



Marketplace bans saga: the *Coty* judgment

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Story of confusion

- **Confusion around the Pierre Fabre judgment:**

Para 46: “*the aim of maintaining a [prestige] 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*”.

- **Confusion around the Commission’s Guidelines:**

Para 54: “*For instance, where the distributor’s website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third-party platform*”.

- **Confusion about how e-commerce markets work:**

E-commerce sector inquiry, Wahl’s opinion in the Coty case and now also the Coty judgment

We will look at

1. How Wahl's opinion, instead of providing answers, added another layer of confusion
2. How the *Coty* judgment improved the situation only slightly



COTY



Wahl's opinion: Main points of disagreement

- Confusing notion of luxury (already negative impact on case law!)
- Limited understanding of e-commerce (this is a major issue!)
 - Distributors can use their online stores instead
 - Discernible v. non-discernible marketplaces
 - Marketplaces are not an important distribution channel
- Most importantly – we don't learn from the opinion how exactly marketplaces harm the luxury image of products

Aura of luxury v. brand image

- Para 92: “The conclusion applies to both so-called luxury products and so-called quality products. What matters is the need for the network head to preserve the prestige image”.
- **There must be a difference between preserving a brand image and preserving an “aura of luxury”?**

“Luxurious” Nike shoes



Post-Wahl: Dutch ruling

- Amsterdam District Court - 4 October 2017
 - Marketplace ban imposed by Nike on its distributors upheld
 - The Court examined Nike's distribution system under the Metro criteria
 - In particular "Nike's products must be considered luxury products and the policy aimed at maintaining the brand image"
- The Dutch Court relies extensively on Wahl's opinion

The *Coty* judgment: good news

- The Court puts a stop to the confusion around luxury products (at least to some extent)
- The judgment seems to apply exclusively to luxury products (para 32: goods considered in *Pierre Fabre* were not luxury goods but cosmetic and body hygiene goods)
- Still, the judgment does not define the notion of luxury :

Para 25: “*The quality of such goods is not just the result of their material characteristics, but also the allure and prestigious image which bestow on them an aura of luxury [...]. That aura is essential in that it enables consumers to distinguish them from similar goods*”.

The *Coty* judgment: bad news

- Limited understanding of e-commerce (this is a major issue!)
 - Distributors can use their online stores instead
 - Discernible v. non-discernible marketplaces
 - Marketplaces are not an important distribution channel
- We do learn from the judgment how exactly marketplaces harm the luxury image of products but these explanations are unconvincing

Understanding e-commerce



e-Commerce: the stuff of legend (1)

- Para 53: “Authorized distributors are permitted to sell the contract goods online both via their own websites”.
- Para 67: “The selective distribution contract at issue allows authorised distributors to **advertise via the internet** on third-party platforms and to use **online search engines** with the result that customers are usually able to find the online offer of authorised distributors by using such engines”.



Online store v. online marketplace



If all lawn mowers are banned tomorrow...



e-Commerce: the stuff of legend (2)

- Para 53: “Authorized distributors are permitted to sell the contract goods online via unauthorized third-party platforms when the use of such platforms is not discernible to the consumer”.



Third-party marketplaces with a visible logo...



And here it the non-discriminable version-
happy shopping everyone!



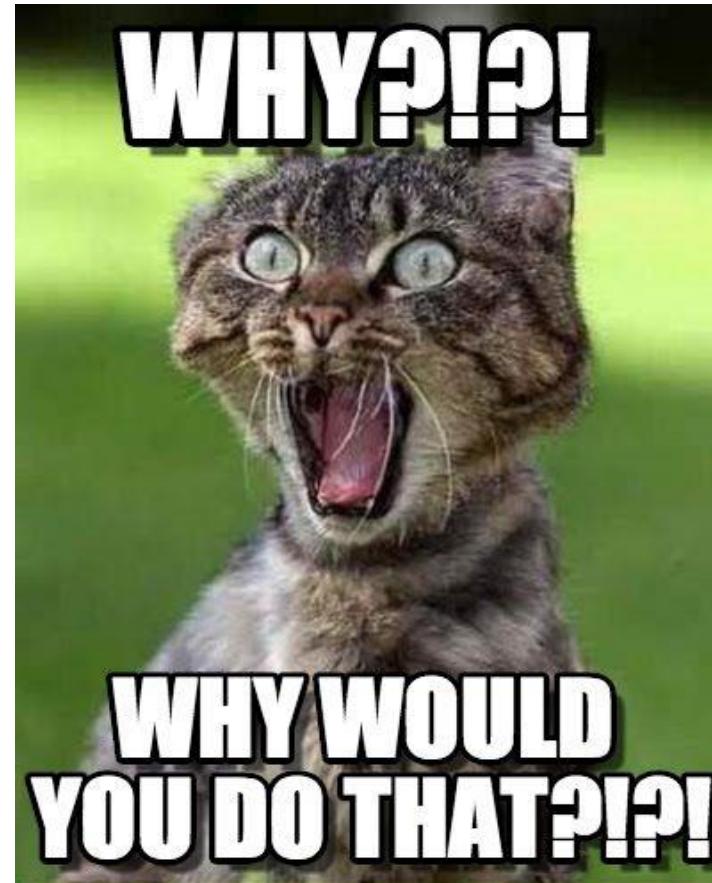
e-Commerce: the stuff of legend (3)

- Para 54: “As it is apparent from the provisional results of the Preliminary Report on the e-commerce sector inquiry [...], **despite the increasing importance of third-party platforms in the marketing of distributor's' goods**, the main distribution channel, in the context of online distribution, is nevertheless distributed by distributors' own online shops”.



Someone please tell Parfumerie Akzente!

- Why was Parfumerie Akzente even litigating this case?
- How can the distribution channel used by 62% distributors in Germany, [43% in the UK and 36% in Poland] not be significant?
- This is a referral from the German market!

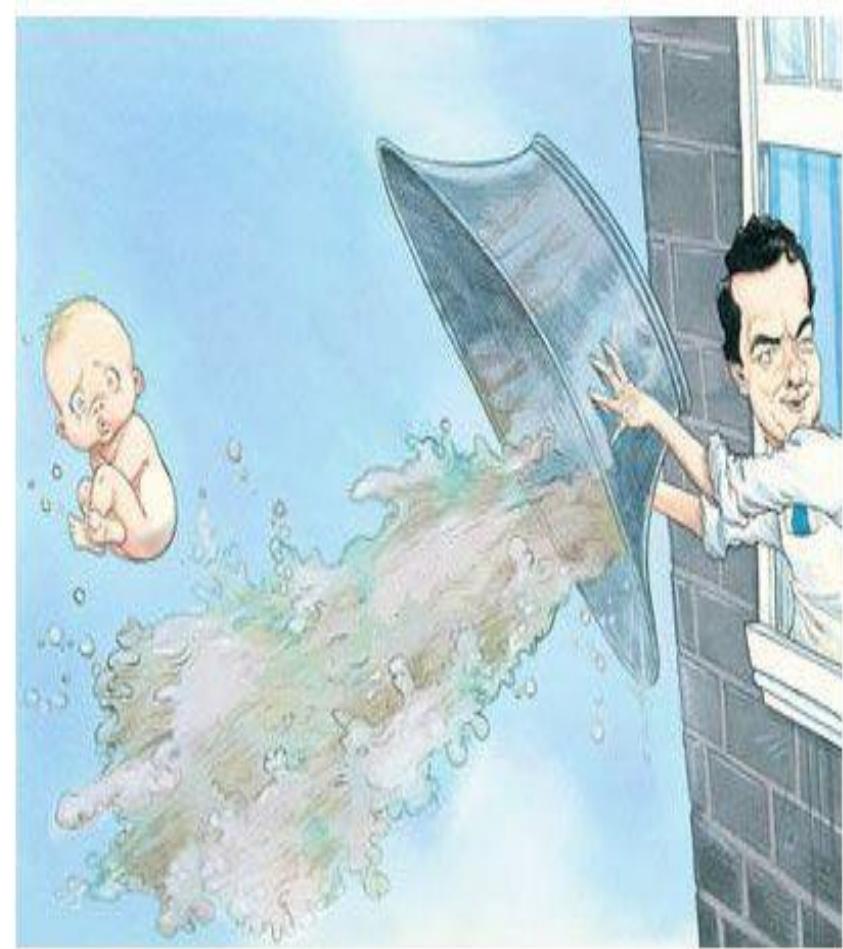


Harm to luxury products



The restriction is justified because..

- Para 44: “the prohibition on the use of third-party platforms in a discernible manner provide **the supplier with a guarantee**, from the outset, in the context of electronic commerce, **that those goods will be exclusively associated with the authorized distributors**”.
- Para 48: “The absence of a contractual relationship between the supplier and third-party platform is an obstacle which **prevents that supplier from being able to require**, from those third-party platforms, **compliance with the quality conditions**”.



Conclusions

- The Court managed to:
 - Draw a (somewhat) clearer line between luxury and branded products
- The Court failed to:
 - Address clearly and honestly absolute marketplace bans
 - Take into account the development of e-commerce



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