVZ 41/17); The UK’s CMA has recently fined Golf club manufacturer Ping Europe Limited £1.45m for online sales ban on golf clubs (CMA’s press release is available at: <https://www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs>, last accessed: 1/02/2018); in France, both the Competition Authority (Decision No 14-D-07 of 23 July 2014, concerning practices in the brown goods distribution sector) and the Court of Appeal of Paris (Judgment of 2 February 2016, *Caudalie* (No 15/01542) have dealt with this issue.

addition, these practices were subject to “widely different opinion”¹⁴ in various jurisdictions even within the European Competition Network (“ECN”). Against this background, *Coty* offers a welcome clarification¹⁵ about the legality and limits of platform bans.

The Court has ruled that Article 101 TFEU allows suppliers of *luxury products* to prohibit their authorized distributors (which operate at the retail level of trade) from using, in a discernible manner, third-party platforms for internet sales of the contract goods. However, such a prohibition has to fulfill the criteria laid down in the *Metro I*¹⁶ judgment. Namely, it has to serve a legitimate objective (in this case, preserving the luxury image of the goods), it must be laid down in a uniform and non-discriminatory fashion and it has to respect the principle of proportionality. It falls upon the referring court to verify compliance with the latter.¹⁷

Another important aspect that will have to be decided by national courts on a case-by-case basis concerns qualification of certain goods as “luxury products”. Although brand reputation has been an important factor in the Court’s analysis since *Consten and Grundig*¹⁸ (i.e. as early as 1966) and several cases provided guidance about the concept of luxury goods¹⁹, the referring court in *Coty* has not asked to further clarify this particular issue. In order to avoid divergence across the Member States post-*Coty*, the European Commission should carefully monitor enforcement involving online sales restrictions within the ECN. The Commission can also rely on its power under Regulation 1/2003²⁰ to intervene in proceedings before national courts and ensure coherent use of the criteria for defining “luxury goods”.

The *Coty* judgment has also clarified legal status of an online marketplace sales ban in the light of the VBER. The Court ruled that the prohibition imposed on the members of a selective distribution system for luxury goods to use in a recognizable manner third-party undertakings for internet sales is not a “hardcore” restriction of competition. Specifically, such a ban constitutes neither a restriction of customers, nor a restriction of passive sales to end users, within the meaning of Article 4(b) and Article 4(c) of the VBER, respectively.

Importance of freedom of online advertising

In reaching the latter conclusion the Court in *Coty* took into account two additional factors: the authorized distributors’ were *free to advertise* the contract goods on third-party platforms and they were also allowed to *use online search engines*. Thus, the potential customers had a possibility to find authorized distributors’ offers on the internet by virtue of such engines.²¹

¹⁴ Speech given by CMA Inquiry Chair, Philip Marsden, at the 11th Baltic Competition Conference in Vilnius, 2 October 2014, available at: <https://www.gov.uk/government/speeches/philip-marsden-speaks-about-competition-enforcement-in-online-markets> (last accessed: 1/02/2018).

¹⁵ The EC praised the judgment for providing “more clarity and legal certainty to market participants that had been facing diverging views on the legality of their distribution practices”. The statement of the EC of 6 December 2017, available at: http://ec.europa.eu/newsroom/comp/newsletter-specific-archive-issue.cfm?newsletter_service_id=221&newsletter_issue_id=6372&page=1&fullDate=Sat%2012%20Aug%202017&lang=default (last accessed: 1/02/2018).

¹⁶ Judgment of the Court (Fourth Chamber) of 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, Case 75/84 (“Metro I”).

¹⁷ Case C-230/16, *Coty*, para. 58.

¹⁸ Judgment of the Court of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, Joined cases 56 and 58-64, ECLI:EU:C:1966:41.

¹⁹ See, e.g. Judgment of the Court of First Instance of 12 December 1996, *Groupement d'achat Édouard Leclerc v Commission*, T-88/92, ECLI:EU:T:1996:192, para. 1: “Luxury products, that is to say high quality articles sold at a relatively high price and marketed under a prestige brand name [...]”; Case C-59/08, *COPAD*, paras. 24 and 25: “The quality of luxury goods such as the ones at issue in the main proceedings is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury [...]”; “Luxury goods are high-class goods [...]”.

²⁰ Article 15 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25).

²¹ Paragraph 67 of the case C-230/16, *Coty*.

This point, which was also emphasized by Advocate General Wahl in his Opinion in *Coty*²², figured in a recent decision of German Federal Court of Justice. In the case²³ concerning internet sales restrictions carried out by the shoe manufacturer Asics, the highest court of Germany distinguished the actual circumstances from the facts in *Coty*. One of the differences²⁴ was that in *Asics* the footwear manufacturer had prohibited its dealers not only from selling its goods on the online marketplaces, but operated an absolute ban on advertising its products on price comparison websites and third-party platforms. The German Federal Court of Justice ruled that this practice violated competition rules without seeking further clarification from the Court of Justice of the EU (“CJEU”).

(iii) The end of “hardcore restriction by object”

While discussing the legality of platform bans in the light of Article 101 TFEU, including the possibility for such practices to benefit from the block exemption for vertical agreements, it is necessary to look closely at the Court’s analysis in *Coty*. It should be noted upfront that the restriction of competition “by object” is a term employed in the Treaty (Article 101(1) TFEU), while “hardcore restriction” appears in the title of Article 4 of the VBER. Nevertheless, the Higher Regional Court of Frankfurt am Main requested the Court to clarify whether online marketplace bans in the context of SDSs constituted “*hardcore restriction[s] by object*”.²⁵

Considering the confusion that interchangeable use of these two notions has generated over the years, it is gratifying that the Court in *Coty* accepted the conceptual distinction between “by object” and “hardcore” restrictions. Although the Court has not been explicit about this point, it analyzed these two categories separately, under Article 101(1) and VBER, respectively. It is submitted that in doing so, the Court drew a clear line between the Commission’s powers under Article 101(1) and 101(3) TFEU. This begs the question whether the presumption that the agreement containing a “hardcore” restriction necessarily falls under Article 101(1)²⁶ can still be justified.

Restriction of competition “by object”

Article 101(1) TFEU provides that an agreement, a concerted practice or a decision of association of undertakings may restrict competition either “by object” or “by effect”. Considering that qualification as a (*prima facie*) restriction “by object” substantially affects the burden of proof in Article 101 cases²⁷, determination of its boundaries has been central in

²² Opinion of Advocate General Wahl delivered on 26 July 2017 in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603, para. 147.

²³ The decision of 12 December 2017 of the German Federal Court of Justice (KVZ 41/17).

²⁴ Another difference was that the German Federal Court of Justice did not consider Asics shoes to constitute “luxury goods”.

²⁵ See: Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany) lodged on 25 April 2016 — *Coty Germany GmbH v Parfümerie Akzente GmbH*, questions 3 and 4. Questions for a preliminary ruling in case *Pierre Fabre* also contained such a wording.

²⁶ See, Recital 10 of Regulation 330/2010; see also European Commission’s Guidelines on Vertical Restraints, (2010/C 130/01), (“Verticals Guidelines”), para. 47.

²⁷ See, Alison Jones, *Left Behind by Modernisation? Restrictions by Object Under Article 101(1)*, European Competition Journal Vol. 649, 2010, p. 656.

competition law debate²⁸. The Court has given useful guidance on the definition and the scope of “by object” restrictions²⁹.

Namely, the case-law provides that “*certain forms of coordination are, by their very nature, harmful to the proper functioning of normal competition*”³⁰ and “*reveal sufficient degree of harm*”³¹, therefore, it “*may not be necessary to examine their actual effects on competition*”.³² The Court has also recently recalled that the concept of restriction of competition “by object” must be interpreted strictly³³.

When establishing a (“by object”) restriction, regard must be held to “*the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part*”.³⁴ Finally, while “*determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question*”.³⁵

Although the scope of the (economic) analysis required under the latter test remains contested³⁶, it is now widely acknowledged that “*the anticompetitive object of an agreement may not be established solely using an abstract formula*”.³⁷ In other words, only the form of the practice cannot be considered determinant in Article 101 cases³⁸. Finally, even the *prima facie* “by object” restrictions can be found compatible with Article 101(1) TFEU³⁹ or excused after the examination of efficiencies that they bring about under Article 101(3) TFEU.⁴⁰

²⁸ Ibáñez Colomo, Pablo and Lamadrid, Alfonso, *On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know* (October 8, 2016), in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017), available at SSRN: <https://ssrn.com/abstract=2849831> (last accessed: 1/02/2018); Alison Jones, *Left Behind by Modernisation? Restrictions by Object Under Article 101(1)*, *European Competition Journal* Vol. 649, 2010; Saskia King, *Agreements that restrict competition by object under Article 101(1) TFEU: past, present and future*. PhD thesis, The London School of Economics and Political Science (LSE), 2015; Joanna Goyder, *Cet Obscur Objet: Object Restrictions in Vertical Agreements*, *Journal of European Competition Law & Practice*, Volume 2, Issue 4, 1 August 2011, Pages 327–339; Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review*, Issue 5, pp. 1057–1099; Cristiana de Faveri, *The Assessment of Selective Distribution Systems Post-Pierre Fabre*, *Global Antitrust Review* 2014, pp. 163-197, etc.

²⁹ According to Pablo Ibanez Colomo, Court's case law demonstrates “remarkably solid understanding of the transactions under art. 101(1) TFEU” (see, Pablo Ibáñez Colomo, *Market Failures, Transaction Costs and Article 101(1) TFEU Case Law*, *European Law Review*, Issue 5, 2012; p. 542).

³⁰ Judgment of the Court of 14 March 2013, *Allianz Hungária Biztosító and Others v. Gazdasági Versenyhivatal*, C-32/11, ECLI:EU:C:2013:160, para. 35 and the case-law cited.

³¹ Judgment of the Court of 11 September 2014, *Groupement des cartes bancaires (CB) v European Commission*, C-67/13 P, ECLI:EU:C:2014:2204, para. 49 and the case-law cited.

³² Judgment of the Court of 20 November 2008, *Competition Authority v Beef Industry Development Society (BIDS)*, C-209/07, ECLI:EU:C:2008:643, para. 16 and the case-law cited (hereinafter “BIDS”).

³³ Judgment of the Court of 23 January 2018, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, C-179/16, ECLI:EU:C:2018:25, para. 79.

³⁴ Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, para. 58 and the case-law cited.

³⁵ Judgment of the Court of 14 March 2013, *Allianz Hungária Biztosító and Others v. Gazdasági Versenyhivatal*, C-32/11, ECLI:EU:C:2013:160, para. 36 and the case-law cited.

³⁶ See, for example, Csongor Istvan Nagy, “*The Distinction between anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?*” 2013, 36 *World Competition* 4, 544, 555.

³⁷ Opinion of Advocate General Mazak delivered on 3 March 2011 in Case C-439/09, *Pierre Fabre*, ECLI:EU:C:2011:113, para. 26.

³⁸ See also, Ibáñez Colomo, Lamadrid, *On the Notion of Restriction of Competition*, supra note 28.

³⁹ See, e.g. Case C-439/09, *Pierre Fabre*; see also, Judgment of the Court of 19 February 2002, *J. C. J. Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, ECLI:EU:C:2002:98; *Judgment of the Court of 19 April 1988, SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, Case 27/87, ECLI:EU:C:1988:183.

⁴⁰ See, e.g. Case C-209/07, *BIDS*, supra note 32; see also: Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [Official Journal No C 101 of 27.4.2004] (“Guidelines on Article 101(3) TFEU”) and Verticals Guidelines, paras. 60-63.

“Hardcore” restrictions of competition

In contrast, the VBER takes a linear, form-based approach. Article 4 of the VBER contains a list of restrictions that remove the benefit of the block exemption – so called “hardcore restrictions”. Recital 10 provides that the VBER should not exempt vertical agreements containing “*severe restrictions of competition*”, since “*they are likely to restrict competition*”⁴¹. Even more so, over the years the Commission has equated hardcore restraints with “*by object*” restrictions.⁴² This approach is problematic as it does not only *remove benefits of the block exemption* from certain category of restraints, but it prejudices agreements containing such clauses as restrictive of competition. It ignores the necessity of individual analysis in establishing existence of a restriction, as well as the fact that, after a proper examination, such agreements may be found not to restrict competition at all.⁴³

An inequality, not an equation

It should be noted upfront that the VBER implements Article 101(3)⁴⁴ and not Article 101(1) TFEU. Although the right to provide a bright-line rule for the purposes of application of the VBER is not disputed, the Commission has been criticized for unduly expanding the scope of Article 101(1) TFEU.⁴⁵ The fact that hardcore restraints “*are to be treated as always, or virtually always, unlawful under Article 101*”⁴⁶, is indeed problematic.

Goyder (2011) neatly summarizes the concerns that this approach raises. Firstly, it may lead to “by object” qualification of restrictions that happen to appear on the Commission’s “hardcore” list without proper examination of the nature of the agreement, its objectives and legal and economic context. In such cases, it is dubious whether the Commission or national competition authorities would be able to properly discharge of their burden of proof.⁴⁷ Secondly, influenced by the VBER black-list, competition enforcers might skip the discussion of possible objective justifications under Article 101(1) TFEU altogether. Thirdly, equating “hardcore” restraints with “by object” restrictions might dissuade undertakings to include certain pro-competitive clauses in their agreements. Finally, instead of simply removing benefits of the block exemption, it can create a strong presumption that such restrictions can never be justified under Article 101(3) TFEU.⁴⁸

⁴¹ Recital 10 of Regulation 330/2010.

⁴² “Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object.” – Vertical Guidelines, para 47; Guidelines on Article 101(3) TFEU, para. 23. Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (“De Minimis Notice”), 2014/C 291/01, provides at point 13: “The Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation”; see also, Alison Jones, Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials*, 6th edition, Oxford University Press (2016), p. 217; p. 784.

⁴³ See, e.g. Judgment of the Court of 4 October 2011, Joined Cases *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), ECLI:EU:C:2011:631; Judgment of the Court of 18 March 1980, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, ECLI:EU:C:1980:84.

⁴⁴ On the basis of the Council’s authorisation contained in Council Regulation No 19/65/EEC of 2 March 1965 on the application of [81(3)] of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966, p. 35).

⁴⁵ See, Goyder, *Cet Obscur Objet: Object Restrictions in Vertical Agreements*, supra note 28.

⁴⁶ Alison Jones, *Left Behind by Modernisation? Restrictions by Object Under Article 101(1)*, supra note 28, p. 655.

⁴⁷ As Advocate General Mazak noted in his Opinion in C-439/09, *Pierre Fabre*: “[...] while certain forms of agreement would appear from past experience to be prima facie infringements by object, this does not relieve the Commission or a national competition authority (13) of the obligation of carrying out an individual assessment of an agreement. I consider that such an assessment may be quite truncated in certain cases, for example where there is clear evidence of a horizontal cartel seeking to control output in order to maintain prices, but it may not be entirely dispensed with” (para. 27).

⁴⁸ While normally there should always be such a possibility. See, Verticals Guidelines, paras. 60-64 and Title VI.

Although the Director General for Competition Johannes Laitenberger asserts that “presumptions are not a shortcut”⁴⁹ and they are “certainly not about ignoring evidence”⁵⁰ justifying a “hardcore” restriction under Article 101(3) TFEU currently appears more of a textbook example than a practical possibility. Therefore, undertakings might not risk to subject themselves to presumption of restricting competition, in particular, due to the risk of hefty fines. Considering the foregoing, it is critical to remember that “hardcore and object restrictions, though overlapping concepts in some respects, are and should remain separate”.⁵¹

The *Pierre Fabre*⁵² case has been helpful in establishing distinction between these two concepts. Nevertheless, national courts’ confusion over their interrelation once again became apparent in *Coty* – this time too, the preliminary questions concerning the black-listed clauses under the VBER also mentioned restrictions “by object”.⁵³

Following the detailed explanation by Advocate General (“AG”) Wahl⁵⁴, who suggested that “the classification [...] of a restriction ‘by object’ must be distinguished from the existence of a ‘hardcore’ restriction for the purposes of determining whether it may qualify for an exemption under Regulation No 330/2010”⁵⁵, the Court removed the wording “by object” from the discussion on “hardcore” restraints. In particular, the Court reformulated the third and fourth preliminary questions and analyzed the possibility of a block exemption under the VBER separately⁵⁶, after the discussion of (in)existence of the “by object” restriction in that case.

Thus, the Court in *Coty* appears to have accepted that equating these two notions is no longer justified. Consequently, the Commission could either remove the anti-competitiveness presumption under Article 101(1) TFEU for “hardcore” restraints⁵⁷ and/or modify its soft-law instruments to reflect the prevailing interpretation. One way of doing it could be by extending the logic of the De Minimis Notice to the VBER.

Instead of creating a new category of “hardcore” restrictions, the Notice provides that its benefits are not provided for agreements which have as their object the prevention, restriction or distortion of competition within the internal market⁵⁸. It is supplemented by the Guidance on restrictions of competition “by object”⁵⁹ which lists the actual cases of relevance for each particular situation. If the approach in the VBER was to align with it, the Verticals Guidelines would also be supplemented with actual cases on the vertical restraints whereby the Court found a restriction of competition “by object”. Although somewhat sophisticated, this approach would reflect better the prevailing idea that even the most severe restrictions of competition cannot be established only by looking at their form. It would also result in uniformity of the “black-lists” in various Commission instruments implementing Article 101(3) TFEU.

⁴⁹ Speech of Johannes Laitenberger, European Commission, Director-General for Competition, *Accuracy and administrability go hand in hand*, delivered at CRA Conference, Brussels, 12 December 2017, available at: http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf, (last accessed: 1/02/2018).

⁵⁰ *Ibid.*

⁵¹ See, Goyder, *Cet Obscur Objet: Object Restrictions in Vertical Agreements*, supra note 28.

⁵² See, Case C-439/09, *Pierre Fabre*, points 32-47 and 47-59, respectively. The Court in *Pierre Fabre* did not directly distinguish “by object” and “hardcore” restrictions, as the latter notion was not part of the EU legislation by then (See, para. 32 of the judgment). However, Advocate General Mazák develops a detailed discussion on the issue in paragraphs 23-28 of his Opinion (See: Opinion of Advocate General Mazák delivered on 3 March 2011 in Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence*, ECLI:EU:C:2011:113).

⁵³ C-230/16, *Coty*, para. 20.

⁵⁴ See in particular, paras. 52-28 and 126-138 of the Opinion of Advocate General Wahl delivered on 26 July 2017 in Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603.

⁵⁵ *Ibid.* para. 56.

⁵⁶ See Case C-230/16, *Coty*, paras. 59-69.

⁵⁷ E.g. during the 2022 review of the VBER.

⁵⁸ De Minimis Notice, para. 13.

⁵⁹ Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, Accompanying the document Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), C(2014) 4136 final.

(iv) Broader impact of *Coty* on the selective distribution systems

Another consequence of the Court's constructive silence in *Coty* concerns SDSs more generally. Although some types of qualitative SDSs have long been found to escape the prohibition of Article 101(1) TFEU⁶⁰, it has also been accepted that agreements constituting a selective distribution system “necessarily affect competition”.⁶¹ The Court in *Pierre Fabre* went so far as to state that “such agreements are to be considered, in the absence of objective justification, as ‘restrictions by object’”.⁶² The Court in *Coty* repeated paragraph 39 of *Pierre Fabre* without its controversial last phrase. It also limited the “by object” qualification to the specific clause (online sales ban) at hand in *Pierre Fabre*⁶³.

Considering that previous CJEU cases emphasize the pro-competitive aspects of SDSs⁶⁴; that the Treaty refers to *agreements* (not forms of distribution) that can be restrictive of competition “by object”⁶⁵; that the SDSs do not even appear on the VBER black-list; and finally, that such a qualification seems to contradict the Court's established case-law on “by object” restrictions, the Court in *Coty* indeed appears to have “reconsidered”⁶⁶ the qualification of the SDSs under EU competition rules. Consequently, the Commission, national authorities and courts will have to look at particular clauses within the SDSs and evaluate them on a case-by case basis, rather than discarding the SDSs as a whole as “by object” restrictions of competition.

Conclusion

In view of ever-growing use of the selective distribution model in the EU, *Coty* is an extremely timely judgment. The Court explicitly stipulated that Article 101 TFEU does not preclude suppliers of luxury products from prohibiting their authorized distributors at the retail level from using, in a discernible manner, third-party platforms for internet sales of the contract goods. It is, however, subject to stringent conditions outlined in the Court's case-law. Verifying compliance with these conditions rests with the competition authorities and courts, including at the national level, and the Commission could play a more proactive role in ensuring the uniformity of enforcement. At the same time, it is submitted that the Court's silence in *Coty*, notably regarding the classification of the SDSs as “by object” infringement of competition, suggests that this category is limited to the particular circumstances in *Pierre Fabre*. Nevertheless, the final status of the SDSs is far from being clear and it is rather difficult to enjoy the silence.

⁶⁰ See Case 75/84, *Metro I*.

⁶¹ Judgment of the Court of 25 October 1983, *AEG-Telefunken AG v Commission*, 107/82, ECLI:EU:C:1983:293, para. 33.

⁶² Case C-439/09, *Pierre Fabre*, para. 39.

⁶³ See Case C-230/16, *Coty*, paras. 26-36, 51-53, 65.

⁶⁴ See, e.g. Case C-59/08, *COPAD*, para. 28.

⁶⁵ See also, Goyder, *Cet Obscur Objet: Object Restrictions in Vertical Agreements*, supra note 28.

⁶⁶ Opinion of Advocate General Wahl in C-230/16, *Coty*, para. 2.



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