E-commerce after the Sector enquiry and Coty

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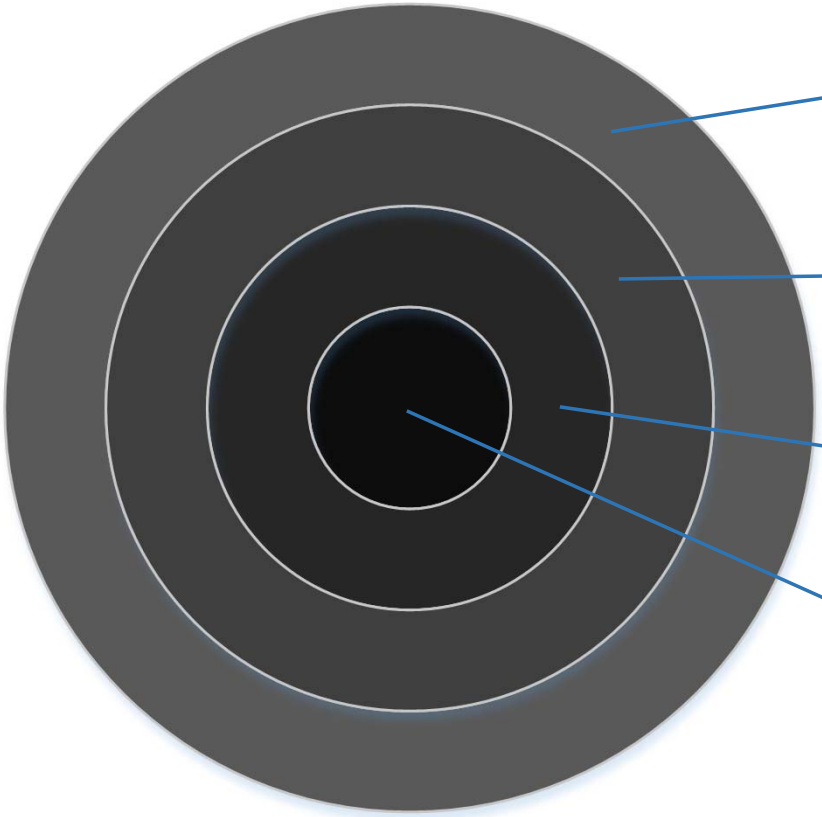
Summary



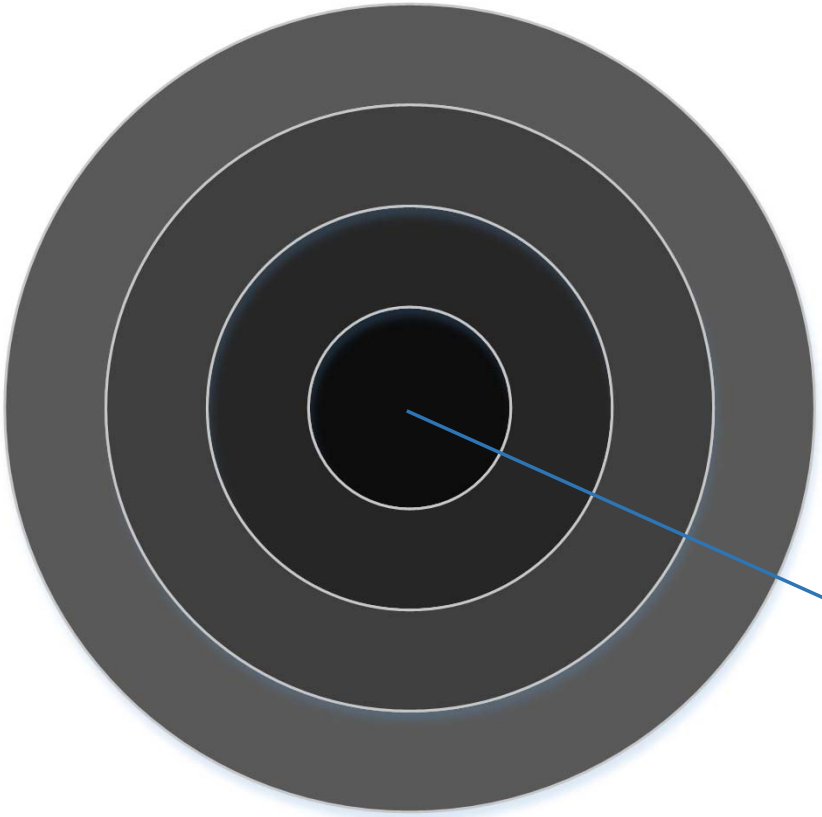
E-commerce: what next?

The logic of *Coty*

Selective distribution after *Coty*

The ruling in *Coty*

Summary



The ruling in *Coty*

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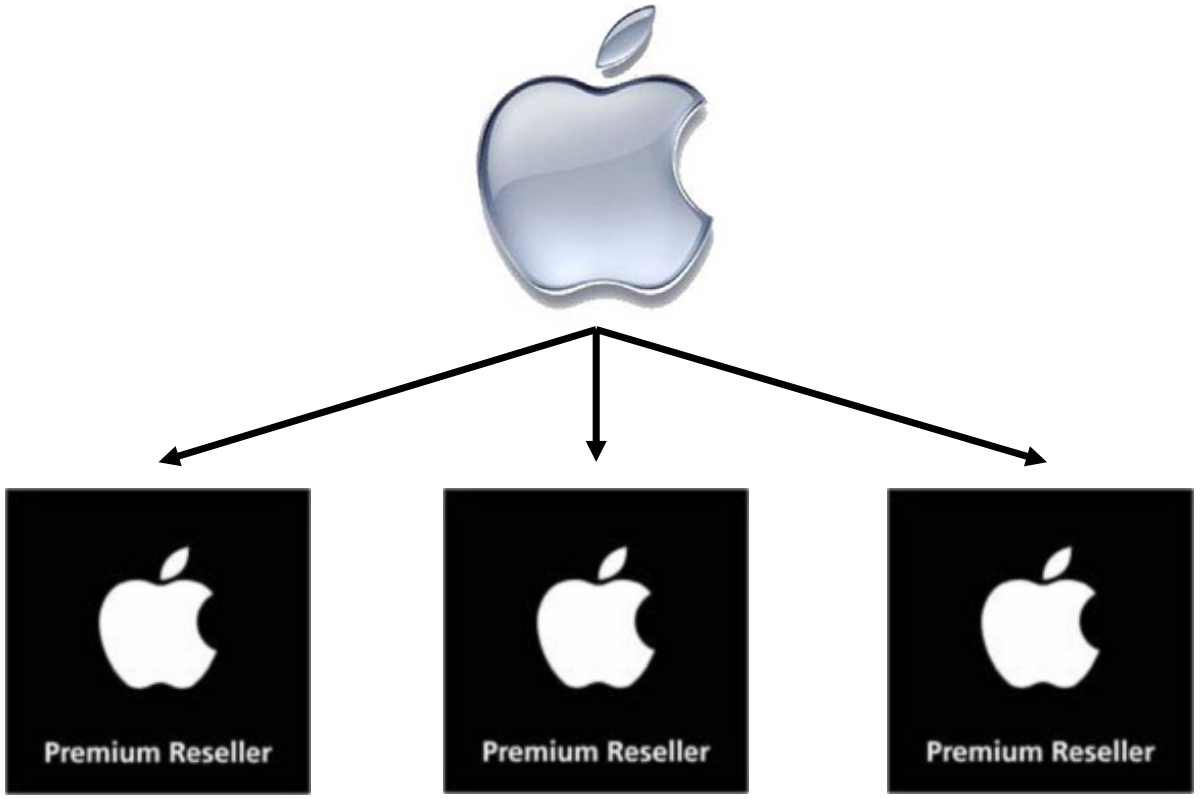


Qualitative selective distribution (size, training of the employees)

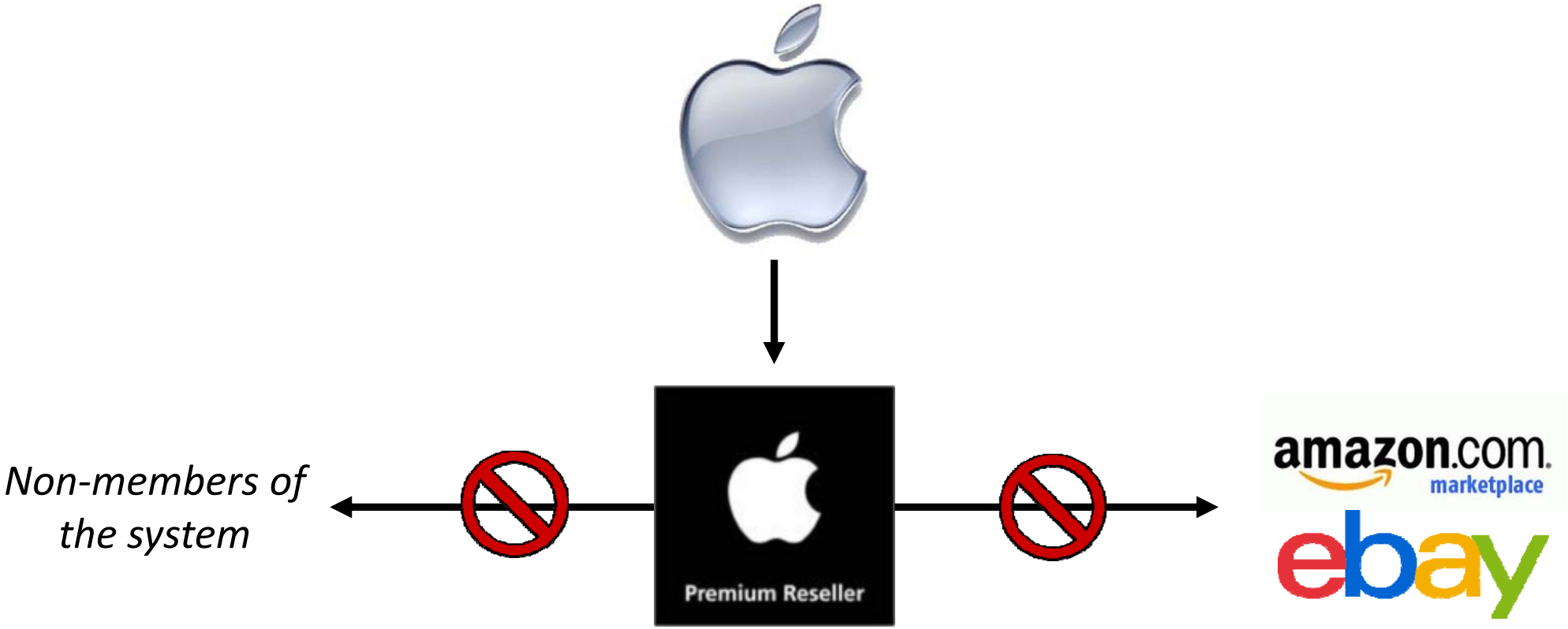
The ruling in *Coty*

- What we knew before *Coty*:
  - Under certain conditions, selective distribution systems are presumptively compatible with Article 101(1) TFEU
  - If these conditions are fulfilled, these systems are neither an object nor an effect restriction
  - These conditions were laid down in *Metro I*:
    - The nature of the product requires the use of selective distribution
    - The members of the selective distribution system are chosen on the basis of purely qualitative criteria that are applied in an objective and non-discriminatory manner
    - The conditions do not go beyond what is necessary to implement the system

The ruling in *Coty*

- What we were uncertain about before *Coty*:
  - What are the products that require the use of the selective distribution system?
    - The case law and the administrative practice suggested that these products are high-technology and luxury products
    - However, *Pierre Fabre* created confusion in this regard: is the protection of the prestigious image of a product not a legitimate requirement?
  - How are the *Metro I* conditions transposed to the online world?
    - The online world requires the adaptation of some of the conditions
    - This is the case, inter alia, of online marketplaces

The ruling in *Coty*



The ruling in *Coty*

‘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’.

Case C-439/09, *Pierre Fabre*

The ruling in *Coty*

- *Coty* confirms that the protection of the luxury image of a product can justify the setting up of a selective distribution system
  - This is in line with pre-*Pierre Fabre* case law – *Givenchy*, *Yves Saint-Laurent*, *Lancôme*
  - It is also in line with the case law on trade marks, namely *Copad*
  - Accordingly, the dictum in *Pierre Fabre* is confined to the specific factual circumstances of that case (an outright ban on online sales)

The ruling in *Coty*

‘25. With particular regard to the question whether selective distribution may be considered necessary in respect of luxury goods, it must be recalled that the Court has already held that the quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods (see, to that effect, judgment of 23 April 2009, Copad, C-59/08, EU:C:2009:260, paragraphs 24 to 26 and the case-law cited)’.

Case C-230/16, *Coty*

The ruling in *Coty*

- The Court also takes the view that a ban on the use of online marketplaces is appropriate and proportionate
  - It accepts that the objective purpose of such clauses is to preserve the luxury image of the products
  - A ban on the use of online marketplaces does not go beyond what is necessary to achieve the said objective
- By the same token, it also concludes that the ban is not a 'hardcore restraint' within the meaning of Regulation 330/2010

The ruling in *Coty*

‘56. In particular, given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, the authorisation given to those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue in the main proceedings’.

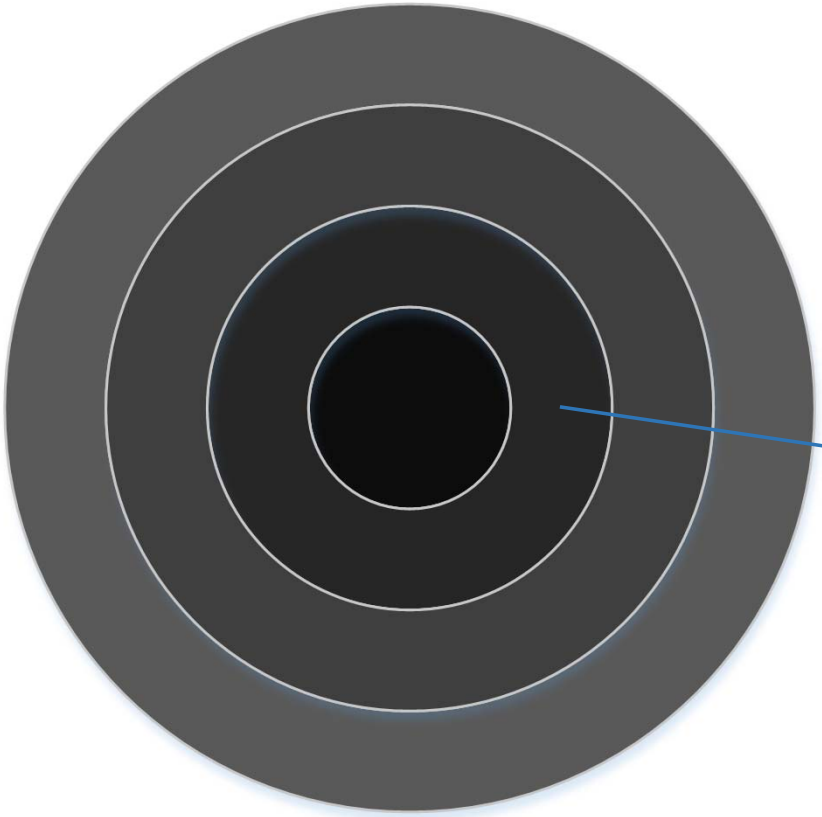
Case C-230/16, *Coty*

The ruling in *Coty*

‘68. In those circumstances, even if it restricts a specific kind of internet sale, a prohibition such as that at issue in the main proceedings does not amount to a restriction of the customers of distributors, within the meaning of Article 4(b) of Regulation No 330/2010, or a restriction of authorised distributors’ passive sales to end users, within the meaning of Article 4(c) of that regulation’.

Case C-230/16, *Coty*

Summary



Selective distribution after *Coty*

Selective distribution after *Coty*

- After *Coty*, it is clear that an online marketplace ban is not caught by Article 101(1) TFEU where the other *Metro I* conditions are fulfilled
- How about other instances where the product would not qualify as a 'luxury product'? Two open questions:
  - Would an online market place ban be deemed restrictive by object under Article 101(1) TFEU?
  - Would an online marketplace ban fall within the scope of Regulation 330/2010?

Selective distribution after *Coty*

- There are reasons to believe that an online marketplace ban would not be a 'by object' breach irrespective of the nature of the product
  - *Irrespective of the nature of the product, the 'objective' of the measures is in any event the same:* ***brand image***
  - The preservation of the image of the product goes beyond 'luxury' or 'prestige': manufacturers may value other factors (e.g. reliability, quality)
  - For instance, Asics may not be a luxury product, but brand image may be essential (end-users value design, technology, health considerations)
  - Think of Apple: again, maybe not a luxury product, but brand image crucial to its success as a company (and the resulting innovation and consumer benefit)

Selective distribution after *Coty*

- Nothing in *Coty* suggests that an online marketplace ban becomes a 'hardcore restraint' if it does not concern a luxury product
  - The Court reaches its conclusion in light of the objective of the ban and its operation; the nature of the product seems irrelevant in this regard
  - Nothing in Regulation 330/2010, nor in the Guidelines is compatible with such an interpretation of the law
  - The European Commission, in a recent brief, also considers that the block exemption covers agreements irrespective of the nature of the product

Selective distribution after *Coty*

Nature of the product	Outcome	Hard-core restriction under VBER?	Block exemptiom applies?
Luxury or hi-tech product (*Metro I*)	The ban is presumptively lawful	No	Yes
Other products	The ban is not by object, case-by-case	No	Yes

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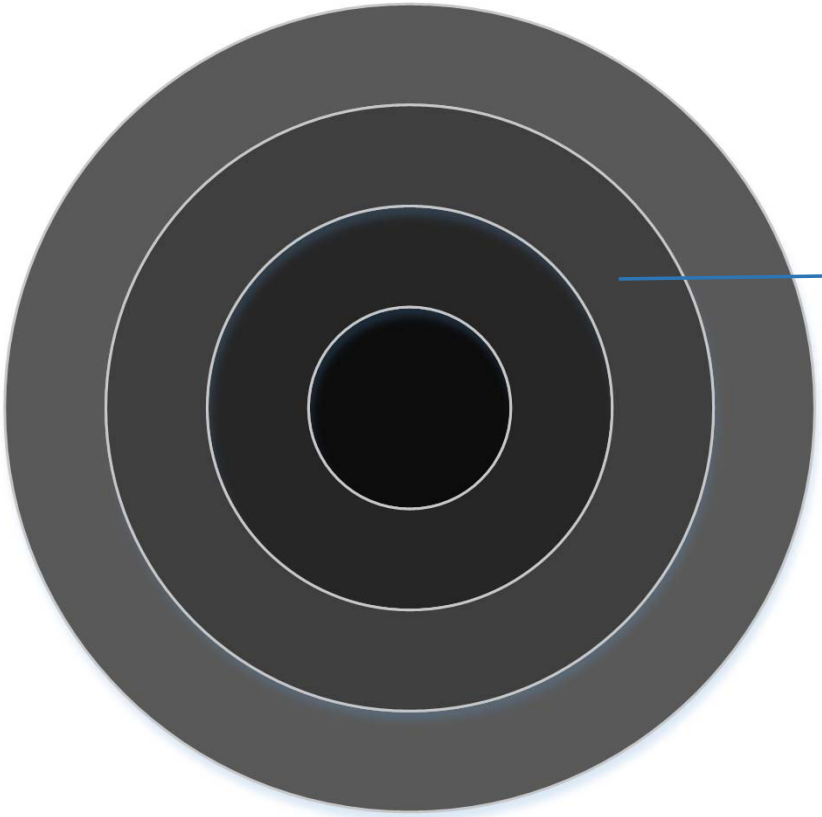

The logic of *Coty*

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The logic of *Coty*

- The logic of *Coty* is compatible with a well-established line of case law concerning the protection of a firm's brand image
  - Precedents show that clauses aimed at preserving the intangible property (or goodwill) of a firm do not violate Article 101(1) TFEU by their nature
  - These precedents are an expression of a broader principle: the counterfactual
    - An agreement is only caught by Article 101(1) TFEU if it restricts competition that would otherwise have existed
    - Would a firm rely on third-party distributors if this method did not allow it to convey and preserve a particular brand image?

The logic of *Coty*

- The Court has long understood that the protection of intangible property may be necessary for the operation of an agreement:
  - Franchising would not take place if the franchisor were not in a position to protect the uniformity and reputation of the distribution system (*Pronuptia*)
  - A non-compete clause may be objectively necessary to allow the buyer to appropriate the goodwill associated with a business (*Remia*)
  - The licensor of protected plant variety may prohibit the export of basic seed to protect the unique and stable character of its product (*Erauw-Jacquery*)
- There is every reason to examine selective distribution systems in accordance with the same principles

The logic of *Coty*

The logic of *Coty*

- Some basic economic principles helps understand why *Coty*-like issues should not be seen as 'by object' infringements
  - As a matter of principle, a manufacturer would be interested in selling as much as possible to resellers
  - By the same token, it would be interested in ensuring that resellers receive maximum exposure
  - An online marketplace ban is thus a counterintuitive conduct for a manufacturer to adopt
    - The fact that the manufacturer behaves in this way suggests that the rationale for the ban is pro-competitive (it would otherwise be irrational)
    - Similar examples include the licensing of football games by leagues

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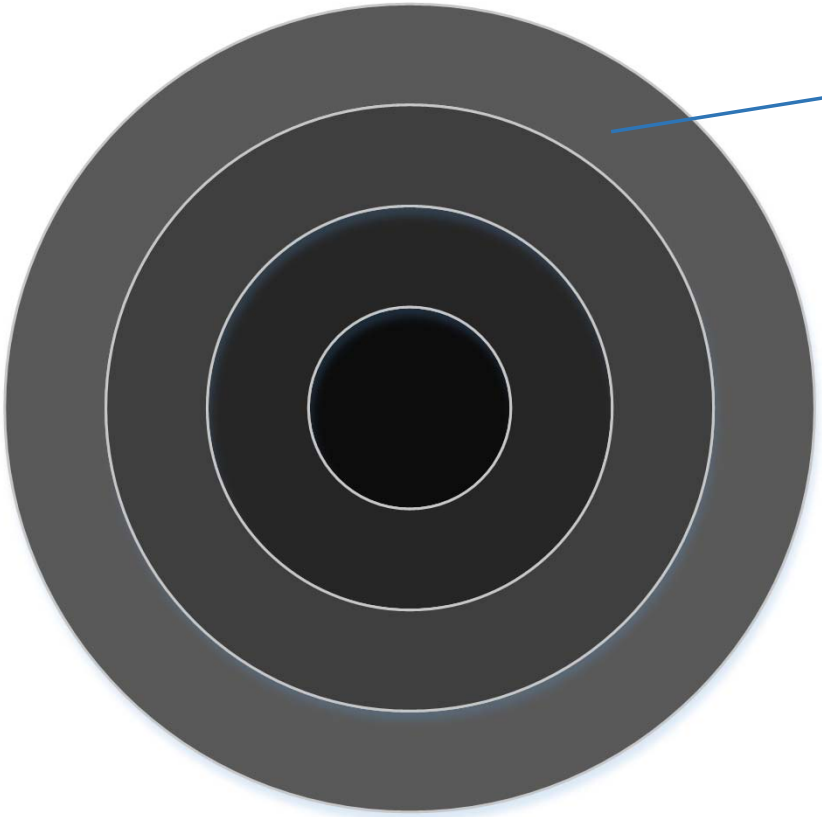

E-commerce: what next?

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- *Coty* and its underlying logic will be put to test for two main reasons
  - There is a disagreement between the Bundeskartellamt and German courts, on the one hand, and courts and authorities elsewhere, on the other
    - In the aftermath of *Coty*, Asics lost a case on a clause that was in every way comparable to an online marketplace ban (price comparison site)
    - On the other hand, French and Dutch courts have favoured an interpretation of *Coty* that is consistent with that of the Commission
  - What is necessary to protect intangible property may vary from case to case
    - The Court (*Coditel II*) distinguishes between intangible property incorporated in a physical good (e.g. a shoe) and intangible property that is not (e.g. a film)
    - This difference has emerged again in the context of the pay-TV case (and see recent dawn raids)

E-commerce: what next?

- Against this background, the following developments seem likely:
  - It looks like disagreements about the scope and logic of *Coty* will eventually reach the Court → more likely that the Court will follow the Commission
  - Clauses analogous to the one at stake in Coty (e.g. ban on the use of price comparison websites) will be given the same legal treatment
  - It is reasonable to expect that most competition authorities will focus their enforcement efforts to fight outright bans on online sales

E-commerce: what next?

- Moving forward, what principles should inform legal analysis?
  - Price is not the only parameter that matters in competition law analysis (*Metro II*)
  - Favouring price competition at the expense of other parameters inevitably has unintended consequences (always consider the counterfactual!)
  - *More than ever, companies compete (successfully!) on parameters other than price* (e.g. Apple)
  - Thanks to the Internet, intra-brand competition is more intense than ever
  - Above all, competition policy should be consistent