

Online distribution: New horizons

Jan Jeram, White & Case

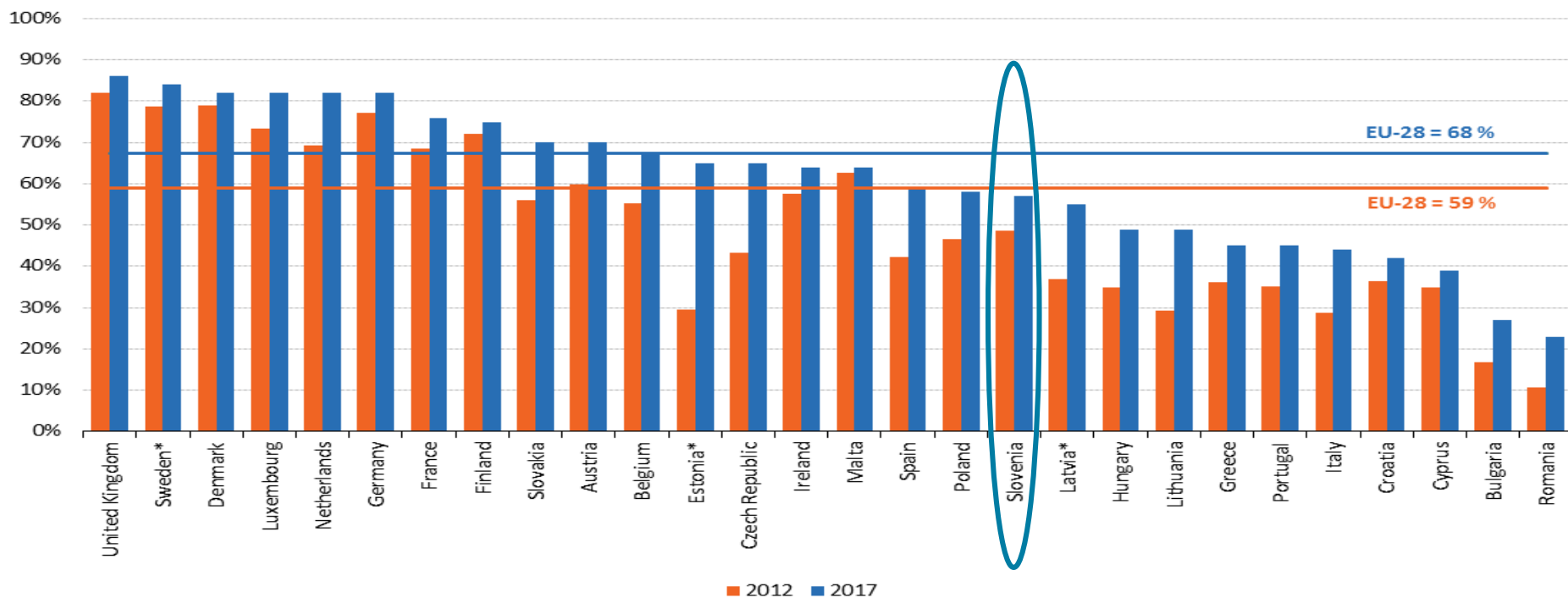
Slovenian Competition Day, September 2018

e-Commerce is booming

- **7 out of 10** internet users made online purchases in 2017
- **Main purchases:** clothes, sporting goods, travel and holiday accommodation, household goods, event tickets and books
- 33% of online shoppers bought **from other EU countries**

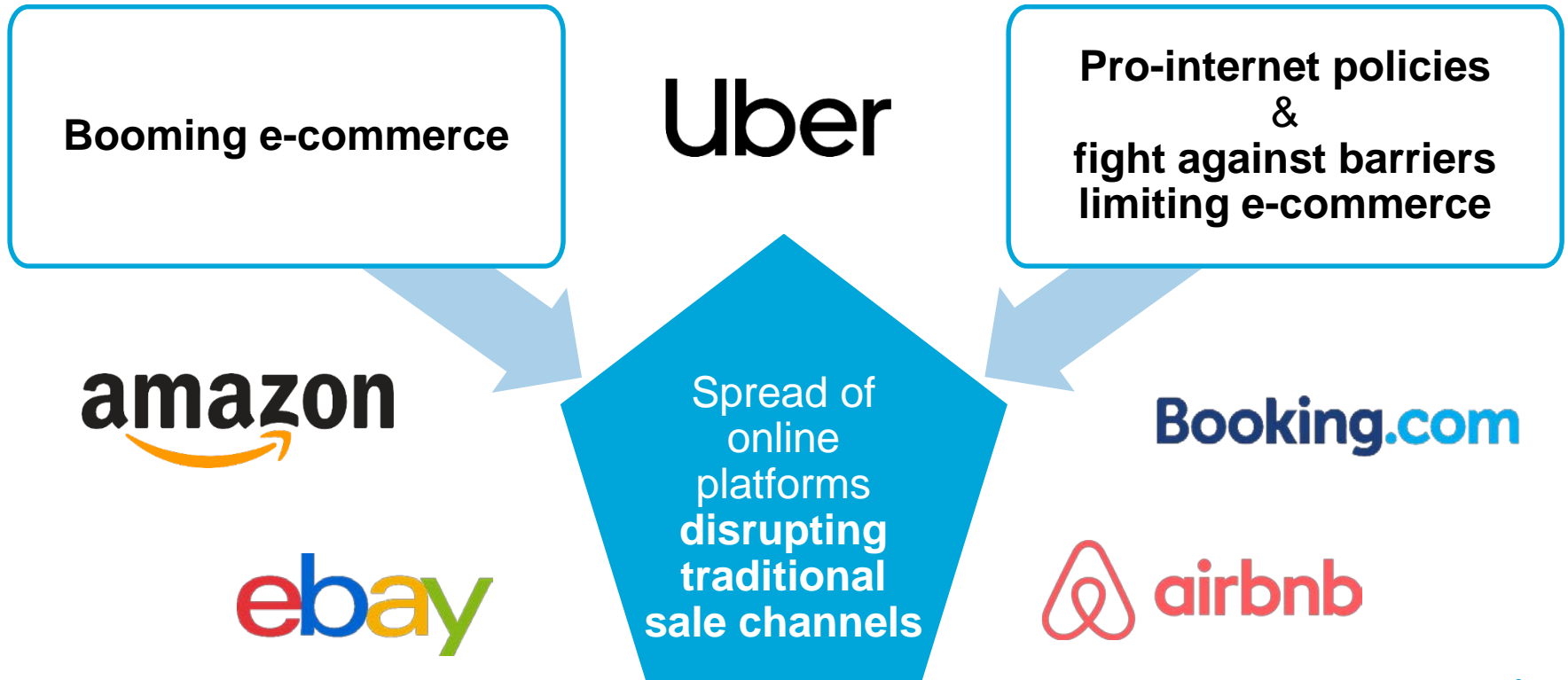


Slovenia: surge still to come



Internet users who bought or ordered goods or services for private use (2012 vs 2017; Eurostat)

Rise of online platforms



Channels to market



e-Commerce seen by manufacturers



Concerns

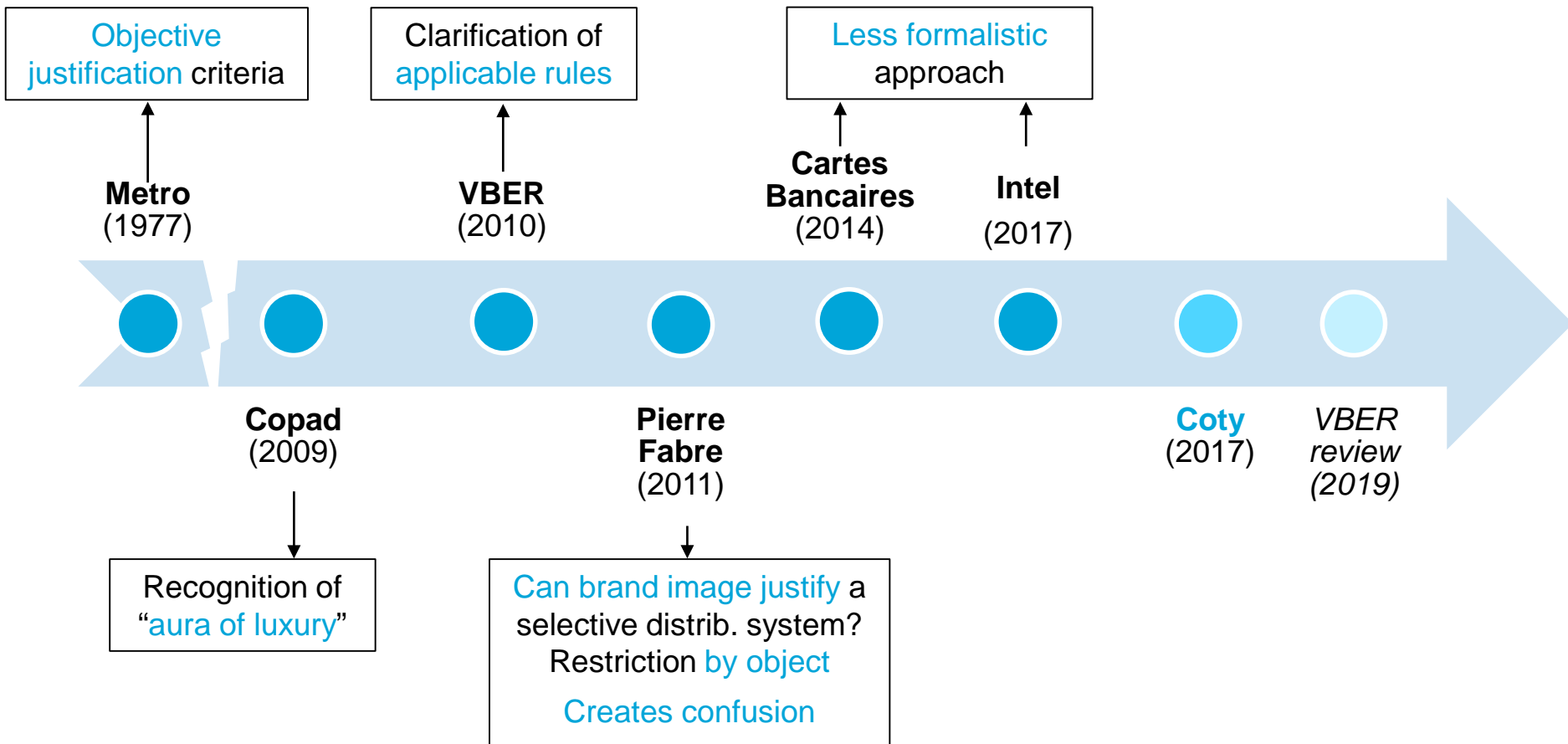
- Increased **price transparency & competition**
 - **Free-riding** behaviour
 - **Loss of control** over the sale of the products
-
- Inadequate **online environments** – damages to **brand reputation**
 - Create a **level playing field** between online and offline
 - **Counterfeit goods**

Reactions

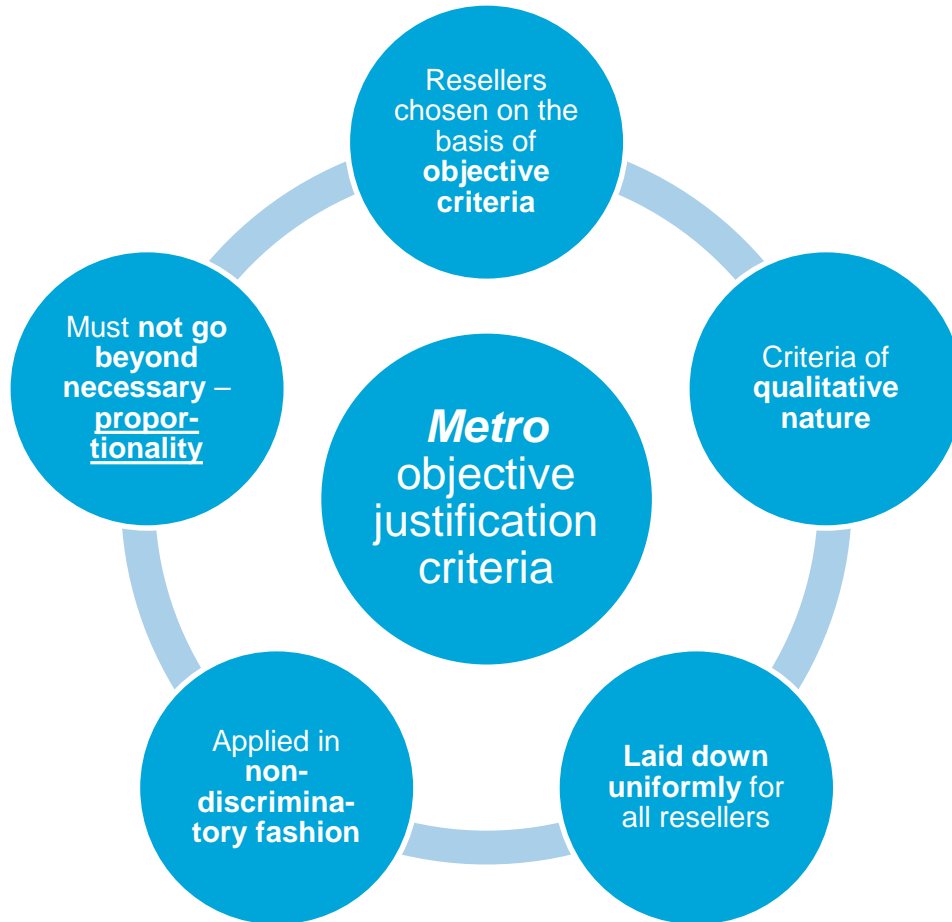
- Seek to **regain control over distribution networks** (quality and price)
 - Increased presence **at retail level** (online retail shops)
 - More (and new types of) **vertical restraints**
-
- Recourse to **selective distribution systems**
 - **Marketplace bans**

Selective distribution systems: Developments

A look into history



Metro set the stage



- **Characteristics of the product** in question **necessitate** such a network to preserve the product's **quality and proper use** (*L'Oreal*)
- **Must be necessary** to the “*continued existence*” of the system (*L'Oreal*)
- “**Aura of luxury**” = quality of the product (*Copad*)

The Pierre Fabre controversy



Pierre Fabre
Dermo-Cosmétique

- **Facts:** Pierre Fabre’s distribution contracts stipulated that sales had to be made **exclusively** in a “**physical space**” and in the **presence of a qualified pharmacist** – *de facto* **absolute ban on internet sales**
- **ECJ** held that, in absence of an objective justification, **blanket bans** covering all internet sales **infringed Article 101 TFEU**

The Pierre Fabre controversy

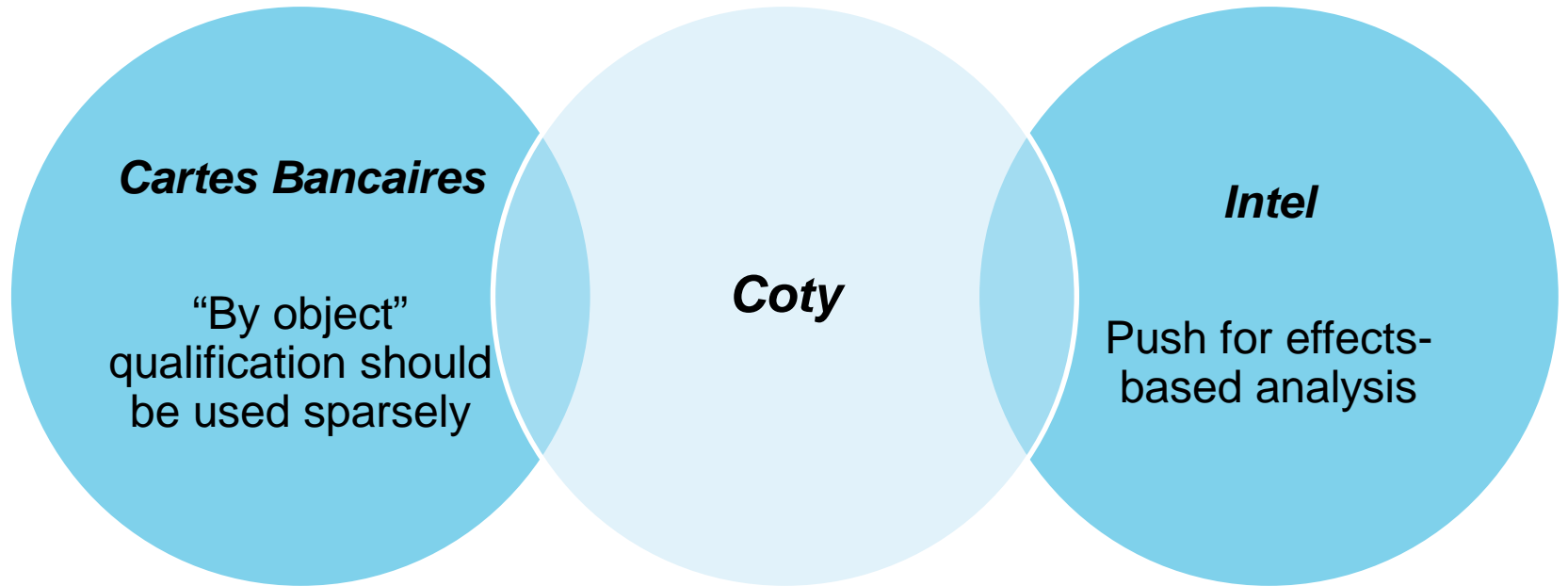


Pierre Fabre
Dermo-Cosmétique

39 As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market. Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

46 The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

Coty set against the background of *Cartes Bancaires* and *Intel*



Coty cosmetics sold on Amazon

- Dispute between **Coty** (producer of luxury cosmetics) and **Parfümerie Akzente** (member of Coty's selective distribution system)
- Coty's **new selective distribution system**
 - Authorised online sales through an electronic shop window of the distributor
 - Prohibited the use of different business names and involvement of **third parties**
- Parfümerie Akzente **refused to sign** and started selling on **Amazon.de**; Coty sued.



The Frankfurt court had some doubts

1. Is a selective distribution system that has as its aim **the distribution of luxury goods** and primarily serves to **ensure a “luxury image”** for the goods **compatible with Art. 101(1)**?
2. Is it compatible with Art. 101(1) if members of a selective distribution system operating at the retail level 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?
3. Is such a restriction a **hardcore restriction under VBER**, either as a restriction of the retailer’s customer group (Art. 4(b)) or its passive sales to end users (Art. 4(c))?

The demise of Pierre Fabre

- “**Aura of luxury**” can be essential for a product’s *quality*
- Selective distribution systems designed to preserve the luxury image **can comply** with Art. 101 TFEU if *Metro* conditions met
- **Sets the record straight** on para. 46 of *Pierre Fabre*:
 - Interpret *Pierre Fabre* in light of the **context**
 - It was about a **specific restriction**, not the validity of the entire system
 - In *Pierre Fabre* – **not luxury goods & total ban** on online sales
 - Para. 46 part of “***interpretative elements***”, not a “*statement of principle*”

AG Wahl's pro-market opinion

- **Economic approach** – trust the self-regulation of manufacturers
- Price competition is **not** “*the only effective form of competition or that to which absolute priority must in all circumstances be accorded.*”
- **Manufacturer's assessment** of what is necessary for its system to function **more important than the product's intrinsic properties**

In *Coty*, the Court of Justice “*confirmed the normal rules*”. *Pierre Fabre* was an “*isolated event*”.

What about the specific ban?

- Specific restraints evaluated in light of the same **objective justification theory** (*Metro* criteria) as the system as a whole
- Was **specific restriction proportionate** in light of the pursued objective?

Appropriate for preserving the luxury image	Not beyond what's necessary
Guarantees exclusive association of the luxury goods with authorised distributors	Not an absolute ban on online sales
Clause's objective " coherent " with aim of system as a whole	Distributors' online shops are still the main online distribution channel
Allows for monitoring of the qualitative criteria – absence of contractual link	More effective to ensure compliance with quality criteria than an authorisation to use platforms subject to certain conditions
Contributes to products' high-end image	

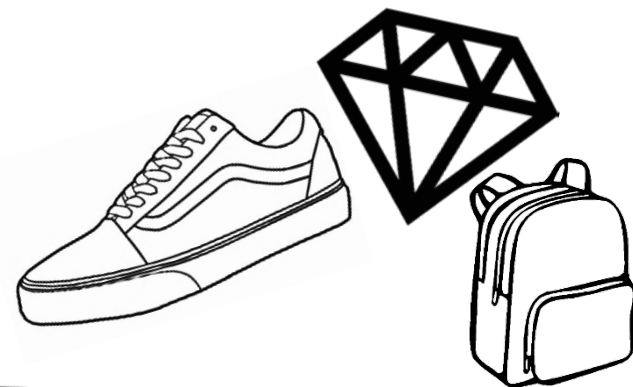
VBER: not a hardcore restriction

- This ban does not restrict (i) the customers to whom authorised distributors can sell the goods; and/or (ii) passive sales to end users:
 - Restricts only a **specific type** of internet sale (different from *Pierre Fabre*)
 - Not possible to circumscribe **third party platform customers** within the group of online purchasers
 - Customers can passively find authorised retailers in other ways:
advertisement on third party marketplaces & online search engines
- Not all internet sales are passive sales?

Is it all about luxury?

- AG Opinion referred to **high quality** and **high technology products**
- ECJ did **not define luxury goods and refrained from explicitly limiting** the judgment to luxury goods
- In the part on VBER, luxury element is not mentioned
- Narrow interpretation would be at odds with:
 - **Vertical Block Exemption Regulation** – Article 4 (hardcore restrictions)

It appears to be broader



“The purpose of a selective distribution system is pro-competitive effects, independent of the nature of the products. Trademark law seeks to protect all producers not only the producers of luxury goods. In my mind, there’s no reason why EU competition law should be different.”

(AG Wahl at Fordham, 5-7 September 2018, MLex)

- And the Commission seems to agree.

What lies ahead?

Open questions

- Vertical restraints a **necessary** part of the online market economy
- Clear rule set for certain restrictions, but what about **variations on a theme**?
 - Prohibition on marketplace in **different market circumstances**;
 - Sale on marketplace in a **non-discernible manner**;
 - **Shop-in-shop** windows on marketplaces;
 - What if **manufacturer itself sells on the marketplace**?
 - Bans on **price comparison engines**.
 - Would it apply *mutadis mutandis* to exclusive distribution systems?
- Keep in mind: economics tells us that vertical restrictions are **rarely bad**

Watch this space

- Commission's current **enforcement wave** might answer some of the **open questions**
- **Recent/ongoing national cases** (*Coty* France, *Asics* Germany, *Ping* UK)
- **Divergent views** and different restraints **across Europe** – role of the **ECN**
- Settle the **“by object” or “by effect” question**.
- Will **evolution of the market** require the rules to change?
- What to expect from the **review of VBER and Guidelines** that starts in 2019?

Questions?

Thank you

White & Case

62 rue de la Loi Wetstraat 62

1040 Brussels

Belgium

T + 32 2 219 16 20

F + 32 2 219 16 26