



# Marketplace bans saga: the *Coty* judgment

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# Story of confusion

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- **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

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



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**COTY**



# Wahl's opinion: Main points of disagreement

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- 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

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- 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

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# Post-Wahl: Dutch ruling

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- 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

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- 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

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- 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)

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- 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

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# If all lawn mowers are banned tomorrow...

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## e-Commerce: the stuff of legend (2)

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- 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...

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

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# e-Commerce: the stuff of legend (3)

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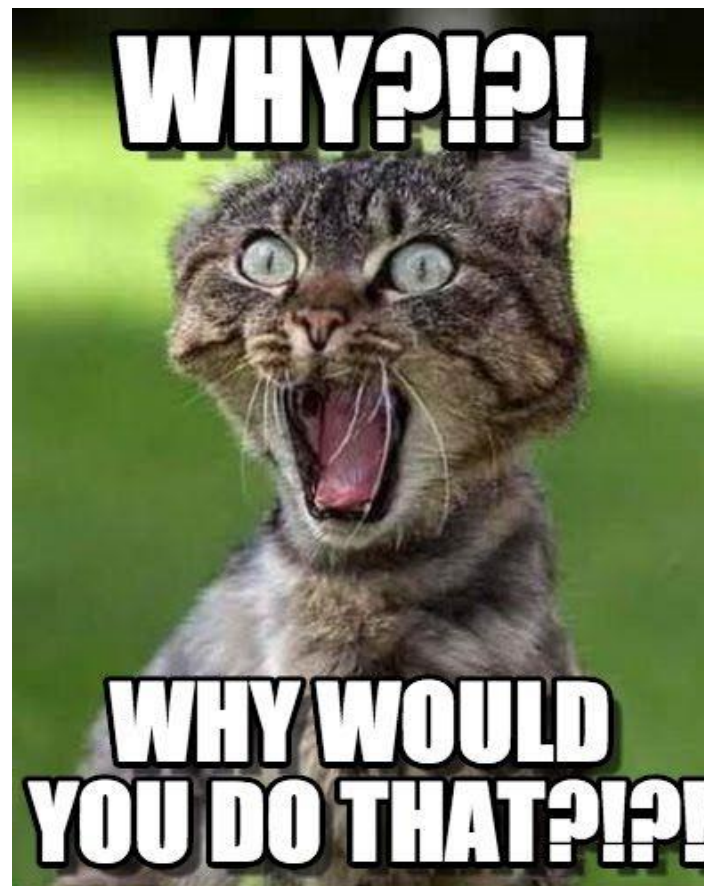
- Para 54: “As it is apparent from the provisional results of the Preliminary Report on the e-commerce sector inquiry [...], despite the increasing importance of third-party platforms in the marketing of distributor's' goods, the main distribution channel, in the context of online distribution, is nevertheless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



# Someone please tell Parfumerie Akzente!

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- 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!



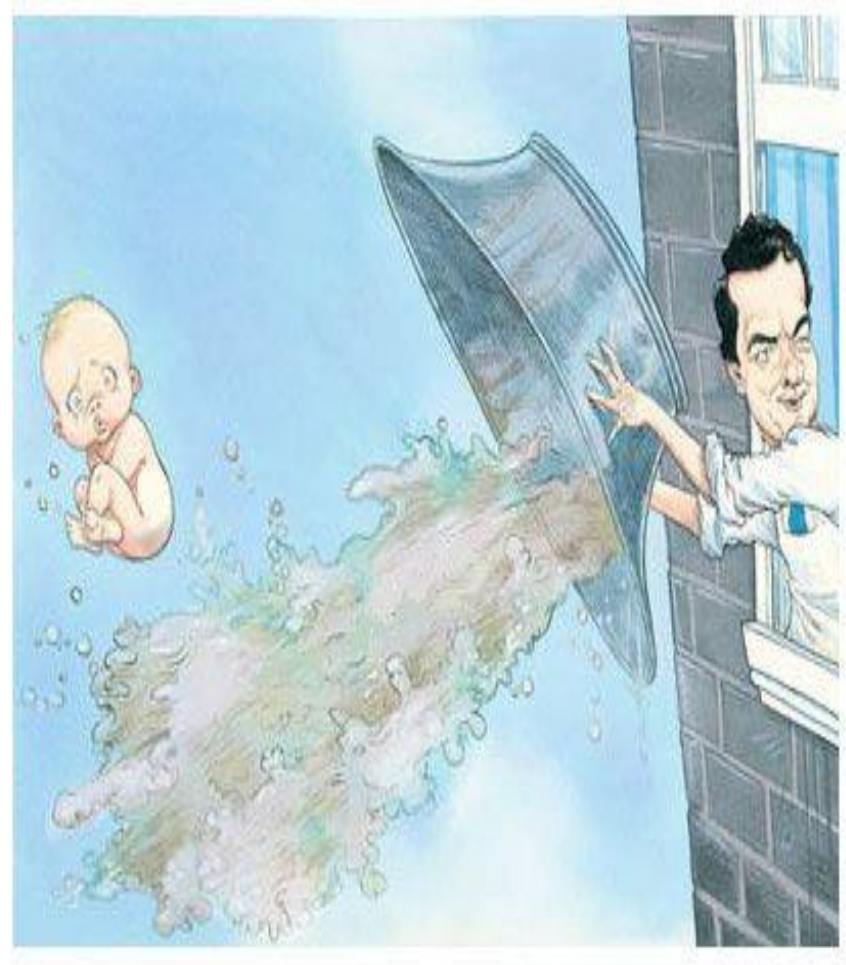


# Harm to luxury products



# 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

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- 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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