BRINGING COMPETITION LAW INTO THE DIGITAL ERA – SELECTIVE DISTRIBUTION AND MARKETPLACE BANS: WHAT SHOULD CHANGE?*

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Abstract *The increasing development of Digital Market and the growth of e-commerce have been the centre of attention of the European Union's agenda. As the digital transformation of the markets occurred at a fast pace it is necessary to assess whether the European Competition legislation is still suitable to the actual market reality. This article focusses on the relationship between Selective Distribution Systems and E-commerce and discusses: whether and under which conditions these restrictions are compatible with EU Competition Law; the relevance of the nature of traded products to assess that compatibility; and whether further legal certainty is needed in this field.*

Key-Words Antitrust; Antitrust Law; Selective Distribution; Online Sales; Marketplace Bans; Hardcore Restrictions; Luxury Products.

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* This Article was written as a part of the LL.M in Competition Law and Regulation – University of Amsterdam, in 2019.

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1. INTRODUCTION

The digital development and e-commerce growth trends have been increasingly changing our consumption habits. The digital world allows consumers to access different markets, leading to the expansion of those markets and the creation of more space and different means for companies to innovate and grow.[1] Consumer behaviour has changed and traditional commerce is no longer the obvious choice for consumers. The benefits brought by e-commerce, such as the possibility to overcome physical barriers, are followed by new challenges with which we were never before confronted, such as new policy issues.

At present, the European Union (the "EU") is one of the largest e-commerce markets in the world. The dimension of this market varies from Member State to Member State, but the growth has been steady everywhere.[2] This is one of the main reasons why the EU is so focused on the digital world and its development, and why policy concerns have been the centre of discussions within EU Competition Law. There is an urgent need to adapt the existing legal framework to this reality in order to provide new markets with adequate tools to ensure its proper functioning and safeguard the development of the digital market.[3]

Using the internet as a sales channel inevitably affects the distribution systems available in the market, as it influences the way products and services are provided throughout the world. This influence transforms distribution as we knew it, and may result in conflicts between producers and distributors, especially regarding the potential reduction of online distribution opportunities by the imposition of certain clauses. A good example are Selective Distribution Systems (hereinafter "SDS") that are usually included to control the distribution of products by establishing criteria that potential distributors must fulfil to be admitted as such and thus protect, for instance, the quality

1 Manyika & Roxburgh, 2011.

2 European Commission, *Final Report on the E-commerce Sector Inquiry*, SWD (2017) 229 final: 10.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *A Digital Single Market Strategy for Europe*, COM (2015): 192 final: 4; Cian, 2015: 49; De Franceschi, 2015: 144.

of the products or the brand image.[4] This essay aims to focus on EU Competition law concerns in the context of these agreements in the digital market.[5]

The EU Competition Law, whose main purpose is to safeguard fair competition in the market, prohibits, through Article 101(1) TFEU, undertakings from concluding agreements or concerted practices that restrain competition, and establishes that those agreements that are capable of restricting competition must be prohibited.[6] However, according to Article 101(3) TFEU, this prohibition does not apply, to agreements that have an objective justification to do so, such as encourage the progress of the production or distribution of goods/services or agreements that endorse technical or economic development, while making consumers profit from a fair part of those benefits. In other words, a restrictive practice may be acceptable under the EU Competition law when compliant with the requirements of Article 101(3) TFEU.

The restrictive practices referred herein can be categorized as vertical and horizontal restraints. In this essay, we will focus on the vertical restraints, which are agreements – such as distribution, franchising, or supply – entered into by two or more parties which, within such an agreement, operate in different levels of the production chain and are non-competitors with each other at that level. They refer to practices carried out by manufacturers or suppliers regarding the resale of their own products.

Since the Vertical Block Exemption Regulation[7] (from now on "BER") and the Guidelines on Vertical Restraints[8] (hereinafter "Guidelines") still leave plenty of room for uncertainty in this field, this thesis will focus on the SDS and online marketplace bans and will discuss whether and under which conditions these restrictions are compatible with the mentioned purpose of EU Competition Law.

The relationship between the SDS and the development of e-commerce has been discussed by the Court of Justice of the European Union (hereinafter "CJEU"). However, these decisions still do not seem to provide enough

4 Lieber & Syverson, 2012: 189-223; Kirsch & Weesner, 2006: 300.

5 C-41/90, *Höfner & Elser v Macroton GmbH,* EU:C:1991:161, §21 establishes the concept of "undertaking": "*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity*."; Cian, 2015: 47.

6 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47 (2012), Article 101(1).

7 Commission Regulation (EU) n.º 330/2010 of 20th of 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.*

8 European Commission, *Guidelines on Vertical Restraints*, OJ C130/1 (2010).

clarity and still leave room for legal uncertainty and conflicting interpretations. In order to discuss this uncertainty, as well as to provide possible solutions focused on the bans on marketplaces, this essay will provide an overview of the CJEU's most relevant decisions throughout the years, as well as an overview of the state-of-the-art of the EU regulation, regarding the BER, the Guidelines and the E-commerce Sector Inquiry[9] (hereinafter "Sector Inquiry") developed by the European Commission (hereinafter "EC"). This thesis will also analyse some national perspectives based on the position of different Member States regarding the relationship between the SDS and marketplace bans.

2. SYSTEM OF ASSESSMENT OF SELECTIVE DISTRIBUTION SYSTEMS

To understand the current SDS legal framework, there are two main decisions from CJEU that need to be analysed from the outset – Metro I[10] and Metro II[11]. These decisions had a serious impact on the way we now interpret these agreements since they were included by the Commission in EU legislation.

2.1. Metro I and Metro II

The Metro I is a decision from 1977, where the CJEU established three conditions that must be fulfilled in order for an SD agreement to comply with EU Competition Law (the "Metro Rule"), not falling under the scope of Article 101(1) of the TFEU[12]. These conditions are as follows[13]:

I. The SDS is necessary due to the inherent characteristics of the product; such a network is required to preserve the properties of the product and its proper use;[14]
II. Distributors are to be chosen based on objective criteria of a qualitative nature regarding technical qualifications of the reseller and his staff and the suitability of his trading premises; these conditions

9 Sector Inquiry (n 2).

10 C-26/76, *Metro SB-GroBmarkte v. Commission* (Metro I), ECR 1875.

11 C-75/84, *Metro SB-Großmärkte GmbH & Co. KG v. Commission* (Metro II), ECR 3021.

12 TFEU (n 6).

13 Metro I (n 10): §20.

14 Guidelines (n 8): §185.

must be determined uniformly for all potential resellers and must be applied on a non-discriminatory basis;[15] and

III. The restrictions must not go beyond what is necessary.[16]

This decision played a very important role in defining whether an SDS is compliant with competition law provisions or if, on the contrary, it is distorting competition in the market. In this case, the SDS was not compatible with the Metro Rule. However, it could still be acceptable from a competition law perspective if it would comply with the requirements of Article 101(3) TFEU. This Article ensures that price competition can be partially restricted when that restriction shows to be essential to achieve legitimate objectives such as "*improving production or distribution or promoting technical or economic progress*", which has nothing to do with the nature or characteristics of the product itself[17].

Subsequently, in Metro II, the Court once again recognized that, although an SDS usually represents some limitations to competition by price, it can be balanced with competition on another basis, such as the quality of service supplied to customers. The Court, while endorsing the Metro I decision, established another condition that must be fulfilled when analysing these agreements: the number of similar distribution systems in the market must not preclude the possibility of other forms of distribution or result in a rigid price structure.[18] This condition must be fulfilled along with the three conditions set by the Court in Metro I.[19]

15 Metro I (n 10): §20.

16 Metro I (n 10): §§20 and 24.

17 Metro I (n 10): §19.

18 Metro II (n 11): §40: "*there may nevertheless be a restriction or elimination of competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different type of competition policy or results in a rigidity in price structure which is not counterbalanced by other aspects of competition between products of the same brand and by the existence of effective competition between different brands*".

19 Witt, 2006; Monti, 2013; Hawk, 1995; Colangelo & Torti, 2018: 81. Despite the importance of these decisions and the fact that the test set herein has been implemented by the EC in the BER, it has been object of several criticisms, such as its formalist approach and inability to identify the likely effects on competition, as well as the fact that it does not explore the scope of any other benefit under Article 101(3) TFEU to balance the pro-competitive effects, using only the anticompetitive effects under the scope of Article 101(1) TFEU.

2.2. The Vertical Block Exemption Regulation

The BER is a regulation published by the EC in 2010, which incorporated the CJEU's decisions analysed above. This regulation applies to vertical agreements which fall within article 101(1) TFEU and in relation to which it can be assumed with sufficient certainty that they satisfy the conditions established by Article 101(3) TFEU.

Alongside Article 101 TFEU, the BER establishes a fundamental foundation of vertical agreements, stating that the agreements falling under its scope should be exempt from the prohibition foreseen in article 101(1) TFEU if the following conditions are met:

1. There has to be a vertical agreement as described above;
2. The market share of each party must not exceed 30% of the relevant market; and
3. There are no hardcore restrictions within that agreement.

Thus, the BER provides a "safe harbour" for agreements entered into between parties who hold a market share below 30%[20], and which do not include any of the restrictions foreseen in Article 4. When an agreement contains a hardcore restriction, it is automatically presumed to fall under the scope of Article 101(1) TFEU and it is considered unlikely to fulfil the conditions defined in Article 101(3) TFEU.[21]

It is important to point out that, while it is mandatory to analyse the improvement of economic efficiency or the promotion of technical or economic progress that can result from an agreement, the nature or characteristics of the products or services concerned are usually not considered to assess the advantages that such an agreement might bring to competition under the BER. Instead, the nature or characteristics of the products or services concerned may be taken into consideration under a case-by-case analysis to assess whether an agreement, which falls outside the scope of the BER, can be justified under Article 101(3) TFEU and when assessing the balance between the pro-competitive effects and anti-competitive effects of the agreement. This assessment is usually made considering the market power of the undertakings involved and "*on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or*

20 See European Commission, *Notice on Agreements of Minor Importance that do not Appreciably Restrict Competition Under Art 101(1) TFEU*, OJ C368/13, (2001).

21 Accardo, 2013: 269.

substitutable for one another, by reason of the products' characteristics, their prices and their intended use."[22]

In what regards SDS, they are defined by the BER as "*a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system*."[23] This definition does not determine any specific type of product or service to which the SD may or may not apply, but only impose the condition that distributors be chosen based on specific criteria.

The SDS allows manufacturers to limit the number of undertakings that are entitled to resell their products and are usually implemented where highly technological and luxury products are concerned. These agreements must be assessed under Article 101(1) TFEU. This provision applies when there is an "*agreement or concerted practice between two or more undertakings or a decision by an association of undertakings*".[24] The collusion must appreciably restrict or distort competition and it must have an appreciable effect on trade between Member States.[25] When the agreement falls within the scope of Article 101(1) TFEU, it has also to be assessed under Article 101(3) TFEU which, as referred, provides an exception from the general prohibition set on number 1 when agreements are proved to contribute to "*improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*".[26] These restrictions, as well as their periods of application, must also be the minimum necessary to attain the benefits which justify the exemption.[27]

In a nutshell, according to the BER, it is up to the supplier to determine the relevant criteria for each of the potential distributors, considering the specific market, the potential distributor characteristics and/or the supplier goals. Article 1(1)*(e)* also does not consider the "standard of necessity"

22 BER (n 7): §7.

23 BER (n 7), Article 1(1)*(e)*.

24 TFEU (n 6), Article 101(1).

25 C-501, 513, 515 and 519/06-P, *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission*, ISSN 1725-2423, §63; 193/83 *Windsurfing International Inc v Commission*, EU:C:1986:75: §96.

26 TFEU (n 6), Article 101(3).

27 Metro II (n 11): §49: the agreement can fulfil the exemption foreseen in Article 101(3) TFEU when "*the advantages of the system for the competition outweigh the disadvantages*"; Hubert, 2014: 180.

criteria, meaning that, under the BER, in the context of a purely qualitative selectivity, the defined criteria may go further than what is required, given the nature of the products or services, contrary to the CJEU's statements.[28] Essentially, under the BER, the supplier is free to choose whichever criteria he considers relevant to select the SD network. Those criteria don't need to be available to the potential applicants and can be different from distributor to distributor, however, it needs to be specified.

The hardcore restrictions in the context of an SDS are stated in the BER in Article 4*(c)* and 4*(d)*. The first foresees that when the agreement contains a restriction that can lead to a market partitioning both by territory or by customer group – an exception being made for sales of a member of the SDS to a non-authorized distributor within a territory which is already operated in the context of the SDS or where the products are not yet sold at all[29]; the later regards restrictions on the supply between authorized distributors within an SD network, even if there are in stake distributors operating at a different level of trade.[30] Therefore, the BER applies to SD agreements provided that the conditions referred to at the beginning of this chapter are fulfilled and that the active sales from the authorized distributors to end-users and to each other are not restricted by the agreement.[31]

2.3. Guidelines on Vertical Restraints

The Guidelines published by the EC in 2010 provide information to stakeholders on how the EC interprets the BER and how it should be enforced.

Regarding SDSs, the Guidelines point out that they "*restrict the number of authorised distributors on the one hand and the possibilities of resale on the other*" and explains the difference between this kind of agreement and exclusive distribution agreements.[32] The document also lists the risks SDS can represent to competition, such as the reduction of intra-brand competition, the foreclosure of some distributors and the softening of competition, enabling collusion between the parties.[33]

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28 Metro I (n 10): §§20, 24 and 26-27; C-230/16, *Coty Germany GmbH v. Parfumerie Akzente GmbH,* EU:C:2017:941: §§43-55.

29 Colangelo & Torti, 2018: 86.

30 See BER (n 7), Article 4*(c)* and *(d)*.

31 Guidelines (n 8): §176; Colangelo & Torti, 2018: 86.

32 Guidelines (n 8): §174.

33 *Ibid*: §175.

Vis-à-vis the criteria to apply the BER, the Guidelines state that it "*exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria*". However, this criterion does not seem to have a significant practical effect since the BER will probably not apply when "*the characteristics of the product do not require selective distribution or do not require the applied criteria*", since "*such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition*".[34]

Before going any further, it is necessary to establish the distinction between qualitative and quantitative criteria. Qualitative criteria subject the acceptance of distributors to objective criteria which are crucial to the distribution process (e.g. staff training, point of sale characteristics); and quantitative criteria consist on the limitation of the number of authorized distributors.[35] Paragraph 175 states that, regarding purely qualitative SDS, an agreement that fulfils the Metro Rule conditions – where the network is selected based on objective criteria required by the nature of the product (e.g. the training necessary for distributors, the kind of service that needs to be provided, etc.) and where there is no direct limit required regarding the number of distributors within the network – will not fall under Article 101(1) TFEU since it does not represent anticompetitive effects. However, the fulfilment of the Metro Rule conditions does not exclude the agreement from the scope of Article 101(1) TFEU in cases where the agreement relates to a qualitative and quantitative distribution. In those cases, as stated in paragraph 176, the agreement can be exempted by the BER if its conditions are met, regardless of the nature of the product and regardless of the nature of the selective criteria. Nonetheless, when the characteristics of the product do not require an SDS or do not require the applied selective criteria, the agreement will probably not fall under the BER, since the efficiency enhancement it might represent will possibly not outweigh the anticompetitive effects it embodies. Therefore, the EC considers that, in order to justify the restrictions on competition potentially brought by an SDS, the products or services involved must contain some characteristics or attributes which make them "superior" to other regular products or services, reducing the choice of retailers who would consider an SDS as a good distribution mechanism for their business. Furthermore, even though Article 1(1)*(e)* of the BER does not include any

34 *Ibid*: §176.

35 Goyder, 1993: 99–112.

requirement in this respect, an SDS is often accepted only for luxury products and not, for example, for fast-moving consumer goods. But, what is the definition of luxury products? We will discuss this more in detail further in this paper.

The Guidelines also pay special attention to the e-commerce and the online bans that can be implemented under an SDS – ban on the use of the brand name, logo or third-parties' marketplaces.[36]

Regarding the hardcore restriction foreseen in Article 4*(c)* of the BER, which prohibits the restriction of passive sales, the Guidelines establish that online sales must be considered as passive sales, meaning that the supplier must always allow their distributors, operating under an SDS, to sell their products through their own online platforms.[37] In addition, the Guidelines give the supplier the right to establish mandatory quality criteria which the distributor has to comply with in order to sell the products or services online, as well as to require that the distributors only sell the products or services through third-party marketplaces when the name or logo of that third-party is not discernible to the customer.[38] Therefore, in the Guidelines, the EC already considers a ban on the use of third-party online platforms (discernible to the client) as a non-hardcore restriction.[39]

The relationship between e-commerce and SDS also raises questions regarding the quality standards the supplier may impose on distributors, within the framework of online sales, to safeguard the image of the supplier's brand image.[40] The supplier may, in both online and offline sales provide distributors with guidelines on how to sell the products or provide the services.[41]

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36 Auricchio, Padellaro & Tomassi, 2013: 337-395; Schultze, Pautke & Wagener, 2011: 331-361.

37 Guidelines (n 8): §§50, 52 and 57; French Competition Authority, Decision n.º 12-D-23, *Bang & Olufsen* (2012).

38 Guidelines (n 8): §54; Sector Inquiry (n 2): §501.

39 Also relevant for the topic: C-439/09, *Pierre Fabre Dermo-Cosmetique SAS v. President de l'Autorite de la Concurrence*, ECR I-9419; Also see BER (n 7), Article 4*(c)* BER; also see Sector Inquiry (n 2): §§502-504: "*If a marketplace ban de facto amounts to a total ban of the use of the internet as a method of marketing, then it could […] be considered as having as its object the restriction of passive sales and as a hardcore restriction under the VBER […] Marketplace bans should not, therefore, be considered as restricting the effective use of the internet as a sales channel irrespective of the markets concerned: (a) Own online shops remain the most important online sales channel for retailers.*"; Sector Inquiry (n 2), §509; C-230/16, *Coty Germany GmbH v. Parfumerie Akzente GmbH,* EU:C:2017:941, Opinion of Advocate General Wahl (2017).

40 Guidelines (n 8): §54.

41 Guidelines (n 8): §52; see also Hederströmand & Peeperkorn, 2016.

In this regard, the Guidelines establish an "equivalence test"[42] that states that "*the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet*", where, the EC will consider "*any obligations which dissuade appointed dealers from using the internet to reach more and different customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop*". Nevertheless, this does not necessarily mean that "*the criteria imposed for online sales must be identical to those imposed for off-line sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes"* as a hardcore restriction under Article 4*(c)*.[43]

3. FROM THE FIRST ASSESSMENT TO THE DIGITAL ERA – HOW IS THE EUROPEAN UNION ACTING WITHIN THIS SYSTEM?

From 2010 until today, a lot has changed in the market. The online sales channel has been increasingly growing and becoming as popular as brick and mortar sales channel (or maybe even more) and has changed the reality of distribution systems. As the Metro I and Metro II decisions did not consider online sales and, as the BER was not yet shaped for this reality, some questions have been coming up. Both the CJEU and EC have been working to solve these questions and to adjust EU law to the digital challenges.

3.1. The CJEU

a) Pierre Fabre[44]

The *Pierre Fabre* Decision dates back to 2011. *Pierre Fabre* Dermo-Cosmetics was a manufacturer of non-medicinal cosmetics and personal care products that used an SDS to distribute its products both in the EU Market and in the French Market. The products had to be sold only in retail pharmacies in a physical place with a qualified pharmacist present. When confronted with the SD agreements concluded by *Pierre Fabre*, the French Competition Authority (hereinafter "FCA") considered that they were restricting competition, since the retailers were being denied the possibility of selling the goods

42 Guidelines (n 8): §56.

43 Guidelines (n 8): §56.

44 *Pierre Fabre* (n 39).

online. Moreover, the FCA considered these agreements to be restricting active and passive sales, which represents a hardcore restriction as foreseen by Article 4*(c)* of the BER.[45]

When the CJEU was approached to decide on the case, it was more strict when establishing the arguments that are considered to be able to justify the restrictions on competition, stating that *"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*"[46] and 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 qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object […] that clause is not objectively justified*."[47] Therefore, a clause imposing a complete ban on online sales amounts to a hardcore restriction to competition and falls under the scope of Article 101(1) TFEU.

The Court clarified that a marketplace ban, which amounts to a total restriction of online sales for a distributor would constitute a ban on passive sales and thus a hardcore restriction under Article 4*(c)* BER.[48] This decision created uncertainty among manufacturers and distributors regarding the legitimacy of restrictions imposed through an SDS. The doubt was if the Court would no longer consider the argument of ensuring the proper use of the product as a legitimate aim or if it was a decision based on the specific characteristics of these products in relation to which the Court considered that the specialist advice was unnecessary.[49] Nevertheless, it should be taken into account that restrictions to e-commerce should not be deemed automatically restrictive of competition without analysing the product and the

45 See BER (n 7): "*The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: […] the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment*".

46 *Pierre Fabre* (n 39): §46; see C-59/08, *Copad v. Christian Dior couture SA*, ECR I-3429.

47 *Pierre Fabre* (n 39): §47.

48 *Ibid.*

49 Colangelo & Torti, 2018: 93; Romano, 2012: 345-347.

relevant market in each case[50], since competition by quality or technological innovation can be as relevant as price competition.[51]

b) Coty Prestige[52]

The *Coty Prestige* case is a very important decision from 6 December 2017 that was expected to solve the uncertainty brought by the previous case law. This case related to the possibility of the suppliers of luxury goods, under certain circumstances and in the context of an SD agreement, being able to prohibit their authorized distributors from selling the concerned products on a third-party online platform. The Advocate General's Opinion[53] in this case had an important influence on the Court's decision, which was essentially based on three main questions.[54]

Coty is a German supplier of luxury cosmetics that sells its products through authorised distributors organized in an SDS around Europe. This system allows *Coty* to ensure the quality requirements under which it wants the products to be sold.[55] *Parfümerie Akzente* is one of *Coty*'s authorized distributors. The agreement signed between the parties established a prohibition on the sale of the products under a different name or sale through a third--party undertaking which was not authorized to do so.[56]

The dispute between these two parties was based on the following:

- *Coty* wanted to introduce an amendment to the SD agreement in order to include a provision, which would ensure that "*the authorized retailer is entitled to offer and sell the products on the internet, provided, however, that internet sales activity is conducted through an 'electronic shop window' of the authorized store and the luxury character of the products is preserved.*"[57]

50 See *Pierre Fabre* (n 39): §40: "*there are legitimate requirements, such as maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price*."

51 Buccirossi, 2015: 94.

52 *Coty* (n 28).

53 Opinion AG (n 39).

54 *Coty* (n 28): §§21-58.

55 *Ibid*: §2.

56 *Ibid*.

57 *Ibid*: §15.

- *Coty* wanted to introduce an explicit prohibition on the use of a different business name as well as an explicit prohibition on the engagement with a third-party which was not an authorized retailer.[58]
- *Parfümerie Akzente* refused to accept these amendments and Coty brought an action before the German Court, which dismissed the action with reference to the *Pierre Fabre* decision, which determined that the objective of maintaining the "luxury image" of a brand could not justify the introduction of an SDS when it includes a hardcore restriction to competition under Article 4 *(b)* or *(c)* of the BER.[59]
- *Coty* appealed to the Higher Regional Court of Frankfurt, which referred the case to the CJEU for a preliminary ruling under Article 267 TFEU.[60]

- In its preliminary ruling, the Court asked the CJEU three questions[61]:
    1. Is an SDS established to preserve a luxury brand/product compatible with Article 101(1) TFEU?
    2. Is a prohibition to engage with third-party platforms, in a manner discernible to the public, to handle online sales compatible with the provision of Article 101(1) TFEU?
    3. In case this prohibition includes a restriction of competition under Article 101(1) TFEU, does it constitute a hardcore restriction under Article 4 *(b)* or *(c)* of the BER?

In this decision, the CJEU provided the following main findings:

1. The CJEU clarified its previous rulings in Metro I and II where it stated that SDSs are not prohibited by article 101(1) TFEU *per se*. In addition, the Court brought to mind the main criteria these agreements must fulfil in order to comply with Article 101(1) TFEU, which were referred to above in point i). In this decision, the CJEU also stated that, in the *Pierre Fabre* decision[62], it was not its intention to exclude the

58 *Ibid.*

59 *Coty* (n 28): §16; Judgment of the District Court Frankfurt am Main, 2-3 O 128/13, (2014).

60 Judgment of the Higher Regional Court Frankfurt am Main, 11 U 96/14 (Kart), (2016).

61 *Coty* (29): §20.

62 *Pierre Fabre* (n 39).

possible use of an SDS for luxury goods *per se* and that the criteria set in Metro I and II shall continue to apply in these cases.[63]

2. Regarding the clause prohibiting the use of third-party platforms, the Court decided that a clause inserted to safeguard the luxury image of the products, which prevents resellers from engaging, in a manner discernible to the customers, with third-party platforms for the online sales of luxury products, does not infringe Article 101(1) TFEU:
    a. The clause prohibiting the authorised distributors to sell their products via third-party online platforms has to be established in an objective, uniform, and non-discriminatory manner. Also, the restriction must focus on safeguarding the brand's luxury image.[64]
    b. The restriction was considered necessary, appropriate and proportionate for the preservation of the luxury image of *Coty*'s products and the CJEU considered that it ensured that only the authorized distributors sell the products. In addition, the clause gave the manufacturer the possibility to act against a distributor that does not sell its products in compliance with the qualitative conditions required for online sales, which would not be possible regarding a third-party online platform, since there is no contractual link between the third-party and the supplier. Furthermore, the Court also highlighted that the luxury image of the products is likely to be preserved if the luxury products are not sold together with standard products that can be found in a marketplace.[65]
    c. The CJEU acknowledged the clause as proportional, since it did not have an absolute restriction of online sales but only included "*the use, in a discernible manner, of third-party platforms for the internet sale of the luxury good*."[66] In this sense, the authorized distributors were still able to perform online sales through their own websites. Also, this clause did not restrain distributors from selling the products through unauthorized third-party platforms, provided that these were not discernible to the public (the consumer does not know that there is an online platform involved in the

63 *Coty* (n 28): §§24-25; *Copad* (n 46): §§24-26.

64 *Coty* (n 28): §§42-43.

65 *Ibid*: §§43-51.

66 *Ibid*: §§43 and 58.

purchase and the sale of the products in such an environment that meets the quality standards of the luxury brand).

d. In a case where the German court decided differently when analysing the facts of the case and would still have to address the questions of whether a ban on the use of the third-party platform to online sales constitutes a hardcore restriction under the provisions of Article 4 *(b)* or *(c)* BER, the CJEU considered that, since this restriction did not "*prohibit the use of the internet as a means of marketing the contract goods*", it did not restrict authorized distributors from selling to certain customers or on certain territories nor did it prohibit passive sales; also the clause did not make it possible "*to circumscribe, within the group of online purchasers, third-party platform customers*"; and authorized distributors were not prohibited from advertising "*via the internet on third-party platforms and to use online search engines*", which means that passive sales were not prohibited.[67] If these three criteria were fulfilled, the clause would not constitute a hardcore restriction under Article 4 of the BER, which means that this decision opens the path to an application of the BER, if the remaining conditions are verified.[68]

This decision is having important repercussions among manufacturers and retailers, especially regarding the luxury industry and the ability of luxury brands to restrict their distributors' engagement with third-party platforms when performing online sales within an SD network. This decision represents a relevant step towards a more clear legal framework for assessing marketplaces bans under Article 101(1) TFEU under the light of the SDS and allowing for a more homogeneous application of EU Competition law in this field.[69]

One of the main questions raised by this decision is how to determine and qualify "luxury goods" and how to analyse if the limitations of online sales are necessary and proportionate to preserve the luxury image and prestige of those goods, since both SD agreements and the control of online sales mechanisms must be sustained by the nature of the goods and must be necessary and proportionate in order not to constitute a violation of Article

67 *Ibid*: §§65-67.

68 *Ibid*: §68.

69 Toplensky, 2017.

101(1) TFEU. In this sense, the manufacturers of luxury goods with such concerns must justify the luxury nature of their products, must only impose restrictions which will safeguard the "luxury image" of the goods, must not go further than what is necessary to achieve that goal and must implement a non-discriminatory SDS based on objective criteria and meticulously define the reasoning behind the ban on the use of third-party online platforms, otherwise it is likely to be considered a violation of Article 101(1) TFEU.

The German Court issued its decision on 12 July 2018, where it followed the position presented by the CJEU and applied the criteria set by this Court. This Court considered that the products should be qualified for selective distribution and the luxury image of those products would be jeopardised if the marketplaces would have free admission to the SDS. Furthermore, the German Court also concluded that marketplace bans are not to be considered hardcore restrictions under Article 4*(b)* and *(c)* of the BER.

3.2. The European Commission

Alongside the CJEU, the EU is also trying to find the best way to meet the necessities of e-commerce and allow for the functioning and development of online sales. Therefore, the EC launched the Sector Inquiry to study the market and better understand its needs and difficulties and, also, launched the BER Revision to decide whether to lapse, prolong its duration or revise it, before its expiration on 31 May 2022.

a) E-Commerce Sector inquiry[70]

The markets' development, mainly the passage from the clear dominance of the brick and mortar sales channel to an increasing online sales channel, resulted in the need to find new answers on how to make the market work best. Therefore, in May 2017 the EC published the Sector Inquiry as a part of the European Digital Single Market Strategy that aims to create a better-organized digital market across the EU, providing consumers with better and safer access to the digital world. In the words of the Commissioner in charge of competition policy, Margrethe Vestager, "*certain practices by companies in e-commerce markets may restrict competition by unduly limiting how products are distributed throughout the EU. Our report confirms that. These restrictions could limit consumer choice and prevent lower prices online. At the same time, we find that there is a need to balance the interests of both online and 'brick-and-mortar'*

70 Sector Inquiry (n 2).

retailers. All to the benefit of consumers. Our findings help us to target the enforcement of EU competition rules in e-commerce markets".[71]

The main goal of the Sector Inquiry was to ascertain the potential competition concerns regarding e-commerce markets in the EU, and to target the enforcement of competition law in these markets, opening more antitrust investigations. In addition, this effort aims to improve the quality and convenience of cross-border e-commerce for consumers, lowering prices and increasing the choice of retailers.[72]

During the elaboration of the Sector Inquiry, the EC collected information from a large number of undertakings from all Member States regarding e-commerce in consumer goods and digital content, in order to guarantee a broad demonstration of the products that consumers can find on e-commerce markets. The EC's investigation was made based on questionnaires sent to retailers, manufacturers, e-commerce platforms and payment service providers, covering several product categories such as clothes, software, children products, books, etc, as well as several kinds of content.[73]

There were some relevant findings regarding the evolution and functioning of the digital market across the EU. Regarding consumer goods, the EC concluded that e-commerce has been growing for the last ten years alongside price transparency and price competition, representing a notable change in the commercial strategy of undertakings acting in digital markets and, also, in consumer behaviour towards these markets. Also, the investigation concluded that a large number of producers has decided in favour of online sales directly to consumers through their own online shop, competing with their own distributors. Likewise, the establishment of SDS became more common, giving producers greater control over their distribution network and, also, imposing contractual restrictions in order to control the distribution of products, such as pricing restrictions and marketplace bans, increased during the past ten years.[74]

Regarding the marketplace bans issue, the Sector Inquiry tried to provide an answer to the question "*to which extent restrictions limiting the ability of retailers to sell via online marketplaces may raise concerns under the EU competition*

71 Sector Inquiry (n 2): 1; European Commission Press Release, 2017.

72 Sector Inquiry (n 2): 1; EC Press Release (n 71).

73 Sector Inquiry (n 2): 1.

74 *Ibid.*

rules"[75]. With this purpose, the EC worked towards achieving more clarity regarding the relevance of the marketplaces as a new sales channel and of the characteristics of the marketplace bans.[76] The investigation concerned both absolute marketplace bans and restrictions on marketplaces that do not fulfil certain quality criteria. The EC concluded that 18% of retailers have supply agreements that contain marketplace bans, especially retailers from France and Germany (21% and 32% respectively). The main reasons manufacturers present to justify the imposition of marketplace bans are: the need to protect brand image and positioning, the need to fight counterfeit products in the marketplace, the need to ensure that pre- and post-sales services are provided properly to their clients, and the need to protect the existing channels from free-riding. On the other hand, retailers and marketplaces present another view on the reasoning for these bans: to reduce the number of online sellers and to avoid the growth of price transparency growth.[77]

The Sector Inquiry also concluded that the impact of the marketplace ban and its importance vary according to the size of the retailers and the type of product concerned: "*marketplaces are more important as a sales channel for smaller and medium-sized retailers with a turnover below EUR 2 million while they are of lesser importance for larger retailers with a higher turnover. The results show that smaller retailers tend to realise a larger proportion of their sales via marketplaces than larger retailers*" and "*the importance of marketplaces differs between the different product categories and within product categories depending on the nature of the product and whether customers would expect to find the products for sale on marketplaces. Marketplaces are most relevant for retailers selling clothing and shoes and consumer electronics*."[78]

The Sector Inquiry's findings in this field do not allow for the conclusion that marketplace bans are a *de facto* prohibition to online sales, such as found in the *Pierre Fabre* decision. Also, it does not allow for the conclusion that marketplace bans intend to restrict the actual use of the internet as a sales channel. A wide number of inquired retailers (61%) considered marketplaces not to be a relevant sales channel, since they sell their products through their own online shop. Hence, only 4% of the retailers use the marketplace as the

75 *Ibid*: 150-155.

76 *Ibid*: 153.

77 *Ibid*: 153-154 and 290.

78 *Ibid*: 154.

single online channel to sell their products, while 31% sell via both options: own online shops and marketplaces.[79]

Moreover, the Sector Inquiry concluded that absolute marketplace bans are not to be considered as hardcore restrictions within the meaning of Article 4*(b)* and Article 4*(c)* of the BER, since there the goal of these bans is not to segment markets on territory or customers. As stated by the EC "*they concern the question of* ***how*** *the distributor can sell the products over the internet and do not have the object to restrict* ***where or to whom*** *distributors can sell the products*."[80] However, being considered as a non-hardcore restriction does not make this restriction automatically compliant with EU competition law. The Competition Authorities are free to analyse these restrictions when the agreement concerned falls outside the BER, "*either because the market share thresholds in Article 3 of the VBER are exceeded or because the agreements contain any of the listed hardcore restrictions in Article 4 of the VBER. The Commission or a National Competition Authority may also decide to withdraw the benefit of the VBER if in a particular case the marketplace bans restrict competition within the meaning of Article 101(1) TFEU and are incompatible with Article 101(3) TFEU.*"[81]

4. IS THE ASSESSMENT OF ONLINE SALES WITHIN SELECTIVE DISTRIBUTION SYSTEMS CLEAR ENOUGH AT THIS POINT? – A NATIONAL APPROACH

Even though both the CJEU and the EC have been working to answer questions concerning the relationship between SDS and marketplace bans, there is still the need for further clarity. Mainly, the question regarding the definition of "luxury products" that the Court failed to answer both in the *Pierre Fabre* and the *Coty* Decisions remains unsolved. It can be concluded from an overview of some national decisions where there is no consensus on how to interpret the CJEU's decisions together with the BER and the Guidelines regarding online sales within an SDS. Moreover, it is important to state that, due to the lack of clarity in this field, there is no legal certainty within the EU since there is no uniform or clear interpretation from the Court nor the EC.

79 *Ibid*: 154-155 and 290.

80 *Ibid*: 155.

81 *Ibid*: 155 and 290-291.

Notwithstanding the *Coty* decision and its guidance on the enforcement of competition law, there is still a certain degree of legal uncertainty regarding bans on the use of online third-party platforms in some jurisdictions. Not all Member States seem to agree on the same train of thought. While countries such as Austria, Italy, France, and the Netherlands agree with the EC, there are jurisdictions such as Germany and Luxembourg that believe that this kind of ban on online platform should be considered a hardcore restriction in line with general restrictions on online sales, as stated in the *Pierre Fabre* decision. In order to have an overview of the national perspectives, we will analyse two different jurisdictions with different points of view: The Netherlands and Germany.

4.1. The Netherlands

The most relevant case in The Netherlands relates to the distribution agreement between Nike (the manufacturer) and Action Sport, a retailer of Nike's sportswear, footwear, and other related products. The dispute arose when the latter used a non-authorised online platform to sell Nike's products, breaching the SD agreement entered into between the parties. This agreement established a distribution policy that restricted authorised retailers, such as Action Sport, from selling Nike products via non-authorised parties.[82] Nike decided to terminate the agreement and lodged a complaint against the distributor before the District Court of Amsterdam (hereinafter "DCA"). In the context of this lawsuit, the distributor stated that the agreement was in violation of competition law and thus should be considered null and void. [83]

The DCA started by confirming that Nike was operating an SDS and that the criteria established by Nike to select distributors, such as the distributor's technical qualifications, his staff and the suitability of his trading premises, were uniform and non-discriminatory. Then, the DCA invoked the opinion of the Advocate General Wahl[84] in the *Coty* case to establish that "*having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are properly used*"[85], and thus support the decision to allow Nike to establish an SD network for the distribution of

82 C / 13/615474 / HA ZA, Amsterdam Court, (2017): 16-959; Ten Have, 2017; Kmiecik, 2017.

83 *Ibid.*

84 *Coty* (n 28); Opinion of AG (n 39).

85 *Ibid.*

its products, to safeguard its luxury brand image.[86] Furthermore, the DCA also referred to the AG Opinion in the *Coty* Case where made reference to "*[…] compliance with the qualitative requirements which may be lawfully imposed in the context of a selective distribution system can be effectively ensured only if the internet sales environment is devised by authorised distributors, who are contractually linked with the supplier/head of the distribution network, and not by a third-party operator, whose practices escape the influence of that supplier*", dismissing Action Sport's argument regarding the anti-competitive effect of the ban on sales via non-authorised platforms.[87] Further, in the present case, the distributors were not banned from selling the products through online platforms, since Nike allowed their authorised distributors to sell products through some previously defined online platforms. However, Amazon did not comply with the criteria established by Nike to define the authorized platforms where its distributors could sell the products under the SDS. The DCA also stated that if Amazon met the qualitative criteria set by Nike and asked to be admitted as a part of the SDS, Nike would have to accept it as a member. In this regard, we should note that the BER enables a producer to operate a quantitative SDS and to exclude applicants irrespective of whether they comply with the qualitative criteria set for that system.[88]

The DCA decided in favour of Nike, in October 2017, affirming that its SDS, despite the fact that it contained a ban on online sales through non-authorised third-party platforms, was intended to safeguard the luxury image of Nike's brand, and was in accordance with competition law, stating that a ban on online selling through third-party platforms is not to be assessed as a hardcore competition restriction.[89]

4.2. Germany

The German approach is the opposite of that adopted by the Netherlands, and the disparity between the opinions of the German Federal Cartel Office (hereinafter "FCO") and the EC is clear, especially by the time of the publication of the FCO's paper on the subject (the "FCO Paper").[90]

86 Ten Have, 2017.

87 *Coty* (n 28); Opinion of AG (n 39).

88 Kmiecik, 2017.

89 Ten Have, 2017.

90 German Federal Cartel Office, *Competition and Consumer Protection in the Digital Economy: Competition restraints in online sales after Coty and Asics – what's next?*, (2018); Westrup & Rohr, 2018; see also Decision

Following the *Coty* decision, the introduction of bans on online third-party platforms in the sphere of an SD agreement, particularly when luxury goods are involved – and when all the requirements, such as proportionality and non-discrimination, are fulfilled – were considered to be compliant with EU competition law. Nevertheless, in the opinion of the FCO, there were still some questions that remain unresolved.[91] The FCO Paper presented three main arguments to justify the legal uncertainty that still persists even after the *Coty* decision. Firstly, this decision related to luxury products, which means that the decision can not apply to all other types of products and that the establishment of this kind of ban within an SDS when non-luxury goods are at stake may imply an infringement of competition law. The lack of a definition of "luxury products" is one of the main problems identified, and may lead to the acceptance of these bans regarding other products that should not be included in this category, jeopardizing the selectivity conferred by the *Coty* decision.[92] Furthermore, the FCO referred to the general ban on the use of third-party online platforms as likely to be excessive regarding non-luxury goods, and that the brand image of these products could be protected by less restrictive measures. For instance, the online platforms that would be allowed to sell these products could be selected based on explicit and pre-determined requirements.[93] Lastly, the FCO was concerned about the application of the BER in relation to these bans. To justify this concern, the FCO started by referring to the *Pierre Fabre* decision[94] where the Court stated that suppliers cannot prohibit their distributors from selling the products via online sales, meaning that a ban on online sales *per se* is, in principle, a violation of EU competition law. The FCO's main point was focused on the impact that online sales have in Germany. Moreover, the FCO noted that the impact of online sales is different from Member State to Member State. In this sense, and regarding the way the German market is structured, marketplaces and other websites that allow consumers to compare prices and characteristics

B2-98/11, *ASICS,* German Competition Authority, (2015); Decision B3-137/12, *Adidas,* German Competition Authority, (2014); Judgment 2-03 O 158/13, Frankfurt Regional Court (2014); and Judgment 16 U (Kart) 154/13, of the Schleswig Higher Regional Court (Germany), (2014).

91 FCO Paper (n 90).

92 FCO Paper (n 90); Steinvorth, 2018.

93 *Ibid*.

94 *Pierre Fabre* (n 39).

are truly relevant for its consumers and more meaningful in Germany than in other Member States, due to its consumers' behavioural patterns. Therefore, in Germany, banning a distributor's access to marketplaces could lead to a decline of perceptibility by consumers and, ultimately, to an unlawful exclusion of that distributor from online sales.[95]

In addition, the German Federal Court of Justice ("GFCJ"), decided in the *ASICS* Case that sports and running shoes were not to be considered to be "luxury products", when analysing the company's online restrictions just a few days after the *Coty* decision was published.[96]

That said, it is expected that both the FCO and the GFCJ will keep challenging these bans whenever they consider there is a possible violation of Competition law, since they are not keen on admitting the lawfulness of bans on a third-party platform to the same extent as the EC and the CJEU, provided that the "luxury product" concept is not defined in the same manner.

5. HOW TO DEAL WITH THE CURRENT SYSTEM AND IMPROVE LEGAL CERTAINTY?

As can be concluded from the chapters above, there is still a lot to be done in this field, and the answers provided by the CJEU and the EC until this moment are still not enough for EU law to be suited to the needs of digital markets.

Besides failing to provide a definition of "luxury products", the CJEU and the EC also fail to assess if the marketplace bans within an SDS amount to a restriction by object or a restriction by effect. Although the AG Opinion in the *Coty* case states that the marketplace bans that do not fulfil the Metro Rule, falling under the scope of Article 101(1) TFEU, shall be considered as restricting competition by effect, the CJEU's decisions failed to clarify this question. Therefore, uncertainty remains.[97]

Notwithstanding the above, it is important to analyse the perspective of the CJEU's argument when evaluating marketplace bans, since it considered that it does not constitute a restriction of competition as foreseen in Article

95 FCO Paper (n 90); Steinvorth, 2018.

96 Decision n.º CPC 41/17, Bundesgerichtshof, (2017).

97 European Commission, 2018: 3; Opinion of AG (n 39); *Coty* (n 28): §117.

4*(b)* or Article 4*(c)* of the BER, as it does not amount to a limitation on customers to whom distributors may sell their products nor to a restriction of passive sales to end-users by the SD network. As such, it might be concluded from the CJEU's reasoning, that those marketplace bans would not fall under the definitions of "customer group" or "passive sales", and therefore would not fall under the definition of a restriction by object.[98] However, the CJEU also submitted this analysis based on the fact that the products involved were "luxury products" and that the nature and characteristics of the products concerned should be taken into consideration in an assessment. Therefore, the Court did not clarify if this decision should only apply to "luxury products" or to other kinds of products that might justify the implementation of an SDS and failed to define those products, leaving room for different interpretations of the concept and opening the door to new litigation.

5.1. What is luxury in the eyes of the CJEU?

Despite the lead role that "luxury products" played in the *Coty* decision[99], the CJEU failed to provide a definition. Instead, the Court relied on the *Copad* Decision, where it stated that for a product to be considered a "luxury product" it is necessary to take into consideration not only its material characteristics but also its "*luxury aura*", which arises from the charisma and reputable image of the product. The CJEU considered, in that decision, that the "aura of luxury" guides consumers in distinguishing these products from all other similar products and thus luxury is a relevant characteristic to take into consideration. This is why the Court considered that an SDS is perfectly justified in these cases since it is the most suitable distribution system to safeguard the products "aura". Through the implementation of this system, manufacturers may ensure that the goods are presented in a way that will preserve their reputation and, therefore, will allow consumers to recognize their luxury status.[100]

The CJEU established that when the Metro Rule conditions are fulfilled and "luxury products" are at stake, the SDS falls outside the scope of Article 101(1) TFEU and, thus, it complies with EU competition law. Following this line of thought, the *Coty* decision did not go against what was stated in the *Pierre Fabre* decision. Although the main issue in the latter decision was not

98 European Commission (n 97): 4.

99 *Coty* (n 28): §§25-29.

100 *Copad* (n 46): §§24-26 and 28-29.

the characterization of the product as luxury or non-luxury, the Court made a reference to it stating that the products concerned in that case were not to be considered luxury products but only "cosmetic and body hygiene goods".[101] This reference brought to light some doubts regarding the Court's interpretation of "luxury products" and whether this characteristic was, in fact, relevant for the final decision.

5.2. How should Luxury be defined?

At this point, it is clear that there is a need to find a definition for luxury products. For that reason, it is also important to establish the difference between brands and luxury brands as well as to understand what factors should be considered when labelling a brand or a product as luxury. Also, it should be stated that "luxury products" are mainly, if not exclusively, produced by luxury brands.[102] There are several factors that can be taken into consideration when assessing if a certain brand is a luxury brand or not, such as product innovation, the exclusivity and strength of the brand, the high quality of the manufactured products and its distinction from other products and, often, the price of the products that are usually more expensive. Nevertheless, these factors should be considered in combination in order to identify a luxury brand and not individually, mainly considering the price factor, since there are several expensive products that cannot be considered luxury.[103] More than price, luxury is about exclusivity, since the distinction of the products and the fact that only a few consumers can afford to purchase them is one of the key means of perception of the brand as a luxury brand by consumers.[104] Furthermore, a product can be considered luxury not by its characteristics, but by the reaction, consumers have towards it.

There were several attempts to define luxury products. Firstly, Heine (2011) defined luxury brands as follows: "*luxury brands are regarded as images in the minds of consumers that comprise associations about a high level of price, quality, aesthetics, rarity, extraordinariness and a high degree of non-functional associations*".[105] On the other hand, the Bernard Arnault from the CEO in *Louis*

101 *Coty* (n 28): §§30-35; Opinion of AG (n 39): §§75-84.

102 Heine, 2011: 47.

103 Som & Blanckaert, 2015: 6-7 and 92; Bruce, Erihoff, Lindberg & Marshall, 2007: 252; Suuripää, 2018: 19.

104 Sun, 2015: 411.

105 Heine, 2011: 46.

Vuitton[106] defined it and reduced it to "*star brands*" that "*should be timeless, modern, fast-growing, and highly profitable*".[107] Also The Boston Consulting Group provided us with a definition for luxury products as *"items, products, and services that deliver higher levels of quality, taste, and aspiration than conventional ones"*.[108] However, these definitions are not based on economic factors and all of them leave room for doubt, since what is considered luxury for some can be considered regular for others or a brand that is considered luxury in one year may not be in the following year given the dynamics of the markets.[109]

Besides all these contributions and discussions regarding the definition of "luxury products", there is still no information on when or if a definition will be provided. As has been discussed throughout this thesis, the current revision of the BER would be the perfect opportunity for the EC to insert a definition. In economic terms, while with a normal product an increase in income results in an increase in demand, meaning a positive income demand elasticity; when we have a luxury product, an increase in income causes a greater percentage increase in demand, meaning that when consumers' income increases, they are willing to spend a greater part of it on these kinds of products. The main problem with a purely economic definition is that the analyses of these goods for the determination of whether or not they are luxury takes time that does not comply with the rapidly changing environment of the markets. What seems to stem from this research is that a definition of luxury products should not rely on a pure-economic approach but, also, should not rule it out. Therefore, the EC should provide a definition based on an economic approach, which would establish criteria able to withstand time and market variations and to overcome the time issues that a purely economic definition creates. This would provide guidance on what factors should be considered in order for brands and products to be considered luxury products.

106 LVMH Moët Hennessy – Louis Vuitton SE, also known as LVMH, is a French multinational luxury goods conglomerate headquartered in Paris.

107 Som & Blanckaert, 2015: 31.

108 *Ibid*: 30.

109 Suuripää, 2018: 20.

5.3. What about non-luxury products?

As mentioned in Chapter 3, the *Pierre Fabre* case related to a *de facto* ban on internet sales (of non-luxury products) while the *Coty* case considered a ban only on the use of third-party online platforms (of luxury products). Whereas in the former, the measure was considered to go beyond what was necessary, in the latter, the Court considered the prohibition to be necessary and consistent with its purpose, to preserve the quality of the products and its "luxury aura" and to ensure its proper use, as well as ensure the product was only associated with the authorised distributors within the network.[110] This difference between both decisions justifies the CJEU's conclusion, which is also in accordance with the Sector Inquiry, that an absolute ban on the use of marketplaces within an SDS is not to be considered as a hardcore restriction under Article 4*(c)* of the BER, since it does not represent an absolute ban on the use of the internet as a sales channel and still allows distributors to sell their products through online sales using their own website or third-party platforms not discernible to consumers.[111] Therefore, one of the questions that arises from the *Coty* decision is whether the CJEU's intention was to confine this decision only to authentic luxury products or if, on the other hand, this conclusion fits all or some kinds of products. The lack of response to this question, as well as the lack of a definition of "luxury products", may give rise to a significant amount of litigation. The doubt is enhanced since in *Pierre Fabre* the Court also referred to the qualification of the products as "luxury" or "non-luxury" even when the ban was an absolute ban on online sales and distinguished it from the *Coty* decision on this basis.[112]

Even though the CJEU has not yet clarified this point, it is in any case necessary to consider the possibility of including marketplace ban clauses in agreements including "non-luxury" products, by virtue of the exemption of the BER, if the parties concerned have less than 30% market share.[113] In these cases, the clarification of whether the CJEU's decision applies to luxury or non-luxury products as well as it is the definition of "luxury products" are irrelevant. In cases where the parties have a market share above 30%, the

110 Colangelo & Torti, 2018: 103.

111 Sector Inquiry (n 2): §§41-42; Colangelo & Torti, 2018: 104.

112 Colangelo & Torti, 2018: 104; *Coty* (n 28): §§32 and 34.

113 Opinion of AG (n 39): §66.

definition of "luxury products" is crucial for suppliers to know if they can rely on the *Coty* decision.

In a nutshell, the definition of "luxury products" is relevant to determine which marketplace bans do not fall within the scope of Article 101(1) TFEU, therefore are compliant with EU competition law, and which fall within the scope of this Article, and therefore need to be assessed under Article 101(3) TFEU. Consequently, SDSs which ban the use of marketplaces and which concern non-luxury products (falling within Article 101(1) TFEU) can be exempted by the BER if the undertakings concerned have less than 30% market share; or can be justified under Article 101(3) TFEU, when the conditions of this Article are fulfilled.

At this point, it is also relevant to mention that the CJEU, prior to the *Coty* decision, stated that an SDS may be necessary to safeguard the quality of products that are not included in the "luxury" field.[114] Following the same line of thought, the AG in the *Coty* case stated that what is important to take into consideration are the properties of the products concerned that need to be preserved, and those properties can rely either on the luxury image of the products or on any other factor.[115] Also, the Guidelines support this position by considering that "*qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long as the market share of both supplier and buyer each do not exceed 30 %, even if combined with other non-hardcore vertical restraints […] provided active selling by the authorised distributors to each other and to end users is not restricted*" and that "*[t]he Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria*".[116]

Furthermore, the EC's opinion is that the CJEU's reasoning on marketplace bans regarding their relationship with Article 4*(b)* and *(c)* of the BER are "*valid irrespective of the product category concerned […] and are equally applicable to non-luxury products*." The EC also stated that "*[w]hether 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*".[117] Moreover, the EC provided its own arguments to support the position that the bans on sales

114 Opinion of AG (n 39): §69; See C-31/80, *NV L'Oreal and SA L'Óreal v. PVBA De Nieuwe AMCK*, ECR 3775.

115 Opinion of AG (n 39): §87.

116 Guidelines (n 8): §176.

117 European Commission (n 97): 4.

thought marketplaces are not to be considered as hardcore restrictions under the BER, irrespective of the fact that the products concerned are luxury or non-luxury products: (1) the BER's main goal is to provide undertakings that enter into an agreement with legal certainty regarding its lawfulness under Article 101(1) TFEU. This will only be possible if the undertakings are capable of relying on the BER. If the nature of the product or the relevant market conditions were to be considered when assessing the existence of a hardcore restriction, the predictability of the BER and its practical effect of ensuring legal certainty for undertakings would be jeopardised[118]; (2) Article 4*(b)* of the BER applies to SDSs as well as under the scope of other distribution systems, therefore, this provision cannot rely on the nature and characteristics of the products to remove the exemption provided by the BER. Since the CJEU considered that the bans on the use of marketplaces do not restrict passive sales to end-users, complying with the conditions foreseen under Article 4*(c)* of the BER, it would not be correct to consider that the same marketplace bans would represent a restriction on passive sales under Article 4*(b)* of the BER which, as stated above, applies irrespective of the characteristics of the products.[119]

In the end, the definition of "luxury products" is relevant to avoid litigation on whether the Agreement is to be considered as falling within the scope of Article 101(1) TFEU, and thus automatically considered compliant with EU competition law. However, when it comes to assessing the legality of an SD agreement, which contains a marketplace ban, it is not as relevant, since it was already established that those restrictions are not considered as hardcore. Therefore, the SD agreements, even when not concerning luxury products, are likely to be considered exempt by the exception contained in Article 101(3) TFEU. In other words, when it comes to the assessment of an SDS, which falls within the scope of Article 101(1) TFEU, the nature and characteristics of the products are not relevant, since the BER applies irrespective of the kind of product at stake. Consequently, we are likely to think about the usefulness of the distinction between luxury and non-luxury products under the scope of the SDS in practical terms for the protection of competition.

118 T-51/89, *Tetra Pak Rausing SA v Commission*, EU:T:1990:41, §37; Opinion of AG (n 39): §§130-132; European Commission (n 97): 4.

119 European Commission (n 97): 4.

5.4. Would the selective distribution system be an alternative for the Fast-Moving Consumer Goods' distribution?

At this point, it is already clear that manufacturers of luxury goods to control quality and brand image often use an SDS. This system allows suppliers to select distributors based on number and criteria defined by them, according to their specific needs. It is not uncommon for this kind of agreement to contain restrictions imposed by the supplier on the distributor on the basis of which the latter is only permitted to sell products to other authorised distributors or to the final consumer and obligations can also be set, for instance, the conditions under which the products are sold or specific training the distributor might have to perform.

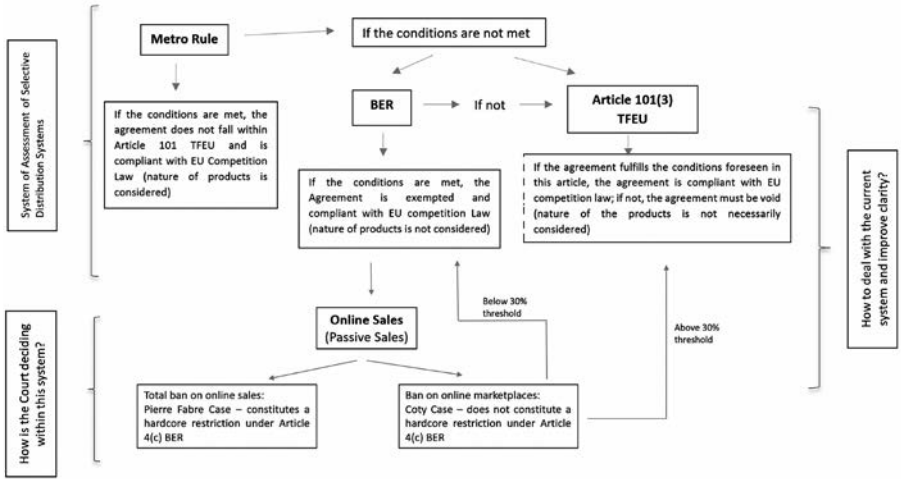
As it contains some restrictions, this distribution system needs to be carefully analysed before being implemented. A balance must be reached between the advantages and disadvantages of this system, since it may increase competition by adding value to the products concerned but it may also reduce competition by limiting the number of distributors in the market or by foreclosing the market to some suppliers or distributors or even to consumers who may have their possibilities of buying products reduced. The major advantages of this system are several, and start with the control the supplier may have over the products, defining how they should be sold, where, by whom and under which conditions. This allows suppliers to understand who their main consumers are, their preferences and demands, helps to implement better price strategies, increase effectiveness, and improve the quality of the product and the brand experience. Besides, this system improves business certainty as the supplier may define the most suitable criteria for selecting its distributors, define communication rules and provide training. On the other hand, the SD may also represent disadvantages such as a smaller capacity to enter into the market and to make the products known by consumers.

An SDS is often considered only for certain types of products, such as technological products, luxury products or cosmetics, which are, by their nature, more suitable to justify these restrictions under EU competition law because they require increased customer care, advice, and after-sale support. However, exactly what kind of business may or not implement selected distribution systems is not pre-defined, and that is why a standard of necessity must be taken into consideration.[120]

120 Wijkmans & Tuytschaever, 2012: 206-207.

6. CONCLUSION

In a nutshell, this essay encompasses the following:



In conclusion, this study has shown that a lot of ground has been made, but also a lot still needs to be done in the field of EU competition law regarding the digital markets, in particular, in what concerns the marketplace bans. It also shows that, the Commission should take into special consideration the importance of legal certainty in the market. It should be kept in mind that the legislation needs to be in constant evolution. Whereas the world and science are constantly evolving, the legislation also needs to adapt in order not to become obsolete.

As the revision of the BER is now taking place, this might be the best opportunity to improve the current legal framework of selective distribution agreements and bring EU competition law closer to the digital reality.

The CJEU's decisions have evolved throughout the years and given more clarity to the SDS's legal framework. The *Coty* decision is the litmus test for clarity and legal certainty for market players, but it is also the basis for further discussion. The legal framework as it stands at this moment contributes to legal uncertainty and leaves room for litigation. It is necessary to determine if the *Coty* decision applies only to "luxury products" or not. This is important in order to understand when an agreement is automatically considered to fall outside the scope of Article 101(1) TFEU, even when including a marketplace restriction. In case it only applies to "luxury products", the definition of this type of product is necessary to provide legal certainty to market

players. For this reason, the EC should, first of all, state in the BER or in the Guidelines that marketplace bans do not represent hardcore restrictions, irrespective of the characteristics of the products concerned, as they do not represent a *per se* ban on online sales.[121] In practical terms, this means that only undertakings with a market share above 30% of the relevant market will be affected by the distinction between "luxury or non-luxury products", since the BER will exempt the remaining agreements from the application of Article 101(1) TFEU.

Secondly, the Commission should make it clear whether the BER is intended to apply irrespective of the nature and characteristics of the product at stake.

Thirdly, the EC should also define "luxury products". The lack of this definition opens the door to different interpretations and litigation. At this point, not considering the marketplace ban as a hardcore restriction, an agreement involving luxury products that foresees such a restriction, will fall outside the scope of Article 101(1); and, an agreement involving non-luxury products – any kind of products – concluded by undertakings that have less than 30% market share, will fall within the scope of Article 101(1) but will be exempted by the BER and, if not exempted can still be justified by Article 101(3). But who knows what luxury products are? Where is the limit? What kind of products can be considered luxury? – a definition of luxury products would answer all these questions.

Lastly, and after all has been said, I am of the opinion that the EC should consider this subject on an economic-based perspective, focused on consumer welfare and on the potential efficiencies these restrictions might bring, helping to improve the legal framework of SDSs, representing a step forward in EU competition law. An example of these measures would be the establishment of clearly defined objective justifications for hardcore restrictions.[122] Also, the EC should discuss a potential solid and firm list of objective justifications for hardcore restrictions with the stakeholders that would add to or replace the vague list present in the Guidelines, and provide more legal certainty for market players.

In conclusion, the EU Competition legal framework is not well adapted to the e-commerce and digital world reality and should, therefore, undertake some amendments to keep up with the development in Digital Markets. The revision of the BER that is now taking place is the best opportunity for the

121 EC (n 97): 4.

122 Vogel, 2016: 455-457; and Vogel, 2013: 281-282.

EC to bring competition law, especially concerning distribution agreements, into the Digital Era and to address the new reality of e-commerce. All the steps stated above would create awareness for the development and growing relevance of e-commerce, especially regarding distribution agreements, and would bring EU competition law into the Digital Market.

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