Provisional text

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 July 2017 (1)

Case C-230/16

Coty Germany GmbH

v

Parfümerie Akzente GmbH

(Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany))

(Reference for a preliminary ruling — Competition — Agreements, decisions and concerted practices — Article 101(1) TFEU — Selective distribution — Clause prohibiting retailers from making use of a non-authorised third party in the context of internet sales — Benefit of the block exemption provided for in Regulation (EU) No 330/2010 — Article 4(b) and (c))

1. The increasing use by certain distributors of electronic marketplaces or platforms independent of the producers (2) has naturally led a number of national authorities and courts (3) to question whether a supplier may prohibit authorised resellers in a selective distribution network from making use of non-authorised third undertakings.

2. The present request for a preliminary ruling, which invites the Court to 'reconsider' the legality, under the competition rules, of selective distribution systems in the light of recent developments in the e-commerce sector, the possible economic consequences of which should not be underestimated, (4) constitutes a perfect illustration of that point.

3. By that request, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) asks the Court about the interpretation of Article 101(1) TFEU and of Article 4(b) and (c) of Regulation (EU) No 330/2010. (5)

4. The request was submitted in the context of a dispute between Coty Germany GmbH ('Coty Germany'), a leading supplier of luxury cosmetics in Germany, and Parfümerie Akzente GmbH ('Parfümerie Akzente'), an authorised distributor of those products, concerning the prohibition on the use by the latter undertaking in a discernible way of non-authorised third undertakings for internet sales of the contract goods.

5. More specifically, the Court is asked whether and to what extent selective distribution systems relating to luxury and prestige products, and designed mainly to preserve the 'luxury image' of those products, are aspects of competition that are compatible with Article 101(1) TFEU. In that connection, the Court is called upon to determine whether an absolute ban on members of a selective distribution system, who operate as retailers on the market, making use in a discernible way of third undertakings for internet sales, is compatible with that provision, without consideration of whether there is any actual breach of the legitimate requirements of the manufacturer in terms of quality. In addition, the Court is requested to determine whether Article 4(b) and (c) of Regulation No 330/2010 must be interpreted as meaning that such a prohibition constitutes a restriction 'by object' of the retailer's customer group and/or of passive sales to end users.

6. In that regard, the present case provides the Court with the opportunity to clarify whether the judgment in *Pierre Fabre Dermo-Cosmétique*, (6) which, as the referring court observes, has been the subject of divergent interpretations by the national competition authorities and courts, has fundamentally altered the perception, in the light of the EU competition rules, of the restrictions peculiar to any selective distribution system which are based on qualitative criteria.

Legal context

Regulation No 330/2010

7. In the words of recitals 3 to 5 of Regulation No 330/2010:

The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) [TFEU] includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of

goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term "vertical agreements" should include the corresponding concerted practices.

For the application of Article 101(3) [TFEU] by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) [TFEU]. In the individual assessment of agreements under Article 101(1) [TFEU], account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) [TFEU].'

8. Article 1(1) of Regulation No 330/2010 provides:

'For the purposes of this Regulation:

"vertical agreement" means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;

"vertical restraint" means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) [TFEU];

…

"selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

…'

9. Article 2(1) of that regulation provides:

'Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.'

10. Pursuant to Article 3(1) of that regulation:

'The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.'

11. Under the heading 'Restrictions that remove the benefit of the block exemption — hardcore restrictions', Article 4 of Regulation No 330/2010 states:

'The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

…

the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

…

the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and

…

the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

…'

The Guidelines on vertical restraints

12. According to paragraph 51 of the Guidelines on vertical restraints (7) published by the Commission in conjunction with the adoption of Regulation No 330/2010, 'passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers.

13. Paragraph 52 of the Guidelines states that the internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. The third sentence of paragraph 52 states that in general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor.

14. Paragraph 54 of the Guidelines provides:

'However, under [Regulation No 330/2010] the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system … Similarly, 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 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.'

15. In paragraph 56 of the Guidelines, it is explained that the hardcore restriction set out in Article 4(c) of Regulation No 330/2010 excludes the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. The third sentence of paragraph 56 states that within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers that any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop constitute a hardcore restriction.

16. Last, paragraph 176 of the Guidelines states that both qualitative and quantitative selective distribution is exempted by Regulation No 330/2010 and that that exemption is to apply 'regardless of the nature of the product concerned and regardless of the nature of the selection criteria'. However, where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anticompetitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn.

The dispute in the main proceedings, the questions for a preliminary ruling and the procedure before the Court

17. Coty Germany is one of Germany's leading suppliers of luxury cosmetics. It sells certain luxury cosmetic brands via a selective distribution network, on the basis of a distribution contract employed uniformly throughout Europe by it and the undertakings affiliated to it. That contract is supplemented by various special contracts designed to organise that network.

18. Parfümerie Akzente has for many years distributed Coty Germany's products as an authorised retailer, both at brick and mortar locations and over the internet. Internet sales are made partly through its own online store and partly via the platform 'amazon.de'.

19. It is apparent from the decision for reference that, in the introduction to the selective distribution contract, Coty Germany justifies its selective distribution system in the following terms: 'the character of Coty Prestige's brands requires selective distribution in order to support the luxury image of these brands'.

20. In that regard, as regards brick and mortar retail, the selective distribution contract provides that each point of sale of the distributor must be authorised by Coty Germany, and must meet certain standards, set out in Article 2 of the contract, in terms of environment, décor and furnishing.

21. In particular, according to Article 2(1)(3) of the distribution contract, 'the décor and furnishing of the sales location, the selection of goods, advertising and the sales presentation must highlight and promote the luxury character of Coty Prestige's brands. Taken into account when evaluating this criterion are, in particular, the façade, interior décor, floor coverings, type of walls, ceilings and furniture, sales space and lighting, as well as an overall clean and orderly appearance'.

22. Article 2(1)(6) of the distribution contract states that 'the signage for the sales location, including the name of the undertaking and any add-ons or company slogans, must not give the impression of a limited selection of goods, low-quality outfitting or inferior advice, and it must be mounted in such a way that does not obscure the authorised retailer's decorations and showrooms'.

23. Furthermore, the contractual framework linking the parties includes a supplemental agreement on internet sales, which provides, in Article 1(3), that 'the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised'.

24. In March 2012, Coty Germany revised the selective distribution network contracts and also that supplemental agreement, and provided in Clause I(1) of that supplemental agreement that 'the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an "electronic shop window" of the authorised store and the luxury character of the products is preserved'. In addition, Clause I(1)(3) of that supplemental agreement expressly prohibits the use of a different business name and also the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige. A footnote to that clause states that 'accordingly, the authorised retailer is prohibited from collaborating with third parties if such collaboration is directed at the operation of the website and is effected in a manner that is discernible to the public'.

25. Parfümerie Akzente refused to approve those amendments to the distribution contract and Coty Germany brought an action before a national court of first instance, seeking an order prohibiting Parfümerie Akzente from distributing products bearing the brand at issue via the platform 'amazon.de', in application of Clause I(1)(3).

26. By judgment of 31 July 2014, the competent national court of first instance, namely the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) dismissed the application, on the ground that the contractual clause in question was contrary to Article 101(1) TFEU and to Paragraph 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition).

27. That court considered, in particular, that, in accordance with the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the objective of preserving a prestige brand image does not justify the introduction of a selective distribution system which by definition restricts competition. According to the national court of first instance, the contractual clause at issue is also a hardcore restriction, within the meaning of Article 4(c) of Regulation No 330/2010, and cannot therefore benefit from a block exemption on the basis of that regulation.

28. Nor — still according to the national court of first instance — are the conditions for an individual exemption met, since it has not been shown that the general exclusion of internet sales via third-party platforms entails efficiency gains of such a kind as to offset the disadvantages for competition that result from the clause at issue. That court considers that the general prohibition provided for in that clause is not necessary, since there are other equally appropriate means that are less restrictive of competition, such as the application of specific quality criteria for the third-party platforms.

29. It was in those circumstances, and in the context of Coty Germany's appeal against the decision of the national first-instance court, that the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a "luxury image" for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?

If the first question is answered in the affirmative:

Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case?

Is Article 4(b) of Regulation [No 330/2010] to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of the retailer's customer group "by object"?

Is Article 4(c) of Regulation [No 330/2010] to be interpreted as meaning that a prohibition of engaging third-party undertakings discernible to the public to handle internet sales that is imposed on the members of a selective distribution system operating at the retail level of trade constitutes a restriction of passive sales to end users "by object"?'

30. Coty Germany, Parfümerie Akzente, the German, French, Italian, Luxembourg, Netherlands and Austrian Governments and the Commission lodged observations before the Court.

31. A hearing was held on 30 March 2017, in which Coty Germany, Parfümerie Akzente, the German, French, Italian, Luxembourg, Netherlands and Swedish Governments and the Commission took part.

Analysis

Introductory remarks and general considerations concerning the principles that should prevail in the application of Article 101 TFEU to selective distribution systems

32. Generally, the competition rules — and Article 101 TFEU in particular — are designed to prevent distortions of 'competition', it being understood that competition, which is intended to promote economic efficiency and ultimately the welfare of consumers, must not only permit the introduction of the lowest possible prices but also be a vector for diversity in the choice of goods, the optimisation of the quality of goods and the services provided and also the stimulation of innovation. European competition law does not see price competition as the only possible model.

33. In that regard, the Court held at a very early stage that although price competition is important, it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded. (8) There are thus legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. (9)

34. It is on the basis of that premiss that selective distribution systems should be seen.

35. Selective distribution systems are defined as distribution systems in which (i) the supplier (often described as 'the network head') undertakes to sell the contract goods or services only to selected distributors on the basis of defined criteria and (ii) those distributors undertake not to sell those goods or services to non-authorised distributors in the territory reserved by the supplier. (10)

36. It has been accepted, since the judgment in *Consten and Grundig* v *Commission*, (11) that a vertical agreement between undertakings which are not on an equal footing is capable of restricting the competition that might exist between them or between one of them and third parties. It cannot therefore be precluded a priori that contractual clauses in selective distribution agreements entail restrictions of competition, of such a kind, in particular, as to be caught by the prohibition of anticompetitive agreements and concerted practices. As regards the applicability, in the strict sense, of antitrust law to the definition of the selection criteria drawn up in the context of distribution networks, it is undisputed that that selection, when it follows from the contractual clauses in contracts between the network head and its authorised distributers, is of such a kind as to be caught by the prohibition of agreements and concerted practices. (12)

37. However, the Court has consistently taken a cautious approach when dealing with selective distribution systems based on qualitative criteria. (13) It has thus clearly recognised, since its well-known judgment in the case of *Metro SB-Großmärkte* v *Commission*, (14) the legality, from the aspect of antitrust law, of selective distribution systems based on qualitative criteria.

38. In that context, the Court has emphasised that the requirement of undistorted competition accepts that the nature and intensity of competition may vary according to the goods or services in question and the economic structure of the sectoral markets concerned. In particular, the market structure does not preclude the existence of differentiated distribution channels adapted to the particular characteristics of the various producers and the needs of the different categories of consumers. By its reasoning, the Court has implicitly but necessarily acknowledged that a

reduction of intra-brand competition might be accepted when it is essential to the stimulation of inter-brand competition.

39. The Court has thus repeatedly held that those systems might be declared compatible with Article 101(1) TFEU provided that the choice of resellers was based on objective criteria of a qualitative nature, determined uniformly and applied in a non-discriminatory fashion.

40. Furthermore, in the wake of certain trends in the literature, (15) themselves fuelled by the analyses carried out by economists, (16) it has been gradually accepted, notably in the drafting of a new generation of block exemption regulations, that such systems generally have positive effects from the aspect of competition.

41. That development, which is not peculiar to EU competition law, (17) is based, in particular, on the following findings.

42. In the first place, in so far as they tend to approve distributors of certain products on the basis of qualitative criteria required by the nature of the goods, selective distribution systems favour and protect the development of the brand image. They constitute a factor that stimulates competition between suppliers of branded goods, namely inter-brand competition, in that they allow manufacturers to organise efficiently the distribution of their goods and satisfy consumers.

43. Selective distribution systems are, especially for goods with distinctive qualities, a vector for market penetration. Brands, and in particular luxury brands, derive their added value from a stable consumer perception of their high quality and their exclusivity in their presentation and their marketing. However, that stability cannot be guaranteed when it is not the same undertaking that distributes the goods. The rationale of selective distribution systems is that they allow the distribution of certain goods to be extended, in particular to areas geographically remote from the areas in which they are produced, while maintaining that stability by the selection of undertakings authorised to distribute the contract goods.

44. In the second place, from the viewpoint of intra-brand competition, owing to the equality between authorised distributors that results from the application — in principle objective and non-discriminatory — of selection criteria of a qualitative nature, selective distribution may indeed mean that all the member undertakings are subject to similar competitive conditions of the selective distribution network and, accordingly, lead to a potential reduction both in the number of distributors of the contract goods and in intra-brand competition, in particular in terms of price. Paradoxically, the stricter the selection criteria which the supplier imposes, the greater its exposure, owing to the ensuing reduction in the distribution of its goods, to a loss of market and of customers. Therefore, and unless it has significant 'market power', the supplier — the network head — is, in principle, led to 'self-regulate' its conduct in a way that conforms to the competition rules.

45. Consequently, selective distribution systems may be considered, generally, to have neutral, or indeed beneficial, effects from the aspect of competition.

46. It should be borne in mind that the compatibility of selective distribution systems with Article 101(1) TFEU ultimately rests on the notion that it may be permissible to focus not on competition 'on price' but rather on other factors of a qualitative nature. Recognition of such compatibility with Article 101(1) TFEU cannot therefore be confined to goods which have particular physical qualities. What matters for the purpose of identifying whether there is a restriction of competition is not so much the intrinsic properties of the goods in question, but rather the fact that it seems necessary in order to preserve the proper functioning of the distribution system which is specifically intended to preserve the brand image or the image of quality of the contract goods.

47. In short, although, following an examination which is both superficial and formalistic, certain contractual obligations imposed on retailers in the context of selective distribution systems could readily be treated, in that they limited the commercial freedoms of the distributors concerned, as potential restrictions of competition, it very quickly became accepted, both in the case-law developed since the judgment in *Metro SB-Großmärkte* v *Commission* (18) and in the regulations applicable to block exemptions, that a selective distribution system based on qualitative criteria may, on certain conditions, have pro-competitive effects and thus not be caught by the prohibition of agreements and concerted practices referred to in Article 101(1) TFEU.

48. In that context, it must be emphasised that Article 101 TFEU is not intended to regulate or to proscribe certain freely consented contractual obligations, such as those arising from the contract between a distributor and its supplier, but relates essentially to the economic impacts of conduct viewed from the aspect of competition. Also, the fact that a selective distribution system may lead to contractual imbalance between the parties, in particular to the disadvantage of an authorised distributor, is not a relevant factor in the context of the examination of the restrictive effects that that agreement may have on competition. (19)

49. What, next, of the precise framework of the analysis of measures adopted in the context of selective distribution systems from the aspect of antitrust law?

50. Examination in the light of Article 101 TFEU of the corporate behaviour conceived and imposed in the context of selective distribution must be carried out schematically, in two steps. It is necessary, first of all, to examine — as the referring court, by its first and second questions, asks the Court to do — whether that conduct is in principle likely to be caught by the prohibition of agreements and concerted practices laid down in Article 101(1) TFEU. If so, namely if it should be held that the restrictions at issue are caught by that provision, it is then necessary — which, ultimately, is the purpose of the third and fourth questions — to determine whether the conduct at issue is likely to benefit from an exemption under paragraph 3 of Article 101 TFEU.

51. First, as regards the question whether the conditions imposed by the network head on its distributors may from the outset escape the prohibition of agreements and concerted practices, the Court has recognised that, in the case of

high-quality consumer goods, differentiated distribution channels adapted to the specific characteristics of the various producers and to the needs of consumers may be compatible with Article 101(1) TFEU. (20)

52. As the Court has again pointed out in its more recent case-law, the organisation of a selective distribution system is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, determined uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria do not go beyond what is necessary. (21)

53. Second, and in case the Court should conclude that the impugned measure which forms part of the framework of a selective distribution system cannot be automatically excluded from the scope of Article 101 TFEU, it will still be necessary to determine whether the measure is among those which may be exempted, in particular under the applicable 'block exemption' regulation, in this instance Regulation No 330/2010.

54. In that regard, it should be observed that that exemption regulation does not intend to list the types of conduct that might be caught by the prohibition in Article 101 TFEU or those which from the outset escape the application of that provision. As recital 4 of that regulation states, 'in the individual assessment of agreements under Article 101(1) [TFEU], account has to be taken of several factors, and in particular the market structure on the supply and purchase side'.

55. On the other hand, that regulation, which seeks to provide a degree of legal certainty for the undertakings concerned (see, to that effect, recital 5 of Regulation No 330/2010), indicates the measures which cannot benefit at the outset from an exemption under that regulation, which does not mean that those measures cannot benefit from an individual exemption. Provided that certain thresholds relating to the market share held by both the supplier and its distributors are satisfied, the measures in question are those which include 'hardcore restrictions', referred to in Article 4 of that regulation.

56. Although independent, those two steps in the analysis may overlap somewhat in conceptual terms. Whether carried out by reference to paragraph 1 or to paragraph 3 of Article 101 TFEU, the analysis of the measure at issue is based on an examination of the degree of presumed or actual harm caused by the measure. Thus, a restriction of passive sales by distributors may be regarded not only as a restriction 'by object' within the meaning of Article 101(1) TFEU, but also as a hardcore restriction that cannot benefit from a block exemption. The fact nonetheless remains that the classification, for the purposes of the application of the latter provision, of a restriction 'by object' must be distinguished from the existence of a 'hardcore' restriction for the purposes of determining whether it may qualify for an exemption under Regulation No 330/2010. I shall return to this point below.

57. Last, it seems to me to be important to emphasise that the guidelines drawn up by the Commission, and in particular the Guidelines on vertical restrictions, which are indisputably of great interest in the present case, cannot on their own guide the analysis. Those guidelines are not intended to bind the competition authorities and courts of the Member States, but merely describe the way in which the Commission, acting as the European Union competition authority, will itself apply Article 101 TFEU. (22) However, it cannot be precluded that, in carrying out its task of interpreting EU law, the Court may adopt the legal guidance and assessment contained in those guidelines.

58. Having made those general observations, I shall examine, one by one, the questions submitted by the referring court.

First question: the compatibility with Article 101(1) TFEU of selective distribution systems for luxury and prestige goods aimed mainly at preserving the 'luxury image' of those goods

59. By its first question, which directly reflects the diverging interpretations of the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the referring court asks, in essence, whether selective distribution networks for the distribution of luxury and prestige goods aimed mainly at preserving the luxury image of those goods are caught by the prohibition laid down in Article 101(1) TFEU.

60. In essence, two opposite approaches are taken.

61. On the one hand, Parfümerie Akzente and the Luxembourg Government maintain that contracts which organise a selective distribution system for the sale of luxury and prestige goods, aimed mainly at preserving the luxury image of those goods, cannot be excluded from the scope of the prohibition laid down in Article 101(1) TFEU. They contend that that conclusion is firmly based on the statement in paragraph 46 of the judgment in *Pierre Fabre Dermo-Cosmétique*. Likewise, the German Government proposes that the answer should be that Article 101(1) TFEU is applicable to the requirements of selective distribution systems intended to preserve a luxury or prestige image, without there being any need to consider whether the properties of the product in question require that a selective distribution system be put in place, whether the requirements of the system are applied without discrimination and whether they are appropriate for the purpose of preserving the luxury or prestige image.

62. On the other hand, Coty Germany, the French, Italian, Netherlands, Austrian and Swedish Governments and the Commission contend, in essence, that the contracts that organise a selective distribution system for the sale of luxury and prestige goods, aimed mainly at preserving the luxury image of those goods, may be excluded from the scope of the prohibition laid down in Article 101(1) TFEU. Those parties maintain, in particular, that it follows from the case-law that high-quality goods, whose luxury image is appreciated by consumers, may require a selective distribution network, in particular in order to ensure that the goods are presented in an 'appealing manner' and to preserve their 'luxury image'. They emphasise that the judgment in *Pierre Fabre Dermo-Cosmétique*, which concerned not the selective distribution system in the strict sense, but solely the contractual clause referred to in that case, cannot be interpreted as meaning that the protection of a luxury image is no longer capable of justifying the existence of a selective distribution system.

63. To my mind, and unless the principles governing the evaluation of selective distribution systems in the light of the competition rules are to be fundamentally altered, the second position must prevail and the answer to the first question must therefore be in the affirmative, as formulated by the referring court.

64. Further to what I have said above, selective distribution systems must, owing to the beneficial — or at least neutral — effects to which they give rise from the aspect of competition, be regarded as compatible with the prohibition of agreements and concerted practices laid down in Article 101(1) TFEU.

65. In accordance with the consistent case-law of this Court (23) and of the General Court, (24) the findings of which were largely set out in paragraph 175 of the Guidelines, purely qualitative selective distribution systems are not caught by the prohibition in Article 101 TFEU when three conditions are met ('the *Metro* criteria').

66. First, it must be established that the properties of the product necessitate a selective distribution system, in the sense that such a system constitutes a legitimate requirement, having regard to the nature of the products concerned, and in particular their high quality or highly technical nature, in order to preserve their quality and to ensure that they are correctly used. Second, resellers must be chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all potential resellers and applied in a non-discriminatory manner. Third, the criteria defined must not go beyond what is necessary.

67. Although the question whether those conditions are satisfied must be assessed objectively by the national court, the Court has nonetheless identified a number of parameters which may be taken into account in the assessment of the compatibility of selective distribution systems with Article 101(1) TFEU.

68. As regards the criterion relating to the necessity for a selective distribution system in view, in particular, of the luxury goods — the criterion mainly at issue in the present case —, it should be borne in mind that the Court has held on a number of occasions that selective distribution systems based on qualitative criteria may be accepted in the high-quality consumer goods production sector without infringing Article 101(1) TFEU, in order, in particular, to maintain a specialist trade capable of supplying specific services for such products. (25)

69. The Court has made clear that, irrespective even of whether the products concerned are 'luxury' products, a selective distribution system may be necessary in order to preserve the 'quality' of the product. (26)

70. It is thus the specific characteristics or properties of the products concerned that may be capable of rendering a selective distribution system compatible with Article 101(1) TFEU. As I have said above, those properties may lie not only in the physical qualities of the products concerned (high-technology quality products, for example), but also in the 'luxury' image of the products. (27)

71. As a number of the parties who have lodged observations in the present case have submitted, that conclusion may be compared with the considerations set out in the context of the case-law developed in connection with trade mark law, which, owing to its specific competitive function, undeniably interacts with the prohibition of agreements and concerted practices. In so far as it ensures that all the products or services which it designates were manufactured or supplied under the control of a single undertaking which is responsible for their quality, the trade mark plays an essential role in the system of undistorted competition which the FEU Treaty seeks to establish and maintain. (28) Under such a system, an undertaking must be in a position to keep its customers by virtue of the quality of its products and services, something which is possible only if there are distinctive marks which enable customers to identify those products and services. For a trade mark to be able to fulfil that function, it must offer a guarantee that all the goods bearing it have been manufactured under the control of a single undertaking which is responsible for their quality. (29)

72. In the context of trade mark law, the Court has emphasised that luxury and prestige goods are defined not only by reference to their material characteristics, but also on the basis of the specific perception which consumers have of them, and more particularly of the 'aura of luxury' which they enjoy with consumers. As prestige goods are high-end goods, the sensation of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods. Therefore, an impairment of that aura of luxury is likely to affect the actual quality of those goods. In that regard, the Court has already held that the characteristics and conditions of a selective distribution system can, in themselves, preserve the quality and ensure the proper use of such goods. (30)

73. The Court concluded that as the setting up of a selective distribution system seeks to ensure that the goods are displayed in sales outlets in a manner that enhances their value, 'especially as regards the positioning, advertising, packaging as well as business policy', it contributed to the reputation of the goods at issue and therefore to sustaining the aura of luxury surrounding them. (31)

74. It follows from that case-law that, having regard to their characteristics and their nature, luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are properly used. In other words, the selective distribution networks relating to the distribution of luxury and prestige goods and seeking mainly to preserve the brand image of those goods are not caught by the prohibition laid down in Article 101(1) TFEU.

75. Contrary to the interpretation advocated by some of the parties who have lodged observations, that conclusion is not called into question by the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), and in particular by paragraph 46 of that judgment, which states that 'the aim of maintaining a [prestige] image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU'.

76. As may be seen from the observations submitted in the present case, and also from the positions taken by a large number of courts and national competition authorities, (32) that latter assertion has given rise to highly divergent interpretations.

77. It therefore seems wholly appropriate that the Court should, as most of the parties who have lodged observations ask it to do, clarify in the present case the scope of that judgment, with reference to both the context that gave rise to it and the reasoning specifically adopted by the Court in that judgment.

78. As regards, in the first place, the *factual context* of the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), I recall that the point at issue in that case was the obligation imposed by a manufacturer of cosmetics and personal care products on its selected distributors to supply evidence that there would be physically present at their respective outlets at all times at least one qualified pharmacist. According to the Court, which approved the assessment that had been made by the French competition authority, that requirement excluded de facto and absolutely any possibility that the products in question might be sold by authorised distributors via the internet. (33)

79. As is clear from the question referred to the Court for a preliminary ruling in that case, the only point at issue was a contractual clause containing a general and absolute ban on internet sales of the contract goods to end users, imposed on authorised distributors within the framework of a selective distribution system. Conversely, the selective distribution system in its entirety was not at issue.

80. In the second place, as regards the *reasoning* expressly applied by the Court in the judgment in *Pierre Fabre Dermo-Cosmétique*, it relates only to the contractual clause containing, in particular, the ban on internet sales imposed by Pierre Fabre. The mere fact that the inclusion of that clause was based on the need to preserve the prestige image of the products in question was not regarded by the Court as constituting a legitimate objective for restricting competition. However, that does not mean that it was the Court's intention that distribution systems specifically designed to preserve the brand image of the products concerned must necessarily be caught by the prohibition of agreements and concerted practices referred to in Article 101(1) TFEU.

81. It should be pointed out that the Court, in particular, did not overturn the principle that the head of a selective distribution network remained generally free to organise that network and, accordingly, the finding that the conditions imposed on authorised distributors must be deemed compatible with Article 101(1) TFEU when they satisfied the conditions identified by the Court.

82. More fundamentally, it should be observed that there is nothing in the terms used by the Court to suggest that it intended to overturn or further reduce the scope of the principles which had thus far been identified and developed with respect to the assessment, under Article 101 TFEU, of the conditions imposed on the authorised distributors in a selective distribution network.

83. In other words, the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649) must not be interpreted as overturning the previous case-law, since the assertion in paragraph 46 of that judgment belongs to the context of a review of the proportionality of the contractual clause actually at issue in the main proceedings (see, in particular, paragraph 43 of that judgment).

84. Those considerations, taken together, lead me to conclude that selective distribution systems the object of which is to preserve the luxury image of the products may always constitute aspects of competition which are compatible with Article 101(1) TFEU. As the Commission has correctly observed, however, it must be inferred from that judgment that, depending on the properties of the products in question, or in the case of particularly serious restrictions, such as the outright ban on internet sales that resulted from the clause at issue in the judgment in *Pierre Fabre Dermo-Cosmétique*, it is possible that the objective of preserving the prestige image of the products in question may not be legitimate, which would have the consequence that an exemption for a selective distribution system or a clause pursuing such an objective could not be justified.

85. A different conclusion would in my view have two major disadvantages.

86. First of all, it would amount to overturning the firmly established principles in the Court's case-law concerning the assessment of selective distribution systems in the light of the competition rules. It will be recalled that those principles specifically take into account the beneficial effects which such systems have in achieving effective competition.

87. In that context, it must be borne in mind that it is the properties of the products concerned, whether they lie in the physical characteristics of the products or in their luxury or prestige image, that must be preserved. Whether the products in question have certain physical properties, such as high-quality products or technologically advanced products, or whether they are associated with a luxury image, selective distribution may be considered legitimate given the pro-competitive effects which it generates.

88. Next, if the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), were to be interpreted as meaning that a selective distribution system designed to preserve the luxury image of the products concerned can no longer be exempt from the prohibition laid down in Article 101(1) TFEU, such an interpretation would run counter to the guidance laid down in intellectual property matters, and in particular with the case-law developed in the context of trade mark law.

89. Thus, in the judgment of 23 April 2009, Copad (C-59/08, EU:C:2009:260), the Court treated the distributor in the selective distribution system as a licensee and recognised that both were in the situation of a putting into circulation by third parties with the consent of the proprietor of the trade mark. That has the consequence that the prohibition of agreements and concerted practices should not apply in cases where measures taken by the producer/proprietor of the trade mark vis-à-vis the authorised distributor ultimately constitute only the exercise of the right to put the relevant product into circulation for the first time.

90. Likewise, in the judgment of 3 June 2010, Coty Prestige Lancaster Group (C-127/09, EU:C:2010:313), the Court emphasised that the exclusive nature of trade mark rights has the consequence that each use of the trade mark

without the proprietor's consent constitutes a breach of trade mark rights.

91. Therefore, a selective distribution network, such as that provided for in the contract at issue in the main proceedings, which relates to the distribution of luxury and prestige products and is mainly aimed at preserving the 'luxury image', may constitute an aspect of competition which is compatible with Article 101(1) TFEU, provided that the *Metro* criteria are satisfied.

92. That conclusion applies to both so-called luxury products and so-called quality products. What matters is the need for the network head to preserve the prestige image.

93. I therefore propose that the answer to the first question should be that selective distribution systems relating to the distribution of luxury and prestige products and mainly intended to preserve the 'luxury image' of those products is an aspect of competition which is compatible with Article 101(1) TFEU provided that resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner for all potential resellers, that the nature of the product in question, including the prestige image, requires selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and that the criteria established do not go beyond what is necessary.

Second question: the compatibility with Article 101(1) TFEU of the prohibition on members of a selective distribution system for luxury products, who operate as authorised retailers on the market, from using third-party platforms in a discernible manner for online sales

94. By its second question, the referring court asks whether and to what extent Article 101(1) TFEU must be interpreted as meaning that it precludes the prohibition imposed on the members of a selective distribution system for luxury products, who operate as authorised retailers on the market, from using in a discernible manner third-party platforms for internet sales of the products concerned.

95. This question, which is closely linked to the first question, concerns the compatibility with Article 101(1) TFEU of the particular clause in the selective distribution system that is specifically called in question in the main proceedings.

96. However, as I have already stated in answer to the first question, it is the case that selective distribution based on parameters of a qualitative nature does not come under Article 101(1) TFEU, provided that the *Metro* criteria are satisfied.

97. In accordance with the analytical framework resulting from the decision in *Metro SB-Großmärkte* v *Commission*, which was not called in question by the judgment in *Pierre Fabre Dermo-Cosmétique*, (34) it is necessary to examine whether operators were chosen by reference to objective criteria of a qualitative nature, determined uniformly for all potential resellers and applied in a non-discriminatory fashion, whether the properties of the product(s) concerned require, in order to preserve their quality and to ensure that they are correctly used, such a distribution network and, last, whether the conditions defined are consistent with the principle of proportionality.

98. As the first of those conditions is not really an issue in the present case, my analysis will focus on whether the prohibition on authorised distributors using third-party platforms in a discernible manner is legitimate in the light of the qualitative objectives pursued and, if appropriate, whether it is proportionate.

99. As regards, in the first place, the legitimacy of the prohibition at issue, as I stated in my proposed answer to the first question, the objective of preserving the image of luxury and prestige products is always a legitimate objective for the purposes of justifying a selective distribution system of a qualitative nature, such as the system at issue in the main proceedings.

100. It is therefore necessary to determine whether the clause at issue, namely the clause that prohibits authorised distributors from using third-party platforms in a discernible manner, may be specifically justified by the need to preserve the luxury image of the products in question.

101. In that regard, I am of the view that the prohibition on using denominations of third undertakings may be justified by the objective of preserving and monitoring the quality criteria, which requires in particular that certain services be provided when the products are sold and also that the products sold be presented in a specific way.

102. In effect, it must be accepted that the head of a selective distribution network may, for the purposes of preserving the brand image or prestige image (35) of the products which it sells, prohibit its distributors, even its authorised distributors, from using third undertakings in a discernible manner. Such a prohibition may be capable of preserving the guarantees of quality, safety and identification of origin of the products by requiring retailers to supply services of a certain level when the contract products are sold. That prohibition also allows the protection and positioning of the brands to be maintained in the face of the phenomena of counterfeiting and parasitism, which are likely to restrict competition.

103. As the Commission has indicated in paragraph 54 of its Guidelines, the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general.

104. However, in making use of third-party platforms in the context of the distribution of the products, the authorised distributors — and, what is more, the network head — in particular no longer have control over the presentation and image of the products, since, inter alia, those platforms frequently display their logos very prominently at all stages of the purchase of the contract goods.

105. The absolute prohibition imposed on the members of a selective distribution system from using third undertakings in a discernible manner for their internet sales thus constitutes a restriction wholly comparable with the restriction which, according to the Court, is justified and necessary in order to ensure the functioning of a selective distribution system based solely on brick and mortar trade, and is therefore legitimate in the light of competition law, in accordance with the case-law. (36)

106. To conclude, the prohibition on authorised distributors making use of third-party online platforms may be excluded from the scope of Article 101(1) TFEU in that it is likely to improve competition based on qualitative criteria. By expanding on the considerations hitherto applied in relation to selective distribution, that prohibition is likely to improve the luxury image of the products concerned in various respects: not only does it ensure that those products are sold in an environment that meets the qualitative requirements imposed by the head of the distribution network, but it also makes it possible to guard against the phenomena of parasitism, by ensuring that the investments and efforts made by the supplier and by other authorised distributors to improve the quality and image of the products concerned do not benefit other undertakings.

107. That prohibition is clearly distinguished from the clause at issue in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649).

108. It will be recalled that, in the judgment in *Pierre Fabre Dermo-Cosmétique*, the Court ruled that the clause in a contract that absolutely prohibited authorised distributors from selling the contract products online could constitute a restriction by object and therefore be contrary to Article 101(1) TFEU 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'.

109. In the present case, it must be emphasised that, far from imposing an absolute prohibition on online sales, Coty Germany only required its authorised distributors not to sell the contract products via third-party platforms, since, according to the network head, such platforms are not required to comply with the qualitative requirements which it imposes on its authorised distributors.

110. The clause at issue in the main proceedings still allows authorised distributors to distribute the contract products via their own internet sites. Likewise, it does not prohibit those distributors from making use of third-party platforms in a non-discernible manner in order to distribute those products.

111. As the Commission has observed, relying in particular on the results of its sector inquiry, it is apparent that, at this stage of the development of e-commerce, distributors' own online stores are the preferred distribution channel for distribution via the internet. Thus, notwithstanding the increasing significance of third-party platforms in the marketing of retailers' products, the fact that authorised distributors are prohibited from making use in a discernible manner of those platforms cannot, in the present state of development of e-commerce, be assimilated to an outright ban on or a substantial restriction of internet sales.

112. In the second place, it seems to me that the file submitted to the Court does not permit the conclusion that at present such a prohibition must be generally regarded as disproportionate to the objective pursued.

113. It should be emphasised that, whereas the supplier — the network head — is in a position to impose certain obligations on its authorised distributors because of the contractual relationship between them, and thus to exercise a certain control over the distribution channels used for its products, it is not in a position to exercise control over the distribution of its products through third-party platforms. From that aspect, the obligation at issue may appear to be an appropriate means of achieving the objectives pursued by Coty Germany.

114. Admittedly, it cannot be denied that online platforms, such as the platform at issue in the main proceedings, are capable of devising methods that ensure that the products concerned are represented in an appealing manner, just as authorised distributors do. However, compliance with the qualitative requirements which may be lawfully imposed in the context of a selective distribution system can be effectively ensured only if the internet sales environment is devised by authorised distributors, who are contractually linked with the supplier/head of the distribution network, and not by a third-party operator, whose practices escape the influence of that supplier.

Interim conclusion

115. Therefore, provided that it is applied in a non-discriminatory fashion and is objectively justified by the nature of the contract products — aspects which do not seem to be called in question in the present case, but which in any event will have to be determined by the referring court — the clause at issue may be considered to be compatible with Article 101(1) TFEU.

116. Even on the assumption that it might be concluded in the present case that the clause at issue could be caught by Article 101(1) TFEU, owing in particular to failure to comply with the *Metro* criteria, it will still be necessary to examine whether the clause has an effect restrictive of competition, and in particular to determine whether it amounts to a restriction 'by object' within the meaning of that provision.

117. On the latter point, and unlike the contractual clause at issue in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the prohibition at issue in the present case is in my view wholly incapable of being classified as a 'restriction by object' within the meaning of Article 101(1) TFEU, given that that concept must be interpreted restrictively. It is accepted that the concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a *sufficient degree of harm* to competition to render an examination of their effects unnecessary. (37)

118. In fact, unlike the absolute ban imposed on authorised distributors making use of the internet in order to distribute the contract products, a prohibition on the use of third-party platforms does not — at least at this stage of the development of e-commerce, which may undergo changes in the shorter or longer term — have such a degree of harm to competition.

119. In addition, and still in the event that it should be concluded that the clause at issue is indeed caught by Article 101 TFEU and that, moreover, it is restrictive of competition, it must be recalled that it is still necessary to

examine whether it might benefit from an exemption under paragraph 3 of that article, and in particular from a block exemption under Regulation No 330/2010, as the third and fourth questions ask the Court to do.

120. Since, as is apparent from the decision for reference, the market share thresholds laid down in Article 3 of Regulation No 330/2010 are not exceeded, if the national court were to conclude that the clause at issue is not compatible with Article 101(1) TFEU, the clause might benefit from an exemption under Article 2 of that regulation (see recital 8 of Regulation No 330/2010). However, that would not be possible if the prohibition at issue constituted a hardcore restriction, within the meaning of Article 4 of that regulation.

121. If the national court should therefore conclude that the prohibition on the use of third-party platforms does not escape the application of Article 101(1) TFEU and that it is prima facie restrictive of competition, the clause at issue of the selective distribution system might still be justified under Article 101(3) TFEU, either on the basis of the block exemption regulation or following a case-by-case analysis, which relates specifically to the cases of exemption provided for in Regulation No 330/2010.

Conclusion

122. Consequently, I propose that the answer to the second question should be that, in order to determine whether a contractual clause incorporating a prohibition on authorised distributors of a distribution network making use in a discernible manner of third-party platforms for online sales is compatible with Article 101(1) TFEU, it is for the referring court to examine whether that contractual clause is dependent on the nature of the product, whether it is determined in a uniform fashion and applied without distinction and whether it goes beyond what is necessary.

Third and fourth questions: the applicability of the block exemption under Article 4(b) and (c) of Regulation No 330/2010

123. By its third and fourth questions, the referring court asks the Court, in essence, whether Article 4 of Regulation No 330/2010 must be interpreted as meaning that the prohibition imposed on the members of a selective distribution system, who operate as retailers on the market, from making use in a discernible manner of third undertakings for internet sales constitutes a restriction of their customers, within the meaning of Article 4(b) of that regulation, and/or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.

124. In fact, although the referring court made reference, in the wording of its third and fourth questions, to the problem of identifying restrictions 'by object' of customers and passive sales, its questions relate in reality, as clearly stated in the decision for reference, to whether, in the event that the selective distribution system were considered to be restrictive of competition within the meaning of Article 101(1) TFEU, it might nonetheless be exempt under Regulation No 330/2010.

125. Accordingly, the only question that arises is whether the clause at issue may be analysed as a restriction of territory and/or customers, or as a restriction of passive sales within the meaning of Regulation No 330/2010.

Preliminary considerations on the scope and ratio legis of Regulation No 330/2010

126. As stated in recital 5 of Regulation No 330/2010, the benefit of the block exemption established by that regulation should be limited to vertical agreements 'for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) [TFEU]'.

127. In order to determine whether a restriction is of such a kind as to benefit from a 'block' exemption, undertakings are first of all requested to carry out an initial assessment of the agreement at issue by reference, in particular, to certain presumptions of incompatibility provided for in Regulation No 330/2010.

128. Article 4 of Regulation No 330/2010 sets out a list of obvious restrictions, described as 'hardcore restrictions', the presence of which means that the benefit of the block exemption must be excluded.

129. As the Court has held, since an undertaking retains the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption. (38)

130. Furthermore, along the lines of the approach advocated by the Commission, it is appropriate, in the interest of foreseeability and legal certainty, that the exceptions to the block exemption referred to, in particular, in Article 4(b) and (c) of Regulation No 330/2010 be easily identifiable and therefore not be dependent on a detailed analysis of the market conditions and the restrictive effects observed on a particular market at a specific time.

131. In effect, it must not be overlooked that the objective pursued by the exemption regulations adopted on the basis of Regulation No 19/65/EEC (39) lies, in particular, in the need to allow the undertakings concerned to assess for themselves the compatibility of their conduct with the competition rules.

132. The pursuit of that objective would be undermined if, for the purposes of classifying the measures adopted by undertakings as vertical agreements having as their 'object' the restriction of certain types of sales within the meaning of Article 4(b) and (c) of Regulation No 330/2010, those undertakings were required to conduct a sophisticated and thorough examination of the restrictive effects of those measures on competition in the light of the market situation and the position of those undertakings.

133. As I have already said, it is necessary to distinguish the exercise consisting in identifying a 'restriction of competition by object' within the meaning of Article 101(1) TFEU and the characterisation, for the purposes of the application of a block exemption regulation, of certain types of conduct as *hardcore restrictions* — in this instance those referred to in Article 4(b) and (c) of Regulation No 330/2010.

134. The fact nonetheless remains that, in both cases, it is a matter of identifying the conduct that is presumed to be particularly harmful for competition by reference to the assessment of the *immediate* economic and legal context of the measures adopted by the undertakings.

135. In that regard, it should be borne in mind that the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by

their very nature, and taking the experience gained into account, as being harmful to the proper functioning of normal competition. (40) As for the rationale of Article 4 of Regulation No 330/2010, which identifies a number of hardcore restrictions, it is based on the idea, set out in recital 10 of that regulation, that 'vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned'.

136. Thus, along the lines of the approach taken in the identification of a restriction by object within the meaning of Article 101(1) TFEU, it is necessary, in order to determine whether a contractual clause has as its 'object the restriction' of the territory into which, or of the customers to whom, the distributor may sell (Article 4(b) of Regulation No 330/2010), or of active or passive sales by the distributor to end users (Article 4(c) of that regulation), to refer to the terms of the contractual provisions concerned and to their objectives, examined in their immediate economic and legal context. I would point out, indeed, that the objective of facilitating the self-assessment exercise required of the undertakings concerned would be undermined if, in order to identify the hardcore restrictions within the meaning of Article 4 of Regulation No 330/2010, the undertakings had to carry out a thorough examination, employing, in particular, a counterfactual analysis, of the effects of the proposed measures on the structure and operational conditions of the market or markets concerned.

137. Furthermore, as the Commission has correctly observed, it must be emphasised that both Article 4(b) of Regulation No 330/2010 and Article 4(c) of that regulation must, like the provisions of the previously applicable block exemption regulation, be seen in the context of the more general and fundamental objective of *combating the phenomena of market foreclosure*.

138. Those provisions must thus be seen as being intended to exclude from the benefit of the block exemption certain contractual clauses designed to restrict *the territory into which, or the customers to whom*, the distributor may sell. On the other hand, it seems to me that those provisions cannot be interpreted as excluding from the benefit of the block exemption restrictions that determine the methods whereby the products can be sold. (41) In my view, it must be borne in mind that the head of a selective distribution network must be able to enjoy great freedom in defining the methods whereby those products can be distributed; these are all factors designed to stimulate innovation and the quality of the services provided to customers that are capable of having pro-competitive effects. As stated in paragraph 54 of the Guidelines, under the block exemption regulation, the supplier may require quality standards for the use of the internet site to resell its goods, as it would for a brick and mortar shop.

139. It is in the light of those preliminary points that I shall examine the third and fourth questions in turn.

Third question: the existence of a restriction of the retailer's customer base

140. Under Article 4(b) of Regulation No 330/2010, the block exemption provided for in Article 2 of that regulation is not to apply to agreements 'which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: … the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services'.

141. As stated in paragraph 50 of the Guidelines, that provision refers to market-sharing or customer-sharing measures, which tend to partition the markets.

142. In this instance, there is nothing in the wording of the clause at issue, which merely prohibits authorised distributors from making use in a discernible manner of third-party platforms, to indicate that it must be classified in such terms.

143. As the referring court has observed, it is not possible a priori to identify a customer group or a particular market to which users of third-party platforms would correspond.

144. To my mind, a restriction of customers or of the market can be identified only where it is apparent that, owing to the prohibition at issue and notwithstanding that its products can still be accessed via its own website, the authorised distributor is exposed to a loss of market or of customers.

145. As regards, first of all, the *content* of the clause, it requires that internet sales be conducted through an electronic shop window of the retailer's store or on a third-party site provided that that is not discernible. That clause therefore does not preclude all online sales, but only one of a number of ways of reaching customers via the internet. The content of the clause does not as such have such a market-partitioning effect.

146. Unlike the clause at issue in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the clause at issue in the present case authorises the use of the internet as a distribution channel, provided that the retailer conducts its online business via an 'electronic shop window' of the authorised store or in a non-discernible manner via a third-party site, and complies with a set of provisions in order to preserve the luxury character of the products.

147. As the referring court has observed, in reality that prohibition does not prevent authorised distributors from working with third parties for advertising purposes on the internet. As that prohibition did not prevent those online distributors from being referenced on the internet, their potential customers were still able to access, via the internet, the offer of the authorised distributors, for example by using search engines.

148. As regards, next, the stated *objective* of that clause, it consists in preserving the luxury character of the contract products by requiring that the online business be conducted by means of an 'electronic shop window' of the retailer's store. Here again, the prohibition on the authorised distributors making use of third-party platforms in a discernible manner does not on the face of it have as its object to partition the market by limiting the territory into which, or the customers to whom, the authorised distributor(s) are permitted to sell.

149. Last, as regards the *economic and legal context*, it is apparent from the information submitted to the Court, and in particular from the results of the e-commerce sector inquiry, that, unlike the authorised distributors' own online shops, the use of third-party marketplaces or platforms, although it varies considerably from one country to another and from one product to another, is not necessarily a significant distribution channel. The prohibition imposed on retailers from making use of such platforms cannot be compared with an outright ban on online sales at issue in the case of *Pierre Fabre Dermo-Cosmétique*.

150. Furthermore, there is no reason to conclude in the present case that the clause at issue has the effect of partitioning territories or of limiting access to certain customers. In that context, it has not been established, at this stage of the 'experience gained', that users of the third-party platforms in questions constituted, generally and independently of the specific features of a given market, a definable customer base, in such a way that it may be concluded that the clause at issue results in customer sharing within the meaning of Article 4(b) of Regulation No 330/2010.

151. Having regard to all of those considerations, I propose that the answer to the third question should be that the prohibition imposed on the members of a selective distribution system who operate as retailers on the market from making use in a discernible manner of third undertakings for internet sales does not constitute a restriction of the retailer's customers within the meaning of Article 4(b) of Regulation No 330/2010.

Fourth question: the existence of a restriction of passive sales to end users

152. By its fourth question, the referring court asks whether Article 4(c) of Regulation No 330/2010 must be interpreted as meaning that a prohibition imposed on the members of selective distribution system, who operate as retailers on the market, of making use in a discernible manner of third undertakings for internet sales constitutes a restriction of passive sales to end users.

153. Further to the considerations which I have set out above, in order to determine whether the contractual clause at issue may be analysed as a clause having as its object the restriction of passive sales to end users, it is necessary to ascertain whether that clause may, having regard to its wording, its objective and the economic and legal context of which it forms part, be regarded as being intrinsically of such a kind as to harm passive sales, namely sales made following unsolicited requests from individual customers.

154. In my view it cannot be inferred from the file submitted to the Court that the clause in question must be analysed in that way.

155. As I have already stated, the contractual clause at issue does not prohibit all online sales, unlike the clause referred to in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649). It authorises that distribution channel, provided that the distributor sells the products in question via an electronic shop window belonging to the authorised distributor or does so in a non-discernible manner on a third-party site and that it complies with a number of provisions designed to preserve the manufacturer's brand image.

156. In the light of those considerations, I propose that the answer to the fourth question should be that the prohibition imposed on the members of a selective distribution system, who operate as retailers on the market, from making use in a discernible manner of third undertakings for internet sales does not constitute a restriction of passive sales to end users within the meaning of Article 4(c) of Regulation No 330/2010.

Conclusion

157. Having regard to the foregoing considerations, I propose that the Court answer the questions referred by the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) as follows:

Selective distribution systems relating to the distribution of luxury and prestige products and mainly intended to preserve the 'luxury image' of those products are an aspect of competition which is compatible with Article 101(1) TFEU provided that resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner for all potential resellers, that the nature of the product in question, including the prestige image, requires selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and that the criteria established do not go beyond what is necessary.

In order to determine whether a contractual clause incorporating a prohibition on authorised distributors of a distribution network making use in a discernible manner of third-party platforms for online sales is compatible with Article 101(1) TFEU, it is for the referring court to examine whether that contractual clause is dependent on the nature of the product, whether it is determined in a uniform fashion and applied without distinction and whether it goes beyond what is necessary.

The prohibition imposed on the members of a selective distribution system who operate as retailers on the market from making use in a discernible manner of third undertakings for internet sales does not constitute a restriction of the retailer's customers within the meaning of Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) on the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices.

The prohibition imposed on the members of a selective distribution system, who operate as retailers on the market, from making use in a discernible manner of third undertakings for internet sales does not constitute a restriction of passive sales to end users within the meaning of Article 4(c) of Regulation No 330/2010.

Original language: French.

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2 The best known entities include, for example, Amazon, eBay or again PriceMinister. In its Final report on the E-commerce Sector Inquiry, published on 10 May 2017 (COM(2017) 229 final), the European Commission observed, however, that third-party marketplaces/platforms played a more important role in some countries, such as Germany

(62% of retailers who had participated in the inquiry use marketplaces), the United Kingdom (43%) and Poland (36%), by comparison with other countries such as Italy and Austria (13%) and Belgium (4%). The report also found that third-party platforms are more important as a sales channel for smaller and medium-sized retailers than for large retailers.

3 Apart from the decisions giving rise to the present reference for a preliminary ruling, mention should be made of, for example, the decisions previously adopted by the German courts and competition authorities (see, in particular, judgments of the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) of 19 September 2013, in *Scout* (U 8/09 Kart) and of the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) of 22 December 2015 in *Deuter* (U 84/14), and also of the decisions of the Bundeskartellamt (Federal Competition Authority, Germany) of 27 June 2014 in *Adidas* (B3-137/12) and of 26 August 2015 in *ASICS* (B2-98/11) and French decisions (see, in particular, decision of the Competition Authority No 14-D-07 of 23 July 2014, concerning practices in the brown goods distribution sector, relating in particular to television sets, and judgment of the Cour d'appel de Paris (Court of Appeal, Paris, France) of 2 February 2016, *Caudalie* (No 15/01542)).

4 According to the abovementioned Commission report, selective distribution systems are very widespread in the European Union and are used by a large number of manufacturers. They are not limited to a particular category of goods, but are frequently used for the distribution of 'luxury' brands of goods, such as clothing and shoes, and also cosmetics. In that context, it appears that many distributors report agreements with suppliers that are designed to restrict access to online markets or third-party platforms.

5 Commission Regulation of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

6 Judgment of 13 October 2011 (C-439/09, EU:C:2011:649).

7 OJ 2010 C 130, p. 1, 'the Guidelines'.

8 See judgment of 25 October 1977, Metro SB-Großmärkte v Commission (26/76, EU:C:1977:167, paragraph 21).

9 See, in particular, judgments of 25 October 1983, AEG-Telefunken v Commission (107/82, EU:C:1983:293, paragraph 33), and of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C-439/09, EU:C:2011:649, paragraph 40).

10 See, in particular, Article 1(e) of Regulation No 330/2010.

11 Judgment of 13 July 1966 (56/64 and 58/64, EU:C:1966:41, p. 299).

12 See, in particular, judgment of 25 October 1983, AEG-Telefunken v Commission (107/82, EU:C:1983:293). Paragraph 38 of that judgment thus states that 'such an attitude on the part of the manufacturer does not constitute, on the part of the undertaking, unilateral conduct which … would be exempt from the prohibition [of agreements and concerted practices] … it forms part of the contractual relations between the undertaking and resellers'.

13 That relatively flexible attitude to exclusive distribution agreements could already be found in the case that gave rise to the judgment of 30 June 1966, LTM (56/65, EU:C:1966:38).

14 See judgment of 25 October 1977 (26/76, EU:C:1977:167, paragraph 20).

15 It has been emphasised that the legislation and the case-law relating to vertical agreements have been the subject of a veritable 'Fronde' by writers (see, in that regard, Petit, N., *Droit européen de la concurrence*, Montchrestien, 2013).

16 Among numerous studies, mention should be made, in particular, of Tirole, J., *The Theory of Industrial Organization*, The MIT Press, Cambridge, 1988, in particular p. 186. The author concludes, in particular: 'It seems important for economic theorists to develop a careful classification and operative criteria to determine in which environments certain vertical restraints are likely to lower social welfare.'

17 In fact, in its decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* [551 US 877 (2007)], the Supreme Court of the United States abandoned its '*Dr. Miles*' precedent, under which certain vertical restrictions had up till then been prohibited per se, and expressly adopted a 'rule of reason'. In the words of that decision, 'the Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason'.

18 Judgment of 25 October 1977 (26/76, EU:C:1977:167).

19 See, to that effect, Waelbroeck, M. and Frignani, A., *La droit de la CE — Concurrence*, Éditions de l'Université de Bruxelles, collection 'Commentaire J. Mégret', Brussels, 1997, p. 171.

20 See, in particular, judgments of 25 October 1977, Metro SB-Großmärkte v Commission (26/76, EU:C:1977:167, paragraph 20), and of 11 December 1980, L'Oréal (31/80, EU:C:1980:289, paragraphs 15 and 16). See also judgment of 27 February 1992, Vichy v Commission (T-19/91, EU:T:1992:28, paragraph 32 et seq.).

21 Judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C-439/09, EU:C:2011:649, paragraph 41 and the case-law cited).

22 See in particular, to that effect, judgments of 28 June 2005, Dansk Rørindustri and Others v Commission (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211); of 14 June 2011, Pfleiderer (C-360/09, EU:C:2011:389, paragraph 21); and of 13 December 2012, Expedia (C-226/11, EU:C:2012:795, paragraphs 24 to 31).

23 See, in particular, judgments of 25 October 1977, Metro SB-Großmärkte v Commission (26/76, EU:C:1977:167, paragraphs 20 and 21); of 11 December 1980, L'Oréal (31/80, EU:C:1980:289, paragraphs 15 and 16); of 25 October 1983, AEG-Telefunken v Commission (107/82, EU:C:1983:293, paragraph 35); and of 22 October 1986, Metro v Commission (75/84, EU:C:1986:399, paragraphs 37 and 40).

24 See, in particular, judgments of 12 December 1996, Leclerc v Commission (T-19/92, EU:T:1996:190, paragraphs 111 to 120), and of 12 December 1996, Leclerc v Commission (T-88/92, EU:T:1996:192, paragraphs 106 to 117).

25 See, in particular, judgments of 25 October 1977, Metro SB-Großmärkte v Commission (26/76, EU:C:1977:167, paragraph 20), and of 25 October 1983, AEG-Telefunken v Commission (107/82, EU:C:1983:293, paragraph 33).

26 See, in particular, judgment of 11 December 1980, L'Oréal (31/80, EU:C:1980:289).

27 See, in particular, judgment of 12 December 1996, Leclerc v Commission (T-88/92, EU:T:1996:192, paragraph 109).

28 See, to that effect, in particular, judgments of 23 May 1978, Hoffmann-La Roche (102/77, EU:C:1978:108, paragraph 7), and of 23 April 2009, Copad (C-59/08, EU:C:2009:260, paragraph 22 and the case-law cited).

29 See, especially, judgment of 17 October 1990, HAG GF (C-10/89, EU:C:1990:359, paragraph 13).

30 See, in particular, judgment of 23 April 2009, Copad (C-59/08, EU:C:2009:260, paragraphs 24 to 28).

31 See judgment of 23 April 2009, Copad (C-59/08, EU:C:2009:260, paragraph 29).

32 Reference is made in particular to the examples cited in footnote 3 of this Opinion.

33 The French competition authority had noted, in particular, in the main proceedings, that that ban on internet sales amounted to a limitation on the commercial freedom of Pierre Fabre Dermo-Cosmétique's distributors by excluding a means of marketing its products. Moreover, that prohibition restricted the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers who are not located in the 'physical' trading area of the authorised distributor.

34 Judgment of 13 October 2011 (C-439/09, EU:C:2011:649, paragraphs 41 and 43).

35 In the main proceedings, it is apparent from Clause 1.1 of the selective distribution agreement concluded between Coty Germany and Parfümerie Akzente that the prohibition on the visible use of third-party platforms was specifically intended to preserve the 'luxury nature' of the contract goods.

36 See, in particular, judgments of 25 October 1977, Metro SB-Großmärkte v Commission (26/76, EU:C:1977:167); of 11 December 1980, L'Oréal (31/80, EU:C:1980:289); of 25 October 1983, AEG-Telefunken v Commission (107/82, EU:C:1983:293); and of 23 April 2009, Copad (C-59/08, EU:C:2009:260).

37 See, in particular, judgment of 11 September 2014, CB v Commission (C-67/13 P, EU:C:2014:2204, paragraph 58).

38 Judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C-439/09, EU:C:2011:649, paragraph 57).

39 Council Regulation of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ English Special Edition 1965-1966, p. 35).

40 See, to that effect, judgment of 11 September 2014, CB v Commission (C-67/13 P, EU:C:2014:2204, paragraphs 49 to 52 and the case-law cited, and also paragraph 57). The Court made clear, in particular, that the essential legal criterion for ascertaining whether coordination between undertakings involves a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition.

41 To adopt the approach taken in connection with the application of the rules on free movement of goods, it is not established, in particular, that the measures at issue have a greater effect on sales of products from other Member States (see judgments of 11 December 2003, Deutscher Apothekerverband, C-322/01, EU:C:2003:664, paragraph 74, and of 2 December 2010, Ker-Optika, C-108/09, EU:C:2010:725, paragraph 54 and the case-law cited).