Online Marketplace Bans: Mapping the Landscape under the Light of the Commission's E-commerce Sector Inquiry

Vyron Anastasiadis*

The recent outburst of Internet selling has led several suppliers to amend their selective distribution agreements, thereby introducing new restrictions that have not yet been evaluated from a competition law perspective by the European Courts. These restrictions include online marketplace bans, a practice that could potentially deprive retailers of up to €26 billion of retail sales, which could be diverted elsewhere. This article analyses and evaluates the debate surrounding the legal treatment of online marketplace bans, in the light of the results of the European Commission's E-Commerce Sector Inquiry. It suggests that such bans should not be looked at as restrictions by object and/or hardcore restrictions. Furthermore, this article shows that Advocate General Wahl's opinion in Coty, where the appraisal of online marketplace bans is sought, is well-reasoned and consistent with previous European Courts' case law.

I. Introduction

On 6 May 2015, the European Commission (Commission) initiated the E-commerce sector inquiry (Inquiry) in order to investigate whether competition is restricted, in accordance with article 17 of Regulation 1/2003.[1] This initiative formed part of the Commission's aim to create a digital single market, the Digital Single Market Strategy, which has the potential to boost

* Vyron Anastasiadis holds an LL.B (UoA, Greece) and an LL.M in Commercial and Corporate Law (QMUL, UK). Before studying in the UK, he had worked as a trainee lawyer and as a legal intern in major law firms in Greece, with a focus on International Commercial Arbitration and PTPs.

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

the European economy by €415 billion per year.[2] Two years later, on 10 May 2017, the Commission published the Inquiry's final report (Final Report) and the staff working document accompanying the Final Report (Staff Working Document) which set out the Inquiry's findings regarding the E-commerce related to goods as well as to digital content.[3]

Insofar as the E-commerce of consumer goods is concerned, the Final Report presents the Commission's views regarding restrictions limiting the retailers' ability to sell via online marketplaces such as Amazon or Ebay (online marketplace bans or third-party platform bans) primarily found in selective distribution agreements. The question of the online marketplace bans' legal treatment under the European Union (EU) competition law rules has attracted notable attention over the last few years. It has not yet received a clear answer and is currently pending before the EU Courts. It has been estimated that a generalisation of this practice could heavily impact on the retailers selling on third-party platforms, as up to €26 billions of online retail sales could be diverted elsewhere.[4]

In this context, the present article will first outline the legal framework surrounding selective distribution systems and online marketplace bans. It will then examine the conformity of third-party platform bans with EU competition law and afterwards offer a brief overview of the online marketplaces' key characteristics. The assessment of the arguments articulated by the German Competition Authority as well as legal theory shall be conducted, followed by the presentation of the key legal aspects of Advocate General's (AG) Opinion in *Coty.*[5] Finally, the Inquiry and its

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[2] 'Digital Single Market' (*European Commission*, 2017) <https://ec.europa.eu/commission/priorities/digital-single-market_en - background> accessed 14 August 2017.

[3] European Commission, 'Report from the Commission to the Council and the European Parliament; Final Report on the Ecommerce Sector Inquiry' SWD (2017) 154 final. <http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf> accessed 14 August 2017; European Commission, 'Commission Staff Working Document accompanying the document: Report from the Commission to the Council and the European Parliament; Final Report on the E-Commerce Sector Inquiry' SWD (2017) 154 final <http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf> accessed 14 August 2017.

[4] Copenhagen Economics, 'Economic Effects of Online Marketplace Bans' (2016). <https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/0/380/1479805000/copenhagen-economics-2016-economic-effects-of-online-marketplace-bans.pdf> accessed 14 August 2017, 8.

[5] Case C-230/16, *Coty Germany* (case pending).

results' future impact will be contextually evaluated. This research shall denote that (i) online marketplaces offer a competitive environment whereby efficiencies for consumers, enterprises and competition as a process can be pinpointed, (ii) the current framework, if interpreted correctly, can sufficiently cope with online marketplace bans, (iii) online marketplace bans should not at present be regarded as restrictions by object or hardcore restrictions, (iv) AG Wahl's Opinion in *Coty* should be welcomed as a step in the right direction, and (v) despite the existing criticism, the Inquiry has been fruitful and has already been producing results on multiple fronts.

II. Online Marketplaces: Raison d'être

The analysis of online marketplace bans is intrinsically based on understanding the online marketplaces' nature and *modus operandi.* This chapter (1.) analyses the nature of online marketplaces, and (2.-4.) presents their efficiencies for consumers, micro, small, and medium enterprises and competition.

1. Nature of Online Marketplaces

The dawn of the 21st century has witnessed an outbreak of digital intermediaries, among which a general distinction should be drawn. Professors Strowel and Vergote highlight the difference between 'global platforms' (e.g. Amazon, Facebook and Airbnb) and 'local community exchanges' (e.g. Couchsurfing).[6] Platforms have constructed their business models aiming at profit maximisation, whereas community exchanges also utilise the online environment and smartphones' technological breakthrough to match supply and demand, albeit in a cooperative manner; they provide services free of charge. Therefore, platforms and exchanges differ in terms of (i) monetisation of the provided service; (ii) purpose and ability to raise funds;

[6] Alain Strowel. and Wouter Vergote, 'Digital Platforms: To Regulate or Not to Regulate? Message to Regulators: Fix the Economics First, Then Focus on the Right Regulation' (2016) <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/uclouvain_et_universit_saint_louis_14044.pdf> accessed 14 August 2017, 3.

and (iii) the investment required by the supplier, which in case of platforms is relatively significant.[7]

An online marketplace is a platform acting as an intermediary that connects different user groups (the different 'sides' of the market, as essentially online marketplaces are two-sided markets)[8] and enables them to engage in economic transactions.[9] Sellers may list their products on the marketplace and buyers can purchase the listed products;[10] essentially, online marketplaces operate as online sales hubs.[11]

If the marketplace merely provides the virtual *locus* where the transactions take place without acting as seller as well, then it is a pure intermediary.[12] In case it also acts as a retailer, thus directly competing with other retailers operating on the platform, the marketplace is of hybrid nature.[13] The Commission's Preliminary Report on the E-commerce Sector Inquiry (Preliminary Report) indicates that 25 out of the 37 marketplaces that responded to the questionnaire, i.e. 68%, operate as pure marketplaces.[14]

Furthermore, the platform may be accessible either to all retailers which fulfil certain basic requirements, such as the provision of a tax ID or of the articles of association (open marketplaces) or only to a limited number of retailers (closed marketplaces). The latter business model is usually preferred by hybrid marketplaces which accept on their platform retailers that offer complementary products to the ones offered by the marketplace or retailers that also supply the marketplace operator.[15] Finally, the marketplaces may

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[7] Ibid 3-4. The authors note that the criterion pertaining to the level of the investment required, does not adequately apply on online marketplaces due to the multitude of the products that are thereby offered.

[8] Thomas Hoppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' (2015) 38(3) World Competition 349, 349-350.

[9] For the purposes of this research, the terms "platform" and "marketplace" will be hereinafter used interchangeably unless otherwise indicated.

[10] European Commission, 'Preliminary Report on the E-commerce Sector Inquiry' SWD (2016) 312 final <http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf> accessed 14 August 2017, 36.

[11] Ariel Ezrachi, 'The Ripple Effects of Online Marketplace Bans' (2017) 40 World Competition 47 (also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868347>), 2.

[12] Preliminary Report (n 10) 36.

[13] Ibid. See also Ezrachi (n 11) 2.

[14] Preliminary Report (n 10) 37.

[15] Ibid.

present differences concerning the contractual arrangement with customers, the identity of the sellers (professional or individual sellers), the services offered by the interface, as well as remuneration models.[16]

The concept of online platforms is embedded with significant efficiencies and advantages which can also explain their appeal both to consumers and enterprises. Finally, online marketplaces offer an environment whereby intra-brand and inter-brand competition thrive.

2. Efficiencies for Consumers

When searching for a product listed on an online marketplace, the consumer can explore different offers from various suppliers, as well as the products' prices, technical characteristics and their delivery options.[17] Thus, the information the consumer needs is more easily accessible, limiting the search costs. The reduction of the search costs, which are a form of transaction costs, is recognised as a potential efficiency gain by the Commission as well.[18] The convenience offered is decisive in comparison with the offline retail channel, because when all the other parameters remain equal (e.g. price, quality, type of good sold and brand *ceteris paribus*), it creates a higher consumer surplus (i.e. the difference between the price the consumer is willing to pay and the price he/she actually pays) and consequently, higher social welfare.[19] The increased price transparency also sharpens price competition, which translates into lower prices as the consumers are better informed about the competing products and become sensitive to price increases. Due to better information, they will purchase more of a product only if they deem that the increase in price corresponds to an improvement in quality or service (marginal consumers).[20] Therefore, online marketplaces also contribute in

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[16] Ibid 37-38.
[17] Stefan Wartinger. and Lukas Solek, 'Restrictions of Third Party Platforms within Selective Distribution Systems' (2016) 39 World Competition 291, 294.
[18] Pablo Ibanez Colomo, 'Market Failures, Transaction Costs and Article 101(1) TFEU Case Law' (2012) 37 European Law Review 541, 545; Robert Cooter. and Thomas Ulen, Law & Economics (6th edn, Berkeley Law Books 2012), 87-88.
[19] Copenhagen Economics (n 4) 31.
[20] For the impact of vertical restrictions on marginal consumers see William S. Comanor, 'Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1984-1985) 98 Harvard Law Review 983, 992-999.

quality and services' improvements to justify price increases, hence incentivising innovation.

These arguments are confirmed by consumers as well. A Compass Lexecon survey among consumers of electronics demonstrates that in the end-users' eyes, online marketplaces offer products at more attractive prices than the retailers' websites as well as more choice than any other channel.[21]

3. Efficiencies for SMEs

Micro, Small and Medium Enterprises (SMEs) are entities engaged in economic activity, irrespective of their legal form, which employ less than 250 employees and whose annual turnover does not exceed €50 million and/or annual balance sheet does not exceed €43 million.[22] SMEs' importance for the EU economy cannot be overstated; they constitute 52% of EU retail turnover[23] and 99% of the businesses in the EU.[24]

A key challenge for SMEs is to compete on an equal footing with large retailers, especially in a multi-channel economy where each channel has its own idiosyncrasies. Considering that the online environment is highly competitive, online marketplaces are essential to SMEs' efforts to establish an active online presence due to the advantages they offer. Indicatively, while shopping online the consumers have at least twice as much choice compared to a situation whereby they shop offline in their own country.[25] Therefore, SMEs largely depend on online platforms to stand out and reach more buyers; on Ebay alone there are more than 165 million potential buyers.[26] Evidently, SMEs can benefit from online marketplaces in four core ways.[27]

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[21] Copenhagen Economics (n 4) 30.
[22] European Commission Recommendation [2003] OJ L 124/36, articles 1-2.1.
[23] Copenhagen Economics (n 4) 13.
[24] European Commission, 'What is an SME?' (2017) <http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_el> accessed 14 August 2017.
[25] European Commission (2017) 'E-Commerce Market Study' <http://ec.europa.eu/consumers/consumer_evidence/market_studies/e_commerce/index_en.htm> accessed 14 August 2017.
[26] Ebay, 'Ebay's Comments on the Preliminary Report of the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/ebay_en.pdf> accessed 14 August 2017, 5.
[27] See generally Copenhagen Economics (n 4) 12-22.

First, the retailer can access the platform at a portion of the IT costs it would need to set up its own website. This should be seen in conjunction with the investment in online promotion and advertising required while constructing the website, as well as with that these costs must be borne irrespective of the conversion rate, i.e. the percentage of the page's visitors that purchase products or services. Therefore, the risk is significantly lower when relying on the marketplace to make the relevant investments.[28]

Second, marketplace websites and applications generate more traffic than SMEs' individual website shops.[29] Thus, the retailers gain access to a large clientele through the platform and at the same time they are able to sell cross-border and to remote places by utilising the marketplace's network and delivery system. It is indicative that 73% of the SMEs cross-border turnover derives from online marketplaces.[30]

Third, the mobile shopping era has reshaped the way in which online shopping is conducted. It has been estimated that mobile commerce spending in Europe represented 20% of total e-commerce spending in 2015.[31] A growing number of consumers selects to shop via their mobile devices; 75% of Europeans have used their mobile device to make an online purchase.[32] To that end, various shopping applications have been developed, yet the most popular ones concentrate the various choices, thereby allowing consumers to easily find the product of their preference. Thus, consumers tend to select only a few applications from large providers, and online marketplace applications tend to be among the most popular shopping applications. Namely, Ebay and Amazon applications are currently the two most popular free shopping applications on Apple's App Store.[33] Given the above developments, SMEs are not otherwise able to have access to the mobile

[28] Ezrachi (n 11) 3.
[29] Staff Working Document (n 3) para 442.
[30] Copenhagen Economics (n 4) 15, 19.
[31] Ibid 20.
[32] Ecommerce Europe (2017) 'European Ecommerce Report (light)'<http://ecommercefoundation.org/download-free-reports > accessed 14 August 2017, 48.
[33] 'Shopping - App Store Downloads on Itunes' <https://itunes.apple.com/us/genre/ios-shopping/id6024?mt=8> accessed 14 August 2017.

consumers (e.g. by developing an application), but only via the use of online marketplaces.[34]

Finally, online marketplaces have developed technology to optimise the consumers' shopping process, such as shopping assistants or artificial intelligence in general, from which the SMEs can benefit.[35] Indicatively, Ebay's Shopping Bot is compatible with Facebook's Messenger application and utilises artificial intelligence to aid consumers by providing the optimal offers from Ebay's one billion listings.[36]

However, the need between platforms and SMEs is bidirectional. First, online platforms need the suppliers (hence, they need SMEs) due to direct network effects, i.e. the platform's services become more valuable the more users it has.[37] Intrinsically, the very success of an online marketplace depends on the trust built between the different sides of the market which the third-party platform tries to create by various mechanisms, such as the design of review systems.[38] It should also be taken into account that the buyer and the seller can anytime opt to make the transaction directly (e.g. on the latter's website), without the involvement of any third parties. Bearing that in mind, marketplaces are motivated to provide the best service possible to prevent such transactions from happening outside their platforms.

4. Efficiencies for Competition

Online platforms offer an environment whereby both competition between distributors of the same brand (intra-brand competition), and competition between suppliers of different brands (inter-brand competition) are fierce.[39] The former is stimulated by the market transparency which allows consumers as well as distributors themselves to compare prices. The various handlers of the brand do not therefore have an incentive to exaggerate their pricing because the consumers can turn to another distributor providing a lower price.

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[34] Copenhagen Economics (n 4) 20.
[35] Ibid 22.
[36] Ebay (n 26) 2.
[37] Alison Jones and Brenda Sufrin, *EU Competition Law* (6th edn, Oxford University Press 2016), 47.
[38] Michael Luca, 'Designing Online Marketplaces: Trust and Reputation Mechanisms' (2017) 17(1) Innovation Policy and the Economy 77.
[39] Wartinger and Solek (n 17) 300.

Furthermore, consumers normally use third party platforms to search for products and not for brands,[40] which in conjunction with the aggregated sharpening of intra-brand competition leads to lower prices across brands and therefore intense inter-brand competition as well.

Moreover, online marketplaces' nature (two-sided new economy markets) incentivises them to continually improve the level of their services. In the new economy markets, competition is rather on innovation than on price, while it may be not '*in* markets but *for* markets'.[41] Therefore, undertakings fear the presence of potential maverick competitors which may tip the market in the latter's favour. This is corroborated by Moore's law, which prescribes that:

> [T]he computing power of processors doubles approximately every two years. This means that if Google would fail to innovate, its search engine will easily be contested within a few years by an alternative search engine with an inferior algorithm, but running on hardware with double the computing power.[42]

This danger is more eminent in the digital markets,[43] due to their inherent competitive pressure as well as their particularity; therefore, online platforms have an additional incentive to improve the level of services offered both to consumers and retailers.

Nevertheless, the stakeholders' approach towards online marketplaces is multi-faceted, despite their aforementioned efficiencies. Namely, manufacturers who operate selective distribution systems increasingly impose restrictions on the distributors of their products to use online marketplaces as a sales channel.

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[40] Ibid 294.
[41] Jones and Sufrin (n 37) 48-49 (emphasis added).
[42] Olga Batura, Nicolai van Gorp and Pierre Larouche, 'Online Platforms and the EU Digital Single Market' (2015) <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_e-conomics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> accessed 14 August 2017, 6.
[43] Ibid.

III. Online Marketplace Bans within Selective Distribution Systems

The Vertical Block Exemption Regulation (VBER)[44] in article 1.1(e) defines selective distribution systems for the purposes of EU Competition Law; essentially, to be accepted in a selective distribution system, distributors need to fulfil certain criteria set by the supplier. It is generally accepted that this distribution model can create efficiencies (although limiting price competition), which are recognised by the Commission in its Guidelines on Vertical Restraints (Guidelines) (e.g. incentivise retailers to make investments to distribute new products to consumers).[45] However, the Commission also acknowledges that selective distribution bears certain competition risks as it can produce negative effects such as (i) anti-competitive foreclosure of actual or potential competitors; (ii) reduction of intra-brand competition; (iii) softening of inter-brand competition; and (iv) impediments to market integration.[46]

The use of selective distribution agreements is extensive in the E-commerce sector. The Staff Working Document indicates that more than half of the manufacturers in four product categories utilise selective distribution systems.[47] The manufacturers contend that their preference to this distribution method is attributed to their will to protect the high quality of their products, their brand image, the consumers' overall shopping experience (e.g. by protecting them from counterfeit products), to deter the "free-riding" effect, as well as to ensure the quality of pre- and post-sales services.[48]

The growth of E-commerce has sparked manufacturers' tendencies to incorporate new criteria in their selective distribution agreements. Indicatively, 67% of the manufacturers responding to the Inquiry declare to have incorporated new criteria in their agreements that largely concern online

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[44] Commission Regulation (EU) No. 330/2010 of 20 Apr. 2010 on the application of Art. 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L 102 1.
[45] European Commission, 'Guidelines on Vertical Restraints' (2010) OJ C130/10, para 107. See also Jones and Sufrin, (n 37), 762-763; See generally Paolo Buccirossi, 'Vertical Restraints on E-commerce and Selective Distribution' (2015) 11(3) Journal of Competition Law & Economics 747.
[46] Guidelines para 100.
[47] Staff Working Document (n 3) 73.
[48] Ibid 75-76.

retailers.[49] Among these criteria, the use of third-party platform bans has created a controversy regarding its conformity with EU Competition law rules. As it has been estimated that the spread of this practice could deprive online retailers of up to €26 billion in retail sales,[50] the assessment of online marketplace bans is exceedingly significant from a financial viewpoint. The following sections present the EU framework concerning selective distribution systems, along with the general characteristics of online marketplace bans put forward by the Inquiry's results.

1. Selective Distribution and EU Competition Law

From an EU competition law perspective, it has been settled that vertical restraints such as selective distribution systems can infringe article 101 of the Treaty on the Functioning of the EU (TFEU).[51] The term 'agreement' contained in article 101(1) TFEU has been interpreted broadly to encompass terms and conditions which are imposed from one party on another (expressly or tacitly acquiesced by the latter).[52] If, on the other hand, it is concluded that the practice at hand amounts to purely unilateral conduct by one of the parties, due to lack of concurrence of wills between them, the 101(1) TFEU prohibition is escaped.[53] This approach, although contentious, allows the simultaneous application of both articles 101 and 102 TFEU, if dominance is established.[54] In light of the above, restraints contained in selective distribution agreements can infringe article 101(1) TFEU insofar as there is concurrence of wills between the parties.

In case that a selective distribution agreement does infringe article 101(1) TFEU, it is important to ascertain whether it restricts competition by object or by effect. This distinction -warranted by the wording of article 101(1) TFEU- is of great significance, because EU competition law treats restrictions

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[49] Ibid 71.
[50] Copenhagen Economics (n 4) 8.
[51] C-56/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] EU:C:1966:41.
[52] Case C-32/78 *BMW Belgium SA and others v Commission of the European Communities* [1979] ECR 2435. See also generally Jones and Sufrin (n 37) 146-152.
[53] Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECR II-3383, *aff'd* Cases C-2 and 3/01 P, [2004] ECR I-23; Case T-208/01 *Volkswagen AG v Commission of the European Communities* [2003] ECR II-5141, *aff'd* Case C-74/04 P, [2006] ECR I-6585.
[54] Cases C-2 and 3/01 P (n 53) para 42.

by object in a stricter manner. An agreement is restrictive by object when it is considered to have such likely negative effects on competition (price, quantity, quality) that it is redundant to show actual or probable effects on the market.[55] Therefore, in the case of a restriction by object, the negative effects of the agreement as well as the unlikelihood of net positive effects are presumed. Furthermore, the agreement is assumed to appreciably restrict competition and, therefore, the market need not be defined for that purpose.[56] As anti-competitive effects do not have to be actually shown, the onus shifts to the undertakings which have to demonstrate that the four cumulative conditions of article 101(3) TFEU are fulfilled.[57] However, this has been proven to be a very difficult task in practice, as the Commission explains that severe restrictions will normally fail to fulfil at least the two first criteria of article 101(3) TFEU, i.e. the agreements will not create objective economic benefits and they will not benefit consumers.[58]

The Court of Justice of the European Union (CJEU) in its settled case law, beginning with the seminal judgement *Metro I,*[59] has clarified that selective distribution systems fall outside the scope of article 101(1) TFEU altogether if the following conditions are satisfied:

> i. the nature of the product necessitates a selective distribution system;
> ii. the members of the network are selected on the basis of objective qualitative criteria set out in a uniform way; and
> iii. the criteria must be proportionate with the product in question.[60]

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[55] Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission* [2014] ECLI:EU:C:2014:2204, para 51; Case C-286/13 P *Dole v European Commission* [2015] ECLI:EU:C:2015:184, para 117.
[56] Case C-226/11, *Expedia Inc. v Authorité de la concurrence* [2012] ECLI:EU:C:2012:795, para 37; See also Jones and Sufrin (n 37) 212-217, 237.
[57] Josefine Hederstrom and Luc Peeperkorn, 'Vertical Restraints in On-line Sales: Comments on Some Recent Developments 7(1) Journal of European Competition Law & Practice 10, 11.
[58] European Commission, 'Guidelines on the application of article 81(3) of the Treaty' (2004) OJ C101/97, para 46.
[59] Case 26/76, *Metro SB- Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.
[60] Ibid paras 20-21. See also Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA 'De Nieuwe AMCK'* [1980] ECR 3775.

Insofar as the nature of the product is concerned, the CJEU case law has established that normally selective distribution systems should be reserved for products which are either technologically complex[61] or luxury/branded (to protect their brand image).[62] Jones and Sufrin also suggest that in light of *Leclerc* it may be possible to establish that the nature of certain products not falling within those categories may also justify a selective distribution system (e.g. newspapers).[63] Moreover, the criteria are deemed qualitative when they filter the distributors which can handle the product 'on the basis of their objective suitability'.[64] Finally, *Metro I* clarified that although price competition in selective distribution systems is not the exclusive or principal factor, it is of such an importance that it must never be eliminated.[65] Therefore restrictions to that end will struggle to meet the proportionality requirement.

Furthermore, a selective distribution system which does not fulfil the *Metro* criteria can also escape the application of article 101(1) TFEU, if the agreement in question falls within the scope of the VBER.[66] Namely, the agreement must not fall within the scope of another block exemption regulation, satisfy the 30% market share thresholds and not contain hardcore restrictions, which are considered as restrictions by object.[67] In case the VBER is not applicable, the agreement may still meet the criteria of article 101(3) TFEU.[68]

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[61] Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities (Metro II),* [1986] ECR 3021.
[62] See Jones and Sufrin (n 37) 791 and Case T- 19/92, *Groupement d'achat Edouard Leclerc v Commission of the European Communities* [1996] ECR II-1851, para 116.
[63] Ibid 792.
[64] Ibid.
[65] *Metro I* (n 59) para 21.
[66] Guidelines (n 45) para 176.
[67] VBER (n 44) articles 2(5), 3 and 4; European Commission, 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)' (2014) OJ C291/01, para 13; See also *infra* 12.
[68] Ibid paras 174-188.

2. Selective Distribution and the Internet

Adding to the line of case law following *Metro I*, the *Pierre Fabre* judgment[69] is a point of reference in two ways: First, it reshapes the approach towards selective distribution systems, by suggesting that if an agreement does not meet the *Metro* criteria (which are used as a tool to establish whether a selective distribution system is objectively justified)[70], it is a restriction by object.[71] Second, it connects selective distribution with Internet sales. It was found that the protection of a prestigious brand image is not a legitimate aim to restrict competition and that the absolute restriction (*de facto* ban) on the online sales of non-medicine cosmetics products, constitutes a restriction by object.[72]

However, the judgment has been subject to criticism by legal commentators. Jones and Sufrin find the proposition that all selective distribution systems are restrictive by object, absent objective justification, to be 'surprising' and 'not strictly necessary for the ruling in question'.[73] Furthermore, Monti notes that the judgment mixes the *Metro I* criteria, namely the criteria pertaining to the nature of the product and proportionality:

> However, when the Court holds that the maintenance of a prestigious image is not a legitimate aim, this jars with the previous case law where prestige had appeared to be a factor justifying restrictions.[74]

Evidently, suggesting that maintaining a prestigious brand image is a justification not plausible in general, not just in the case at hand, can be problematic.[75] In this case, the statement about brand image in *Pierre Fabre* is difficult to reconcile with previous CJEU judgments on trademarks,

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[69] Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] EU:C:2011:277.
[70] Jones and Sufrin (n 37) 796.
[71] Ibid para 39.
[72] Ibid paras 46-47.
[73] Jones and Sufrin (n 37) 796.
[74] Giorgio Monti, 'Restraints on Selective Distribution Agreements' (2013) 36 World Competition 489.
[75] Jorren Knibbe, 'Selective distribution and the ECJ's judgment in Pierre Fabre', Case Comment, (2012) 33 European Competition Law Review 10, 450; Monti (n 74) 502.

whereby it is recognised that 'the quality of luxury goods […] is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury' with the result being that 'an impairment to that aura of luxury is likely to affect the actual quality of those goods'.[76] Furthermore, it contravenes General Court's judgment in *Leclerc* whereby it was found that the concept of the characteristics of luxury products also encompasses their 'aura of luxury'.[77] Finally, it clashes with Advocate General Mazak's approach, who acknowledges in his Opinion the protection of the brand image and the aura of the product as a plausible aim and directly cites *Copad* (from the trademark realm) to substantiate his arguments.[78]

On the other hand, it has been suggested that the goal to maintain a prestigious brand image does not justify an absolute ban on the online sales *in abstracto,* but in relation to the cosmetic products examined by *Pierre Fabre.*[79] This interpretation essentially amounts to a proportionality requirement between the adopted restriction and the nature of the product and is corroborated by the answer to the first part of the question posed by the referring court:

> […] 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* […] amounts to a restriction by object […] where, following an individual and specific examination of the content and objective *of that contractual clause* and the legal and economic context of which it forms a part, it is apparent that, having regard to *the properties of the products at issue*, that clause is not objectively justified.[80]

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[76] Case C-59/08, *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)* [2009] EU:C:2009:260.
[77] *Leclerc* (n 62) para 109.
[78] *Pierre Fabre* (n 69) Opinion of AG Mazak paras 44-45, 54.
[79] Cristiana De Faveri, 'The Assessment of Selective Distribution Systems Post- *Pierre Fabre*' Global Antitrust Review (2014).
[80] *Pierre Fabre* (n 69) para 47 (emphasis added).

Finally, the CJEU examined whether the agreement could fall within the scope of the VBER and concluded that even though the threshold requirements are met, the VBER cannot apply.

It was found that the *de facto* ban of internet sales has the object of at least restricting the passive sales to end users. The prohibition cannot be equated with a prohibition to operate on its place of establishment as per article 4(c) of Regulation 2790/1999 (the predecessor of the VBER),[81] because the latter prohibition applies only to physical stores.[82] This provision should not be interpreted broadly to apply to internet sales as well, since the applicability of the exception contained in article 4(b)(i) VBER can be asserted under article 101(3) TFEU.[83]

3. Online Marketplace Bans: Setting the Scene

In the light of the discussion above, the question which arises concerns the legal characterisation of online marketplace bans within selective distribution systems. However, the preliminary question pertaining to the delineation of such bans needs to be addressed first.

Professor Ezrachi illustrates the situation as a spectrum at the two ends of which lie the absolute restriction on Internet Sales dealt with by *Pierre Fabre* and qualitative criteria, respectively.[84] *Pierre Fabre* established that a *de facto* ban on Internet sales is a restriction by object and a hardcore restriction under article 4(c) of Regulation 2790/1999. On the other hand, the European Commission in the Guidelines' paragraph 54 indicates that the supplier can require quality standards for the use of the Internet. More specifically with regard to online marketplaces:

> [A] supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the

[81] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336 21.
[82] Ibid paras 54-56.
[83] Ibid para 57.
[84] Ezrachi (n 11) 6.

> distributors' use of the internet. 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.[85]

The interpretation of paragraph 54 has been contentious, raising the question of whether the paragraph's second sentence (Logo Clause) can be used to justify online marketplace bans in general.[86]

Third-party marketplace bans constitute a territory between the absolute ban on Internet sales and qualitative criteria, which has not been chartered by the case law of EU Courts. The Commission in the Staff Working Document presents its findings pertaining to the bans' categorisation. First, it is acknowledged that the bans' range may vary. On the one hand, the marketplace ban can be absolute, when it prohibits the retailer from using any online third-party platform. On the other hand, the ban can only restrict access to marketplaces which do not fulfil certain quality criteria.[87] Furthermore, the bans can take the form of direct prohibitions not to use third party platforms to sell the contract goods,[88] or they can be indirect or *de facto* when they take the form of qualitative criteria requiring the marketplaces to comply with conditions which cannot be met by any marketplace.[89] *De facto* bans can have the same effects on retailers as absolute bans and can include the requirements that:

> i. the website is operated by the retailer;
> ii. the website appears under the domain name containing the name of the retailer's business; and
> iii. the prohibition to sell on marketplaces whose logo is visible.[90]

Considering that bans to use third-party platforms are primarily found in selective distribution agreements,[91] it is relevant to appraise whether they

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[85] Guidelines (n 45) para 54.
[86] See *infra* 26-27.
[87] Staff Working Document (n 3) para 465.
[88] Ibid 79-80.
[89] Ibid para 467.
[90] Ibid.
[91] Ibid para 470.

infringe article 101(1) TFEU. If yes, is there a restriction by object? Can such bans be block exempted under VBER or are they hardcore restrictions under article 4 VBER?

IV. Legal Assessment

The lack of EU Courts' precedent on the matter in juxtaposition with the lack of elaborate guidance by the Commission in its Guidelines have led to contrasting interpretations regarding the conformity of online marketplace bans with EU competition law. The Commission has recently presented its views on the bans' appraisal in the Final Report, thus reigniting the debate. In any case, the CJEU will have the chance to resolve this controversy by deciding on *Coty*,[92] a preliminary reference by the German Courts.

Considering the above, this section analyses the contrasting opinions articulated by the German Competition Authority, [i.e. the Federal Cartel Office (FCO)], the Commission, as well as legal theory, before concluding with the recent Opinion of AG Wahl in *Coty*.

While engaging with the various responses to the question of whether online marketplace bans should be looked at under the 'object' heading of article 101(1) TFEU, one should bear in mind that restrictions by object and hardcore restrictions, although equated by the Commission, are distinct legal concepts.

Even though the Commission may categorise a certain restriction as hardcore, this does not *ipso facto* mean that the hardcore restriction is a restriction by object as well. AG Mazak notes that the 'hardcore restriction' concept is relevant within the context of the VBER, because it results in the agreement's exclusion from the latter's protective scope. The finding of a hardcore restriction in an agreement can give rise to potential discrepancies with article 101(1) TFEU, which would have to be individually assessed. However, there is no legal presumption that the agreement is a restriction by object under article 101(1) TFEU, just because it is a hardcore restriction.[93]

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[92] *Coty* (n 5).
[93] *Pierre Fabre* (n 69) Opinion of AG Mazak paras 28-29.

1. Views within the European Competition Network

1.1 The *Adidas* Case

On 27 June 2014, the FCO issued a decision concluding the proceedings against Adidas, which agreed to amend its sales conditions infringing competition law, and specifically the ban on the use of online marketplaces.[94] The restrictions incorporated in the selective distribution systems included both direct bans of open online marketplaces as well as the requirement that the retailers' websites shall not be reached through a third-party platform if the logo of the platform is visible.

The FCO reached the conclusion that an absolute ban on sales via online marketplaces did not fulfil the *Metro* criteria as 'specific distribution channels are excluded per se without any consideration of qualitative criteria'.[95] Furthermore, the restriction was not proportionate, as sports articles did not necessitate the ban of all open marketplaces across the board and there were more lenient alternatives which could achieve the desired result, i.e. specific qualitative criteria that marketplaces should meet.

Moreover, it was decided that absolute bans on online marketplaces significantly restrict competition (both intra-brand and inter-brand competition due to market concentration), because retailers cannot reach that many customers. The analysis focused on the SMEs' dependence on online marketplaces, which cannot afford costly advertising expenses. It was also pointed out that SMEs' websites do not receive as a prominent placement in the search engine results as Adidas' online shop; instead, marketplaces' websites can receive an equally strong position in the search results. Due to their safe payment methods and the fact that they are essentially 'one-stop shops', online marketplaces appeal to their regular customers, as they have created a relationship based on trust, which cannot be transferred 'to an unfamiliar online shop of a sports specialist'.[96]

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[94] FCO, *Adidas* (case summary), 19 August 2014, B3-137/12 < http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2> accessed 14 August 2017.
[95] Ibid 3.
[96] Ibid 4.

The FCO investigated whether such an absolute ban restricting competition can be offset by efficiency gains, by conducting an article 101(3) TFEU analysis. The decision recognises that selective distribution in general can lead to efficiencies, such as better coordination between undertakings along the supply chain, the solution of the free-riding problem and the adherence of the system's retailers to minimum quality standards.[97] However, the first three requirements of article 101(3) TFEU were not met as the restriction in question did not produce adequate efficiencies and was not indispensable, while the consumers also did not receive a fair share of the benefit.

Even though retailers were shielded against intense price competition, this did not benefit the final consumers. Moreover, the ban did not solve the free-rider problem, the magnitude of which differs with respect to search and time costs for the consumers, which are significantly lower when selling on online marketplaces.[98] Furthermore, consumer surveys showed that free-riding between online and offline sales is bidirectional.[99] The FCO accepted that the protection of the brand image can be 'in the justified interest of the manufacturer and […] of the final consumer',[100] although it concluded that it cannot be used as a general argument to further restrict competition.

In addition, the consumers did not receive a fair share of the benefit, as the argument that the absolute bans aim at maintaining a shopping experience for the consumers which is compatible with the brand image and advisory services was dismissed. Conversely, it was seen that the need for advisory services varies between different products as well as between consumers of the same product. Finally, the ban was not indispensable, because Adidas could have achieved the positive effects it intended to, by setting quality requirements that the marketplaces had to meet, which is a less restrictive measure.

The FCO concluded by stating that the VBER did not apply as it essentially qualified online marketplace bans as hardcore restrictions pursuant article 4(c) VBER, which breach the principle of equivalence (they are a criterion

[97] Ibid 5.
[98] See *supra* 4-5.
[99] *Adidas* (n 94) 6.
[100] Ibid.

which is not overall equivalent to the criteria imposed for brick and mortar sales)[101] and do not contribute to improvements in the quality of distribution.

1.2 The *Asics* Case

On 26 August 2015, the FCO issued its decision sanctioning Asics for infringing article 101(1) TFEU along with domestic competition law.[102] Among the restraints contained in Asics' selective distribution system (all of which were considered as restrictions by object) was the ban on the use of online third party marketplaces for the purposes of advertising or selling Asics products.

The relevant market was defined as the market for the sale and manufacture of running shoes in Germany, in which Asics held a 25-30% market share during 2011 and 2012. Adidas, Nike and Asics held jointly more than a 75% market share during that time.[103] As the selective distribution system contained both qualitative and quantitative criteria which, in the FCO's view, were not proportionate, the *Metro* criteria were not fulfilled.

The FCO's approach to online marketplace bans in *Asics* is more acute than in *Adidas*. In *Asics,* it held the view that such restrictions should clearly be considered as restrictions by object and hardcore restrictions, whereas in *Adidas* the approach was milder and more cautious. Namely, in *Adidas* the FCO stipulated that the bans significantly restrict competition without explicitly mentioning whether the restriction is by object or effect.[104] It can be inferred that online marketplace bans are considered as a hardcore restriction (this term is not used in *Adidas*) by the statement that the VBER should not apply as absolute online marketplace bans 'target internet distribution per se and which as serious restraints of competition do not fall under the block exemption regulation of the vertical BER from the outset'.[105]

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[101] Guidelines (n 45) para 56, stipulating that restrictions breaching the principle of equivalence are hardcore restrictions.

[102] FCO, *Asics* (case summary), 26 August 2015, B2-98/11 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2> accessed 14 August 2017.

[103] Ibid 4.

[104] See *Adidas* (n 94) 3 and *Asics* (n 102) 10.

[105] *Adidas* (n 94) 8.

In *Asics,* it is recognised that the German case law is not settled regarding the characterisation of absolute marketplace prohibitions under competition law, as there are both decisions which find this restriction plausible and decisions which consider it as a hardcore restriction under article 4(b) and/or 4(c) VBER.[106]

The FCO supported that such a restriction fell within the scope of article 4(c) VBER, because it significantly restricted the authorised retailers', especially SMEs', possibility to make online sales to end customers. The restriction could not be justified by considerations regarding the principle of equivalence, as there is no comparable service for online marketplaces in brick and mortar trading.[107] Furthermore, it was decided that absolute bans on online marketplaces was disproportionate compared to the potential harm to the presentation of the product. Qualitative, less harmful criteria could have achieved the same result. In addition, the absolute ban was not necessary to protect the brand image, because 'the intensified price competition does not necessarily damage brand reputation'.[108]

With regard to brand image, the FCO added that the existence of other requirements, pertaining to advisory services and presentation, enabled the manufacturer to protect itself from potential violations of the distribution agreements which damage the brand image. Finally, the restriction could not tackle the free-riding problem, as the FCO could not see how the absolute ban on marketplaces rewards pre- and post- sales services offered by brick-and-mortar shops. It concluded by stating again that the per se ban was disproportionate and the free-riding problem could have been dealt with by a more lenient measure such as the requirement that retailers establish a brick-and-mortar shop in addition to their online store.

Asics appealed to the decision before the Higher Regional Court Dusseldorf, which on 5 April 2017 affirmed the -FCO's decision only insofar as price

[106] *Asics* (n 102) 10, footnote 8. For the treatment of online marketplace bans by the French Courts as restrictions by object, see Paris, pôle 1, ch. 3, 2 février 2016, n°15/01542, SAS eNova Santé / SAS Caudalie, AJCA, avril 2016, 210, obs. Ponsard, RLDC, mai 2016, 10.
[107] Ibid 11.
[108] Ibid.

comparison engines are concerned. The Court left open the question regarding online marketplace bans.[109]

1.3 The Commission's Approach

In contrast to these views, the Commission, both in its Preliminary Report as well as in the Final Report, suggests that the absolute bans on the use of online marketplaces are not hardcore restrictions.

The Commission does not conduct both a VBER and an article 101(1) TFEU analysis. Rather, it addresses the issue only from the hardcore restrictions perspective within the meaning of articles 4(b) and 4(c) VBER.[110] It recognises that there is currently a debate regarding the legal characterisation of such per se bans as a restriction of passive sales and acknowledges that the CJEU will have the chance to appraise this question in *Coty*.[111]

Since the adoption of the Guidelines (paragraph 54), the Commission did not consider absolute online marketplace bans as hardcore restrictions.[112] Furthermore, it suggests that *Pierre Fabre* could only directly apply to online marketplace bans if they amount to a *de facto* prohibition on the use of the Internet. However, the two restrictions should not be equated, given that insofar as online marketplace bans are concerned, the retailers can still use the online environment.[113]

The findings of the Inquiry indicate that in order to conclude whether the use of marketplace bans restricts effectively the use of the Internet, it is vital to look at the affected market, because the bans' impact is not the same on all markets.[114] In addition, the Commission contends that the nature of the product is also relevant, especially to appraise the merit of the efficiencies

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[109] FCO, 'Düsseldorf Higher Regional Court confirms Bundeskartellamt's decision on prohibition of use of price comparison engines', 6 April 2017, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/06_04_2017_Asics.pdf?__blob=publicationFile&v=3> accessed 14 August 2017.
[110] See generally Preliminary Report (n 10) paras 465-474; Staff Working Document (n 3) paras 499-514.
[111] Staff Working Document (n 3) para 499.
[112] Ibid para 501.
[113] Ibid paras 502-503.
[114] See *infra* 24-25.

that manufacturers claim, in particular with respect to brand image and free-riding.

In light of the above considerations, this view holds that online marketplace bans are not hardcore restrictions within the meaning of article 4(b) and/or article 4(c) VBER, as it is not their object to restrict neither the territory or the customers to whom 'a buyer party of the agreement […] may sell the contract goods or services'[115] nor active or passive selling to end users. Essentially, articles 4(b) and 4(c) VBER sanction – as hardcore restrictions - clauses which have the object to restrict *where* or *to whom* distributors can sell. Therefore, the query is whether online marketplace bans fall within this category. The Commission, both in the Guidelines as well as in the Preliminary Report and the Final Report, interprets the bans as restrictions that do not restrict *where* or *to whom* a distributor may sell. Instead, they determine *how* the manufacturers' products ought to be distributed; hence they can be block exempted by VBER.[116]

Although the Commission does not consider online marketplace bans as a hardcore restriction in itself, it will investigate agreements incorporating such restrictions that are not covered by the VBER. This would be the case either due to excess of the 30% market share thresholds provided for in article 3 VBER or due to the existence of other hardcore restraints in the agreements pursuant to article 4 VBER. Furthermore, the possibility to withdraw the application of the VBER according to article 29 of Regulation 1/2003 is also acknowledged.[117] While scrutinising online marketplace bans, the following factors are particularly relevant:

i. the importance of marketplaces for the specific product and geographic market;
ii. the nature of the restriction (absolute ban or qualitative criterion); and
iii. the merit of arguments pertaining to the brand image and to the maintenance of high level pre- and post-sales services.[118]

The divergent approaches among Competition Authorities have found support in legal theory as well. The debate does not only concern whether

[115] VBER (n 44) art. 4(b).
[116] Hedelstrom and Peeperkorn (n 57) 12; Preliminary Report (n 10) 472; Final Report (n 3) 509.
[117] VBER (n 44) recital 15.
[118] Final Report (n 3) para 513.

online marketplace bans should be treated as a restriction by object and a hardcore restriction; it also extends to the question whether the current European competition law framework can effectively analyse online vertical restraints.

2. Favouring the object analysis

The Commission's approach has not been unquestioned. It has been suggested that the current legal framework provides convincing arguments in favour of an approach similar to *Pierre Fabre*.

It has been articulated that the *Metro* criteria, in conjunction with the CJEU finding that maintaining a prestigious brand image is not a legitimate aim to restrict competition, should bring online marketplace bans within the scope of article 101(1) TFEU.[119] It is argued that absolute marketplace bans are not qualitative criteria, but even if they were, they would be disproportionate to the nature of the product, discriminatory and would lack a legitimate aim.[120] By also examining the economic context of the agreement (its characteristics along with the market dynamics) one could advocate for a *Pierre Fabre* analysis. The aggravation of successful entry for SMEs, the intensification of information asymmetry, the inability to cope with the outburst of mobile e-commerce without online marketplaces in juxtaposition with the dampening of intra-brand and inter-brand competition and the shielding of manufacturers against fierce price competition, are all indicators that an object analysis may be required.[121]

Furthermore, it is supported that third-party platform bans should be considered as hardcore restrictions. First, they infringe the principle of equivalence between the criteria imposed on online and brick-and-mortar sales. Hence, paragraph 56 of the Guidelines classifies them as hardcore restrictions. Moreover, it has been maintained that online marketplaces' customers form a distinct customer group for the purposes of article 4(c) VBER, although this is not a necessary requirement for its application.[122] Influenced by *Adidas*,[123] this view points out that the services offered by

[119] Ezrachi (n 11) 10.
[120] Wartinger and Solek (n 17) 300-302.
[121] Ezrachi (n 11) 12-14; Wartinger and Solek (n 17) 300.
[122] Wartinger and Solek (n 17) 299.
[123] See *supra* 12.

online marketplaces cannot be substituted by the retailers' online shops or by search engines, due to marketplaces' characteristics, i.e. '(i) the immediate price and conditions comparison of products from different suppliers and products offered by different distributors, resulting in a ranking, (ii) broader choice, (iii) quick and safe delivery, and (iv) the overall effect of a one-stop shop'.[124] This interpretation essentially proposes that online marketplace bans restrict the customers *to whom* the distributors can sell and thus infringe article 4(c) VBER. At the same time, the Guidelines' paragraph 54 should not be read as allowing for absolute marketplace bans. On the contrary, its purpose is to avoid confusion between the brands of the supplier and those of the third-party platform which, however, is not likely to occur due to the platforms' popularity.[125]

In addition, it has been questioned whether such bans fulfil the four cumulative conditions of article 101(3) TFEU with sufficient certainty, especially due to lack of efficiency gains and indispensability.[126] By the same token, the VBER - which is essentially a cumulative application of article 101(3) TFEU - should not apply considering its fifth recital.[127]

3. Online Marketplace Bans Meriting Block Exemption

Against these positions, there has been argumentation that even if online marketplace bans do not fulfil the *Metro* criteria, they should not be considered as a hardcore restriction.

According to this view, the CJEU should re-assess its finding in *Pierre Fabre* that maintaining a prestigious brand image is not a legitimate aim for restricting competition. This is because the commercial value of a luxury good comprises both the value of its materials and a psychological value for the consumers, generated by the brand image of the product. The psychological aspect of a product's value has been confirmed not only by the CJEU, but from various other disciplines as well (e.g. economics, psychology and marketing).[128] Therefore, if the brand image is damaged, the good's value

[124] Wartinger and Solek (n 17) 299.
[125] Ibid 303.
[126] Ibid 302-303; Ezrachi (n 11) 11-12.
[127] Ezrachi (n 11) 10-11.
[128] Anne Witt, 'Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods' (2016) 12(2) European Competition Law Journal 435 (also

diminishes; hence, protecting the brand image should be considered as a legitimate aim shielded by the selective distribution system. However, an absolute ban on online marketplaces would probably fail the *Metro* test on proportionality grounds, as there is the less severe alternative of 'approving the third-party platform on the basis of the same objective, qualitative and proportionate criteria it requires from the distributor's online shop'.[129] Moreover, the analogous application of the CJEU case law on franchising agreements in conjunction with the *Metro* criteria could further legitimise the protection of the brand image for products which are not considered as luxury.[130] In *Pronuptia,* the CJEU considered that 'measures necessary for maintaining the identity and reputation of the network bearing [the franchisor's] business name or symbol' fall outside the scope of article 101(1) TFEU.[131]

However, absolute online marketplace bans should benefit from the VBER. They are not a hardcore restriction under article 4(b) VBER, as this provision aims at preventing the blending of exclusive distribution with selective distribution that compartmentalises the market by territory or customer group.[132] In line with the Commission's approach, this take suggests that online marketplace bans restrict only *how* the distributors can sell and do not shield other distributors of the network.

Furthermore, the requirements of article 4(c) VBER are not met either. In particular, it is questioned whether such bans restrict passive sales. Although the Commission indicates in the Guidelines what it perceives as passive selling and as restrictions thereof in the online environment,[133] it has been criticised for penalising restrictions without solid economic justification, moving towards a formalistic approach. The presumption of anti-competitive effects related to restraints categorised as a restriction of passive sales necessitates a clear definition within the context of the VBER.[134] Moreover, it is argued that the classic concept of passive sales restrictions, i.e.

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available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921050>) p 16; See also *supra* 9-10.

[129] Witt (n 128) 17.

[130] Ibid 17-18.

[131] Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, para 17.

[132] Guidelines (n 45) para 50; Witt (n 128) 18.

[133] E.g. Guidelines (n 45) para 52.

[134] Buccirossi (n 45) 763-764.

restrictions on the freedom to respond to unsolicited sales requests by customers, was interpreted very broadly in *Pierre Fabre*. Essentially, it was equated to a restriction whereby the retailer cannot sell the products online and, therefore, reach more potential customers. Thus, the concept was broadened to encompass not only direct prohibitions to respond to unsolicited requests but also prohibitions lowering the sales' likelihood due to channel elimination.[135] Accepting that online marketplace bans, which are a means of online marketing, constitute restrictions of passive sales would further broaden the concept. Concomitantly, one should bear in mind that hardcore restrictions are perceived by the Commission as restrictions by object; hence, they should be interpreted restrictively.[136]

Finally, even if per se marketplace bans are deemed as hardcore restrictions, it would be worth considering whether they amount to a prohibition from operating out of an unauthorised place of establishment, which is permitted under article 4(c) VBER. Although the CJEU established in *Pierre Fabre* that the above exception should apply only to physical outlets, it is suggested that in case of online marketplaces this finding should be revisited. There is no need to distinguish between virtual and physical sales places, between which comparable parallels can be found. [137]

4. Critical Analysis

This section analyses the aforementioned views, considering whether (i) online marketplace bans fall within the ambit of article 101(1) TFEU, and (ii) they can be block exempted under the VBER.

4.1 101(1) TFEU: The *Metro* Criteria

There seems to be a consensus among the contrasting legal theory views that (absolute) online marketplace bans would fail the *Metro* test, at least on proportionality grounds. As a result, this would mean that competition is restricted within the meaning of article 101(1) TFEU. Nevertheless, there is no convergence regarding to whether this is a restriction by object or by effect. Although it has been explicitly supported that absolute online

[135] Witt (n 128) 18-19.
[136] *Cartes Bancaires* (n 55) para 58.
[137] Witt (n 128) 20.

marketplace bans could amount to a restriction by object, this is not the case concerning the effects analysis. The Commission implies that online marketplace bans may be considered as a restriction by effect, by not regarding them as hardcore restriction.[138]

Insofar as the *Metro* criteria are concerned, it has been maintained that absolute online marketplace bans (apart from being disproportionate) are not qualitative, do not pursue a legitimate aim, and are discriminatory.[139] This kind of bans seems not to set quality criteria that marketplaces should meet; it rather bans sales on all, or types of, marketplaces across the board. However, in that case, it is difficult to perceive why such bans are discriminatory if all retailers are prohibited from using the marketplace and the supplier itself does not sell on the marketplace. The scenario would seem more problematic on discrimination grounds if the manufacturer or some retailers can use third-party platforms while others are prohibited from selling thereon, i.e. when the restriction is not laid down uniformly for all the members of the network. The Commission refers to the latter case in the Staff Working Document, stating that justifications pertaining to pre- and post-sales services as well as brand image will be more difficult to succeed.[140]

Furthermore, it is submitted that it is not safe to rely on *Pierre Fabre* to conclude that protecting the brand image is not a legitimate aim to restrict competition. Considering the criticism the judgment has received as well as this passage's possible interpretations,[141] the following should be noted: A literal interpretation of the finding would contrast with previous case law of the CJEU regarding selective distribution. It would also contrast with the fact that certain products require a particular way of handling, which is one of the very purposes of setting up a selective distribution system. On the other hand, if the alternative interpretation is accepted, the result would be that this finding amounts to a proportionality requirement between the nature of the product and the imposed restriction for the products at hand in *Pierre Fabre*. Hence, in that case this holding should not be generalised irrespective of the nature of the product. Moreover, the psychological aspect of a product's value which is directly related to the brand image has been shown by various

[138] Ezrachi (n 11) 16.
[139] See n 120.
[140] Staff Working Document (n 3) para 514.
[141] See *supra* 9-10.

disciplines.[142] Therefore, a blow to the brand image could equal a decrease of the product's overall value, thus rendering the protection of the brand image a plausible goal.

Both the position considering absolute online marketplace bans as a hardcore restriction and the one suggesting that such bans should be block exempted, accept that per se third-party platform bans are disproportionate.[143] From the outset, it should be stated that this is a pragmatic approach, recognising that qualitative requirements are a less pervasive way of achieving the desired result. Furthermore, it takes note of the marketplaces' evolution to address quality concerns.[144] While ultimately this assertion may be correct, it should be borne in mind that the *Metro* criteria, hence the proportionality test contained therein, are designed for a case-by-case analysis which depends on the characteristics of the product in question and which should not be pre-empted. Moreover, it is an approach which should be treated with caution, because accepting *a priori* the disproportionality of the restriction would mean that the restriction would normally fail the article 101(3) TFEU test on indispensability grounds, which would in turn raise doubts as to the application of the VBER.[145]

4.2 Object or Effect?

Accepting that the *Metro* criteria are not met brings absolute online marketplace bans within the scope of article 101(1) TFEU. It is crucial to ascertain whether these bans are a restriction by object in light of the consequences that this characterisation bears.[146]

First, *Pierre Fabre* seems to establish that a selective distribution system not meeting the *Metro* criteria (absent other objective justification) is a restriction by object.[147] If this statement is adhered to in the next CJEU judgments, supporting that online marketplace bans should be block exempted will be a rather arduous task. Although in principle it is possible for a restriction by object to meet the requirements of article 101(3) TFEU, in practice article

[142] See n 128.
[143] Ezrachi (n 11) 12; Wartinger and Solek (n 17) 302; Witt (n 128) 17.
[144] See e.g. Final Report (n 3) paras 490-492.
[145] See n 126.
[146] See *supra* 7-8.
[147] *Pierre Fabre* (n 69) para 39.

101(3) TFEU defences do not normally succeed in 'by object' cases. Thus, the application of the VBER should be excluded based on article 2 and recital 10 thereof; the latter holds that '[t]his Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not *indispensable* to the attainment of the efficiency-enhancing effects'.[148]

Considering not only the criticism that *Pierre Fabre* has received on this point, but also the pro-competitive effects of the selective distribution systems recognised both by the economic theory and the Commission, [149] this finding should be re-assessed. Reaching the conclusion that selective distribution systems not fulfilling the *Metro* criteria are restrictions by object would lead to legal uncertainty. Currently, the undertakings can self-assess whether their selective distribution agreements will benefit from the VBER. It is generally accepted that the VBER can apply even though the *Metro* criteria are not complied with.[150] However, if all selective distribution agreements inconsistent with the *Metro* criteria are *ipso facto* deemed as restrictions by object, in line with the above reasoning, the application of the VBER for all such agreements would be jeopardised, thus hindering the undertakings' possibility to self-assess.

Instead, to reach the conclusion that a restraint is a restriction by object:

> [R]egard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected as well as the real conditions of the functioning of the market or the markets in question.[151]

[148] VBER (n 44) recital 10 (emphasis added).
[149] See e.g., G. Franklin Mathewson and Ralph Winter, 'An Economic Theory of Vertical Restraints' (1984) 15 RAND Journal of Economics 27; Rey Patrick & Vergé Thibaud, Economics of Vertical Restraints, in Handbook of Antitrust Economics 353 (Paolo Buccirossi ed., MIT Press 2008).
[150] Jones and Sufrin (n 37) 812.
[151] *Cartes Bancaires* (n 55) para 53.

It should be also borne in mind that the concept of restrictions by object should be interpreted restrictively; it should cover only restrictions which are sufficiently deleterious to competition.[152] Concomitantly, in case that an elaborate market analysis is required due to the complexity of the measure or due to inexperience with the restriction, *Cartes Bancaires* establishes that the restriction at hand is not a restriction by object.[153]

In the light of the above, it could first be observed that if a look into the market dynamics[154] equals a detailed market analysis, then online marketplaces should not be looked at as a restriction by object. Given that the Commission launched the Inquiry, *inter alia*, to understand the characteristics of the online marketplaces restrictions, one could also question the experience with the restriction as well.[155] Furthermore, it may be true that online marketplace bans hinder competition for SMEs and even lead to their exclusion from reaching the mobile consumer. Nevertheless, this would be a finding that falls into the examination of the anti-competitive effects of the restraint and not of its object.[156]

Moreover, the Commission concluded in the Final Report that the importance of the marketplaces as well as impact of the bans vary significantly between Member States and different products.[157] In addition, the limitation of price competition and the inducement of other forms of competition among retailers are inherent elements in selective distribution systems. While the Internet enhances price competition, it may reduce other forms thereof which are important in markets for products which normally merit selective distribution systems (high-end or technologically complex). Buccirossi notes that in such industries, maintaining a prestigious image is a form of competition in itself.[158] Finally, characterising online marketplace bans as restrictions by object can be questioned from a policy perspective as well. Considering that the object category should be reserved for restrictions which are sufficiently pernicious to competition, such a characterisation would assign the same moral disdain to online marketplace bans as that of price

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[152] Ibid para 58.
[153] Jones and Sufrin (n 37) 202.
[154] See n 121.
[155] Final Report (n 3) para 444.
[156] *Cartes Bancaires* (n 55) paras 80-81.
[157] Final Report (n 3) para 504.
[158] Buccirossi (n 45) 770-771.

fixing agreements. Is it warranted to treat the two restrictions under the same rule?

Having in mind these arguments, it is submitted that online marketplace bans should not be regarded as a restriction by object. Instead, their anti-competitive effects should be assessed before concluding that competition is restricted within the meaning of article 101(1) TFEU.

4.3 A Hardcore Restriction?

Assuming that online marketplace bans are not a serious restriction within the meaning of the VBER and hence they can in principle be block exempted, it is crucial to ascertain whether they constitute hardcore restrictions pursuant to article 4 VBER. Namely, it should be assessed whether (i) they restrict the retailers' customers, (ii) they restrict passive sales to end users, and/or (iii) they comply with the principle of equivalence.

It has been supported that for the purposes of article 4(c) VBER, third-party platforms' customers are a distinct customer group from customers who shop online in general, e.g. via a retailer's online shop.[159] This could also apply for the purposes of article 4(b) VBER, which, nevertheless, was not used by the CJEU to support the finding of a hardcore restriction in *Pierre Fabre*. However, the validity of the above statement needs to be examined. By way of example, if this proposition is true, a customer who would purchase sports articles from an online marketplace would belong to a different customer group from a customer who would do so from a retailer's website, e.g. Sportsdirect. According to this view, a critical difference is that online marketplaces offer a listing of the products and the customer can review their prices and characteristics comparatively. However, Sportsdirect's website also offers that possibility.[160] Furthermore, allegedly online marketplaces offer more choice. Retailers' webshops can provide broad choice as well; by accessing Sportsdirect's website, the consumer can purchase a variety of sports articles supplied by 983 brands.[161] In addition, it is reported that

[159] See n 125.

[160] 'Search Results' (*Sportsdirect.com*, 2017) <http://www.sportsdirect.com/SearchResults?DescriptionFilter=Football Boots> accessed 14 August 2017.

[161] 'Brands' (*Sportsdirect.com*, 2017) <http://www.sportsdirect.com/brands> accessed 14 August 2017.

customers prefer online marketplaces due to safer payment methods as well as to safer delivery schemes. Insofar as payment methods are concerned, Sportsdirect's online shop not only accepts the same credit/debit cards as Amazon but also provides for PayPal payment, which is not accepted by Amazon.[162] Along the same lines, Sportsdirect provides for standard, express, and next day delivery, while its delivery system is supported by order confirmation and order tracking services.[163] Admittedly, online marketplaces enable the sports article customer to purchase at the same time products unrelated to sports, e.g. headphones; thus, they constitute one-stop shops. Nevertheless, retailers' shops can also be viewed as one-stop shops to a certain extent. For instance, a Sportsdirect customer can purchase at the same time a basketball and a suitcase, i.e. products that are also unrelated. Considering the above, it is observed that these grounds do not justify the categorisation of online marketplace customers' as a distinct customer group.

Furthermore, a key difference between online marketplace bans and the *de facto* ban on Internet sales is that the former restriction allows the retailers to sell the contract goods via their website. Given that (i) article 4(b) VBER applies to restrictions that have as their object to partition the market by territorial or customer allocation, (ii) online marketplace bans have as object to protect the brand image, which should be considered legitimate, and (iii) it is not evident that online marketplaces' customers form a distinct customer group, online marketplace bans should not be considered as a hardcore restriction under article 4(b) VBER. The difference between the two *scenarii* in conjunction with the reasoning requiring the restrictive interpretation of the passive sales concept indicate that such bans are not a hardcore restriction under article 4(c) VBER either.[164]

Finally, it should be examined whether the principle of equivalence is breached. The view that third-party platform bans are hardcore restrictions accepts that such bans cannot be justified on equivalence grounds, since there

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[162] 'Amazon.co.uk Help: About Payment Methods' (*Amazon.co.uk*, 2017) <https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=201895610> accessed 14 August 2017; 'Payment Options' (*Sportsdirect.com*, 2017) <http://www.sportsdirect.com/customerservices/placingorders/paymentoptions> accessed 14 August 2017.

[163] 'Delivery Options' (*Sportsdirect.com*, 2017) <http://www.sportsdirect.com/customerservices/deliveryinfo/deliveryoptions> accessed 14 August 2017.

[164] See *supra* 18-19.

is no comparable offline service for online marketplaces.[165] However, if the restriction cannot be justified due to the lack of a comparable service, it can neither be condemned on equivalence grounds. The existence of a basis for comparison is necessary to conclude that a restriction is equivalent or not to other restrictions. On the other hand, in case that it is accepted that such a comparable service exists,[166] it would be worth considering whether online marketplace bans could be equated to a restriction to operate from an unauthorised place of establishment in line with article 4(c) VBER, despite the finding in *Pierre Fabre*.[167]

Concluding that online marketplace bans are neither restrictions by object nor hardcore restrictions is consistent with AG Wahl's recent Opinion in *Coty.*[168]

5. The *Coty* case

Parfümerie Akzente GmbH was an authorised distributor within the selective distribution system operated by Coty Germany GmbH (Coty), a leading supplier of luxury cosmetics. Coty imposed an absolute ban on the use of online platforms in a discernible manner for the sale of contract goods and the OLG Frankfurt am Main referred the matter to the CJEU to determine whether this clause (i) is compatible with article 101(1) TFEU, and (ii) it constitutes a hardcore restriction under article 4 VBER.

On 26 July 2017, AG Wahl delivered his Opinion, whereby focal points of this article are addressed. First, it is clarified that the aim to maintain a prestigious brand image is compatible with article 101(1) TFEU insofar as the *Metro* criteria are met.[169] The finding in paragraph 46 of *Pierre Fabre* pertaining to the brand image concerned only the clause at stake in that case and 'belongs to the context of a review of the proportionality of the contractual clause actually at issue in the main proceedings'.[170] Therefore, the

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[165] *Asics* (n 102) 11.
[166] Ariel Ezrachi, 'Online Marketplace Bans and Consumer Welfare – A Tale of Quality and Long Term Investment, or a Story of Limited Choice and Higher Prices' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983670> accessed 14 August 2017, 5.
[167] See n 137.
[168] He also acted as AG in *Cartes Bancaires* (n. 55).
[169] *Coty* (n 5) Opinion of AG Wahl para 93.
[170] Ibid para 83.

protection of the brand image can still justify the operation of a selective distribution system; finding otherwise would fundamentally alter the CJEU case law related to the evaluation of selective distribution under article 101(1) TFEU.[171] This approach is also consistent with and endorsed by CJEU case law on trademarks, e.g. *Copad*.

Furthermore, AG Wahl proposes that even absolute online marketplace bans can be compatible with article 101(1) TFEU provided that the *Metro* criteria are complied with.[172] The analysis does not elaborate on whether absolute online marketplace bans are a qualitative criterion, as this was not an issue in *Coty*. Rather, it is focused on the legitimacy of the bans as well as on their proportionality. Absolute online marketplace bans are in line with the Logo Clause and can be justified by the aim to protect the brand image, which requires the maintenance of quality standards regarding the presentation of the products. However, while using online marketplaces neither the retailers nor the supplier can control the image and the presentation of the products, as third-party platforms do not need to comply with the selective distribution agreement's terms. Therefore, absolute online marketplace bans may constitute a proportionate way to achieve the objectives pursued.[173] Moreover, this restriction differs from the absolute ban on online sales imposed in *Pierre Fabre*, as the retailers can still sell the contract goods via their websites, which according to the Final Report remain the preferred online distribution channel.[174]

However, even if it is concluded that absolute online marketplace bans fail the *Metro* test, the restriction should not be considered as a restriction by object, because at present it does not entail a degree of harm equal to the one of the total ban on the use of the Internet. Hence, the agreements containing online marketplace bans can benefit from block exemption and from the individual application of the article 101(3) TFEU.[175]

AG Wahl adds that online marketplace bans are not hardcore restrictions under article 4(b) VBER, as their content and objective do not indicate market partitioning. By appraising their economic and legal context, he concludes

[171] Ibid paras 62-63.
[172] Ibid para 122.
[173] Ibid paras 112-113.
[174] Ibid paras 107-111.
[175] Ibid paras 115-121.

that the results of the Inquiry suggest that online marketplaces' importance as a distribution channel varies significantly between member states as well as between products; thus, online marketplace bans cannot be compared with the ban imposed in *Pierre Fabre.*[176] Moreover, it has not been established that online marketplaces' customers are a 'definable customer base' so as to conclude that the online marketplace bans result to customer sharing.[177]

Finally, in the light of the clause's content, objective and economic and legal context, it cannot be deduced that online marketplace bans intrinsically harm passive sales. It is reiterated that the ban at hand differs from the *Pierre Fabre* ban, as the retailers have the possibility to sell the products via their webshops and/or via third-party platforms in a non-discernible manner.

V. The Inquiry: A Contextual Appraisal

The Inquiry gives valuable insight to the various stakeholders about the Commission's views on online marketplace bans and constitutes a step forward towards the much-demanded legal certainty. This chapter analyses (i) the pivotal findings of the Commission regarding online marketplaces and online marketplace bans, (ii) the concerns of the various stakeholders related to the Inquiry, and (iii) the actual and potential impact of the Inquiry.

1. Key Findings

From the outset, the Commission's efforts regarding the Inquiry should be commended, as it examined approximately 8,000 distribution and licence agreements and collected evidence from around 1,900 undertakings.[178] The Commission's approach towards online marketplace bans remained the same throughout the Inquiry, despite the voices during the public consultation stage urging that online marketplace bans should be considered as hardcore

[176] Ibid paras 140-151.
[177] Ibid para 150.
[178] European Commission, 'Antitrust: Commission Opens Formal Investigation into Distribution Practices of Clothing Company Guess' (2017) <http://europa.eu/rapid/press-release_IP-17-1549_en.htm> accessed 14 August 2017.

restrictions.[179] In order to assess whether online marketplace bans can be block exempted, information was gathered from 37 marketplaces, 1051 retailers, and 259 manufacturers/suppliers.[180] The results of the Inquiry showed that only 4% of the respondent retailers use solely online marketplaces to sell contract goods, that the conversion rate achieved on retailers' webshops is marginally lower than the one achieved on online marketplaces (4% and 5% respectively) as well as that 88% of 669 respondent retailers not selling on online marketplaces in 2014 indicated that they were not contractually restricted from doing so.[181] These findings should be seen in conjunction with the volatile importance of the marketplaces both among the EU Member States (85% of professional sellers listed on online marketplaces were established in Germany, United Kingdom and Poland) and among different product categories (only an average of 4% of computer games retailers sell on online marketplaces).[182]

Moreover, it is recognised that even though online marketplaces are not the most important online sales channel for retailers, it is a channel of growing importance, as the number of professional sellers active on online marketplaces has increased by an average of 47% in 3 years.[183] Furthermore, the Staff Working Document affirms that online marketplaces are a very important sales channel for SMEs, as e.g. they account for 69% of online the sales for undertakings with an annual turnover € 500,000 – 2,000,000 that also sell contract goods via their website.[184] However, and despite numerous retailers' manifestations, the Inquiry showed that SMEs are not more likely to have restrictions on the use of online marketplaces than large retailers; instead, the Commission found that the significance of marketplace restrictions ranges between different product categories.[185]

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[179] *See* e.g. CCIA, 'CCIA Response to the Public Consultation on the Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/computer_and_communications_industry_assocation_en.pdf> accessed 14 August 2017.
[180] Staff Working Document (n 3) para 70.
[181] Ibid paras 447-448, 470.
[182] Ibid paras 453-454.
[183] Ibid para 455.
[184] Ibid para 451.
[185] Ibid paras 471-472.

The interested stakeholders had the chance to comment on these findings during the public consultation stage, whereby concerns about the Commission's approach to online marketplace bans were raised.

2. A Critical Stance to the Inquiry's Results

Although the Inquiry was largely welcomed by the E-Commerce stakeholders,[186] the public consultation offered fertile ground for the assessment of the Preliminary Report's results and for points which the Commission may have missed.

First, it should be pointed out that the assessment of the Inquiry's findings is difficult to conduct without access to the datasets that the Commission itself used.[187] Nevertheless, it has been suggested that the results of the Inquiry may not reflect the actual E-Commerce conditions in the various Member States. It is indicative that there are 338 German retailers-respondents to Inquiry and only 38 and 48 respondents in Spain and France respectively.[188] This could be interpreted as an over-representation of German retail sector.[189] However, Ebay suggests that this number is too small, given that in 2010 more than 117.000 German enterprises were engaged in E-Commerce.[190] At the same time, it is proposed that SMEs are under-represented, as only a handful of SMEs are listed on the databases on which the Commission relied to select the retailers and by definition SMEs have less time and human capacity available to devote to answering the questionnaire.[191] In addition, it is alleged that the Commission has defined very broadly some product categories as they encompass products which are not *prima facie* homogeneous, and thus 'raise completely different issues in terms of competitive dynamics, need for

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[186] For the purposes of this research 28 public consultation submissions were studied, 18 of which commend the Commission for launching the Inquiry.
[187] Amway, 'Amway's response to the Public Consultation on the European Commission Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/amway_en.pdf> accessed 14 August 2017, 3.
[188] Assonime, 'Assonime contribution to the Commission Consultation on the Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/assonime_en.pdf> accessed 14 August 2017, 4.
[189] Ibid.
[190] Ebay (n 26) 15.
[191] Ibid 14-15.

brand protection and protection against counterfeiting'.[192] Furthermore, the Commission has received criticism that the Inquiry does not adequately provide guidance for market definition purposes as well for the calculation of the 30% market share threshold to determine whether the VBER is applicable.[193]

Moreover, the Inquiry's findings regarding the manufacturers' concerns about online marketplaces have also been criticised. Amazon argues that it is wrong for the manufacturers to infer that online marketplaces are inherently incapable of addressing brand image considerations; tailored 'landing pages' and 'premium beauty stores' are examples of Amazon's efforts to address such concerns.[194] This is corroborated by the fact that the Commission has taken account of the marketplaces' steps to address quality requirements. It is indicative that 86% of the respondent marketplaces declare to have taken action to improve the services and the image of their platform.[195]

At the same time, the sale of counterfeit products on marketplaces is also a contentious point. One the one hand, manufacturers argue that online marketplaces earn commissions out of the sale of counterfeit products and, thus, their operators are less incentivised to combat such sales.[196] On the other hand, retailers proclaim that manufacturers misuse the notification and take down procedures offered by the marketplaces to report the sale of original products as well.[197] While the sale of counterfeit products is an issue faced by 97% of the respondent marketplaces, it should be borne in mind that online marketplaces have an incentive to safeguard the quality of the products sold on their platforms to establish trust between the two sides of the market and due to network effects; the expansion of the sale of counterfeit products could tip the market in favour of their competitors. In that direction, leading marketplaces have recently announced their collaboration with the

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[192] Assonime (n 187) 4-5.
[193] Brands for Europe, 'E-commerce Sector Inquiry – Interim Report; Response' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/brands_for_europe_en.pdf> accessed 14 August 2017, 8.
[194] Amazon, 'Preliminary Report of the European Commission on the E-commerce Sector Inquiry; Comments by Amazon EU Sarl' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/amazon_eu_en.pdf> accessed 14 August 2017.
[195] Final Report (n 3) paras 490-492.
[196] Ibid paras 481-482.
[197] Ibid.

Commission in order to remove dangerous products sold on their platform, through the use of the Rapid Alert System.[198] Lastly, the call for a distinct analysis required between pure and hybrid marketplaces was not answered.[199] As hybrid marketplaces directly compete with the retailers using their platform, it has been reported that they have an incentive to free-ride on the proprietary data of the active retailers on their platform.[200] Furthermore, it is alleged that hybrid marketplaces enjoy a beneficial taxation and regulatory regime which create competitive advantages against their retailers-competitors.[201]

Insofar as the legal assessment of online marketplace bans is concerned, the Inquiry evidences the Commission's viewpoint that the current framework can adequately cover such restrictions. This approach has also been explicitly expressed by the Competition and Markets Authority.[202] Against this perspective, it has been suggested that the current framework is unclear to the benefit of the manufacturers who justify absolute online marketplace bans by referring to the Logo Clause,[203] and, hence, a recalibration of the Guidelines (or even of the VBER) is necessary.[204] It is argued that a consistent interpretation of paragraph 54 of the Guidelines would mean that absolute online marketplace bans are hardcore restrictions as they are not qualitative criteria.[205] In any case, it has been alleged that both the wording and the scope of paragraph 54 do not reflect the current commercial reality. In particular, the Logo Clause has been criticised as inaccurately drafted, since online

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[198] See European Commission, 'Keeping EU Consumers Safe – Online Marketplaces Join Efforts to Remove Dangerous Products From EU Market' (2017) <http://europa.eu/rapid/press-release_IP-17-602_en.htm> accessed 14 August 2017.

[199] European Consumer Organisation, 'E-Commerce Sector Inquiry; BEUC Comments on the Preliminary Report' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/beuc_en.pdf> accessed 14 August 2017, 7.

[200] Independent Retail Europe, 'Commission "Preliminary Report on the E-Commerce Sector Inquiry": Preliminary Opinion of Independent Retail Europe" (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/independent_retail_europe_en.pdf> accessed 14 August 2017, 6.

[201] Ibid.

[202] CMA, 'CMA Response to the Preliminary Report of the E-commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/competition_and_markets_authority_en.pdf> accessed 14 August 2017, 1.

[203] Amazon (n 193) 10.

[204] Ezrachi (n 11) 17.

[205] Amazon (n 193) 9.

marketplaces do not 'host' the retailers' websites as it is suggested therein; rather, they give the retailers the chance to advertise their products.[206] Moreover, the centrality of online marketplaces as intermediates evidences that the overly wide scope of paragraph 54 of the Guidelines should be narrowed down to qualify online marketplace bans as hardcore restrictions in line with the approach to other restrictions pertaining to the use of the Internet such as dual pricing.[207]

Despite the as above criticism, the Inquiry has created a noteworthy impact, only a few months after the publication of the Commission's Final Report.

3. The Inquiry's Impact: What can be expected?

The developments observed during the various stages of the Inquiry evidence that its results are a valuable tool in the stakeholders' hands. First, various companies in the clothing industry, as well as in other retail sectors, were incentivised to recalibrate their commercial practices on their own volition in order to align with the Commission's findings.[208] Furthermore, the experience gained by the Inquiry enabled the Commission to launch formal investigations into the distribution practices of Guess, as well as into the licensing and distribution practices of Nike, Sanrio and Universal Studios, alleging that these undertakings restrict the sale of licensed products cross-border and online.[209] In this context, online marketplace bans (the understanding and appraisal of which was one of the goals of the Inquiry) should be scrutinised by the Commission in case the VBER is deemed inapplicable.[210]

The Inquiry's results have already proven to be of key importance in the appraisal of online marketplace bans. In the light of the above findings, AG Wahl was able to substantiate his Opinion in *Coty*, especially insofar as

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[206] Ibid 10.
[207] Ezrachi (n 11) 17-18.
[208] European Commission, 'Antitrust: Commission Publishes Final Report on E-Commerce Sector Inquiry' (2017) <http://europa.eu/rapid/press-release_IP-17-1261_en.htm> accessed 14 August 2017.
[209] Ibid; European Commission, 'Antitrust: Commission Opens Formal Investigation into Distribution Practices of Clothing Company Guess' (2017) <http://europa.eu/rapid/press-release_IP-17-1549_en.htm> accessed 14 August 2017.
[210] Staff Working Document (n 3) paras 444, 511.

appraising the importance of online marketplaces as a sales channel and the economic and legal context of online marketplace bans are concerned.[211] Specific reference was made to the results pertaining to the significant variance of online marketplaces' importance as a sales channel between Member States and products.[212] The Inquiry evidenced that at the present stage online marketplace bans cannot be equated to the ban on the use of the Internet and, hence, classified as restrictions by object or hardcore restrictions, given that they are not sufficiently injurious to competition. Given the online marketplaces' evolving importance as a sales channel, this statement leaves open the possibility that in the near future online marketplace bans can be regarded as a restriction by object. Furthermore, AG Wahl's Opinion seen in conjunction with the Final Report, affirms the Commission's position that the current framework can adequately address online marketplace bans. It remains to be seen whether and to what extent the CJEU will use the Inquiry's findings in its decision in *Coty* as well as whether it will concur with AG Wahl's Opinion, which is not binding.

VI. Conclusion

Online marketplaces are progressively becoming an important sales channel that offers not only intense intra-brand and inter-brand price competition, but also increased price transparency and, thus, better information for consumers. Third-party platforms enable SMEs to effectively compete with large retailers by reaching a customer base they would not normally have access to, with significantly low costs.

Against these efficiencies, the limitation of price competition which is inherent in selective distribution systems should be contrasted and balanced. The *Pierre Fabre* judgment connects the CJEU case law concerning selective distribution agreements with the sales via the Internet in a seemingly tumultuous way which requires a careful approach. The decision sets out all agreements failing the *Metro* criteria as restrictions by object as well as that maintaining a prestigious brand image is not a legitimate aim for restricting competition.

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[211] See *supra* 11-12.
[212] See n 175.

Under these circumstances, the appraisal of (absolute) online marketplace bans under article 101(1) TFEU has so far been nebulous. While the CJEU will resolve this controversy in *Coty*, it is submitted that online marketplace bans, if deemed not to fulfil the *Metro* criteria, should not be considered as restrictions by object. The CJEU case law on restrictions by object clarifies that this characterisation should be reserved only for restraints which are sufficiently injurious to competition. Given the inexperience with the restriction, the potential need for a detailed market analysis to ascertain the effects on consumers and SMEs as well as the Inquiry's findings, online marketplace bans cannot, for the time being, be equated to restrictions on the use of the Internet; thus, *Pierre Fabre* is not directly applicable.

Furthermore, the protection of the brand image should be perceived as one of the key goals of selective distribution. The relevant *Pierre Fabre* finding can be reconciled with previous CJEU case law only if it is interpreted as a proportionality requirement between the imposed restriction and the nature of the product, applying only to that case. This view is corroborated by AG Wahl's recent Opinion in *Coty*, which balances between the *intuitu personae* selection of the authorised retailers and benefits of online marketplaces in favour of the former. He proposes that online marketplace bans may even fulfil the *Metro* test, but nevertheless does not address the important point of whether (absolute) online marketplace bans are qualitative criteria.

Therefore, in principle, online marketplace bans should be able to benefit from block exemption under the VBER. Online marketplace bans do not have as their object to compartmentalise the market, but to protect the supplier's brand image, while it is not clear how they breach the principle of equivalence. Concomitantly, it has not been satisfactorily shown that online marketplace customers form a distinct customer group. Moreover, the need not to interpret overly broadly the concept of passive sales in juxtaposition with AG Wahl's conclusion that at present online marketplace bans do not amount to a restriction to sell online, indicates that such bans should not be considered as hardcore restrictions.

The above findings are largely founded on the Commission's Inquiry, which charters an until now undiscovered territory and presents the Commission's view (albeit criticised) that the Guidelines and the VBER can adequately cover restrictions as the third-party platform bans.

Finally, it is important not to lose sight of the economic, social and broader political goals that competition law aspires to achieve. Is it prudent from a policy perspective to over-enforce article 101(1) TFEU to reach the desired result more quickly? Considering that the online market circumstances evolve at an exponentially high pace, the day online marketplace bans should be regarded as restrictions by object may not be far away. In the light of the above, the CJEU ruling in *Coty* is eagerly anticipated.