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Vertical Agreements in an Online Context: The Protection of Luxury Image in Selective Distribution Under European Competition Law

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INTRODUZIONE

Questa tesi ha lo scopo di fornire una chiara panoramica della normativa *antitrust* europea in materia di distribuzione selettiva, in particolare, nei riguardi di quella effettuata da aziende che operano nel mercato del lusso nel contesto delle vendite *online*. L'obiettivo finale è quello di fornire uno studio chiaro delle attuali leggi che disciplinano questo contesto, facendo attenti riferimenti ai precedenti delle corti europee ed extraeuropee. Sarà inoltre utile effettuare un'analisi delle novità introdotte dal nuovo Regolamento sugli Accordi Verticali (VBER) e le relative Linee Guida promulgate dalla Commissione Europea. Infine, verranno esplorati i dubbi che ad oggi rimangono irrisolti.

L'analisi dell'attuale contesto *antitrust* europeo e delle disposizioni applicabili agli accordi di distribuzione verticale, situato all'interno del cosiddetto mercato comune, parte innanzitutto dal Trattato sull'Unione europea (TUE) e dal Trattato sul funzionamento dell'Unione europea (TFUE). L'articolo 101 di quest'ultimo costituisce una delle colonne portanti del diritto antitrust. Esso vieta tutti gli accordi tra imprese, le decisioni e le pratiche che impediscono, limitano o falsano la concorrenza nel mercato interno. Impresa, soggetta all'applicazione dell'articolo 101, intesa come qualsiasi entità impegnata in un'attività economica.

Gli accordi tra imprese vengono solitamente distinti tra quelli aventi natura orizzontale e verticale; questi ultimi sono conclusi tra imprese che operano a diversi livelli della catena di distribuzione, pertanto non tra concorrenti, ma piuttosto tra *partner* che lavorano per massimizzare i profitti. Simili accordi possono generare effetti positivi (*e.g.* un aumento delle vendite e una riduzione dei costi di distribuzione) ma anche negativi, comportando una evidente riduzione della concorrenza.

In genere, gli accordi verticali sono guardati con maggior favore dal legislatore e le Linee Guida fornite dalla Commissione elencano esempi di restrizioni verticali in essi contenute ed i loro possibili effetti.

Onde evitare di compiere volta per volta una singola analisi di ogni accordo verticale, e al fine di escludere quelli che non hanno un effetto apprezzabile sul commercio tra gli Stati membri o che non limitano in modo significativo la concorrenza, la Commissione Europea emette dei regolamenti di esenzione per categoria (VBER), per ultimo il Regolamento 720/2022, che applicano una presunzione generale di legalità a determinate categorie di accordi. Tali accordi sono dunque esentati dall'ambito di applicazione dell'articolo 101 paragrafo 1 del TFUE senza la necessità di soddisfare tutti i requisiti del paragrafo 3 del medesimo articolo.

Il VBER utilizza *in primis* soglie di quota per valutare un accordo verticale e determinare se esso possa beneficiare dell'esenzione per categoria. La quota di mercato del fornitore e dell'acquirente non devono superare il 30% affinché l'accordo rientri nel campo applicativo del regolamento. Tuttavia, qualora l'accordo contenga alcune restrizioni fondamentali, come l'imposizione di prezzi di rivendita o la spartizione del mercato, non potrà essere coperto dall'esenzione. Nei casi in cui non si applichi il VBER, si procederà a un'analisi caso per caso.

Gli accordi verticali, oggetto del VBER, ruotano principalmente attorno ad alcuni modelli di distribuzione, che "dominano" il settore. Gli accordi di distribuzione possono contenere varie restrizioni e assumere forme diverse; una di queste è l'accordo di distribuzione esclusiva, in cui un fornitore sceglie un distributore come punto vendita esclusivo dei propri prodotti in un territorio definito o per un gruppo specifico di clienti. Questi accordi devono rispettare i limiti generali stabiliti dal VBER e sono consentiti nonostante restringano in un certo qual modo la concorrenza per rispondere a specifici problemi del mercato e creare efficienze.

L'altro sistema di distribuzione principale è quello selettivo, basato su criteri qualitativi o quantitativi, o su una combinazione di entrambi. I criteri qualitativi limitano indirettamente il numero di distributori, imponendo condizioni che i distributori devono soddisfare per essere selezionati, mentre i criteri quantitativi ne limitano direttamente il numero. Gli esempi più tipici di criteri qualitativi riguardano la gamma di prodotti da vendere, la formazione del personale di vendita, il servizio fornito al punto vendita, la pubblicità e la presentazione dei prodotti.

In merito alla distribuzione selettiva, una pietra miliare del diritto è fornita dal caso Metro, nel quale la Corte di giustizia europea ha stabilito la regola secondo cui, quando sono soddisfatti tre criteri (la natura dei beni o dei servizi richiede un sistema di distribuzione selettiva, i rivenditori sono selezionati sulla base di criteri oggettivi di natura qualitativa e i criteri non vanno al di là di quanto necessario), si può presumere che l'accordo di distribuzione non generi effetti anticoncorrenziali.

Nel contesto degli accordi di distribuzione selettiva, un elemento fondamentale da considerare nell'analisi è l'immagine di un prodotto, in particolare per i beni di lusso. I sistemi di distribuzione selettiva per i beni di lusso possono essere attuati per preservare l'immagine del prodotto e proteggere gli investimenti e il prestigio di produttori e distributori, garantendo al contempo un elevato livello di qualità per i consumatori.

In passato, se da lato in un contesto di mercato fisico le disposizioni legislative sono state più definite, dall'altro lo sviluppo del commercio elettronico ha aperto infinite possibilità per le imprese di mettere in atto nuove strategie e metodi di distribuzione, creando quindi dei "vuoti" nel campo del diritto. Di pari passo è emersa la necessità di comprensione del mondo dell'*online* per permettere al diritto della concorrenza di penetrare questo campo e rispondere alle questioni emergenti di concorrenza.

L'*e-commerce*, o commercio elettronico, si riferisce all'acquisto e alla vendita di prodotti attraverso *Internet*. Esistono due tipi principali di *e-commerce*: *business-to-business* (B2B) e *business-to-consumer* (B2C). Oggi il commercio elettronico è diventato una componente vitale delle strategie aziendali e un importante catalizzatore dello sviluppo economico. Basti pensare che si prevede che il fatturato dell'*e-commerce* raggiungerà i 4,48 trilioni di dollari nel 2023, continuando a crescere di anno in anno ad un tasso di circa il 9,3%.

In tale contesto di mercato, la Commissione europea mira ad abbattere ogni barriera al commercio *online* e a promuovere il pieno accesso ai beni e ai servizi. Un primo approccio in tal senso è costituito dalla Direttiva sul commercio elettronico (Direttiva 31/2000), adottata nel 2000, che ha svolto un ruolo fondamentale nello sviluppo delle piattaforme *online* in Europa e mirava a garantire un elevato livello di integrazione giuridica comunitaria. Dal punto di vista *antitrust*, le principali disposizioni, contenute nell'articolo 6, stabiliscono le regole generali per la pubblicità elettronica e i requisiti per l'identificazione delle comunicazioni commerciali.

La strategia adottata dalla Commissione europea per eliminare le frontiere virtuali, aumentare la connettività digitale e facilitare l'accesso dei consumatori ai contenuti *online* transfrontalieri è il Mercato Unico Digitale (DSM). Lanciata nel 2015, l'iniziativa si basa su tre pilastri: migliorare l'accesso dei consumatori e delle imprese ai beni e ai servizi digitali in tutta Europa, creare le giuste condizioni e condizioni di parità per lo sviluppo delle reti digitali e dei servizi innovativi e massimizzare il potenziale di crescita dell'economia digitale attraverso investimenti e competenze digitali. L'obiettivo della strategia è ridurre le differenze tra gli Stati membri e garantire una concorrenza leale e la protezione dei dati personali.

Tra le varie attività promosse dalla Commissione in tale senso, notevole è stata l'indagine avviata nel 2015 sul settore dell'*e-commerce*. La finalità era quella di individuare le pratiche commerciali che possono limitare la concorrenza, consentendo alla Commissione di indirizzare l'applicazione delle norme *antitrust* comunitarie nei mercati dell'*e-commerce*. L'indagine si è concentrata sui beni di consumo e sui contenuti digitali e ha rilevato che alcune pratiche, come la trasparenza dei prezzi e le restrizioni contrattuali, possono limitare la concorrenza e impedire ai consumatori di beneficiare di una maggiore scelta di prodotti.

Negli ultimi anni, sempre nell'ambito della strategia per il mercato unico digitale, la Commissione europea ha introdotto due nuove iniziative: il Digital Services Act (DSA) e il Digital Markets Act (DMA). Il DSA mira a migliorare la moderazione dei contenuti sulle piattaforme dei social media e a creare trasparenza, mentre il DMA mira a regolamentare il comportamento delle grandi aziende tecnologiche introducendo regole come l'interoperabilità con terze parti e condizioni pubblicitarie chiare.

Peraltro, le ultime versioni del VBER sono state introdotte anche e soprattutto per affrontare la sfida di riconoscere e regolare le vendite dell'*e-commerce* nel diritto della concorrenza. Il vecchio VBER prevedeva, in effetti, una rigida distinzione tra vendite attive e passive, e qualsiasi divieto di vendita passiva veniva riconosciuto come una restrizione fondamentale e quindi considerato illegale. L'attuale VBER ha incorporato i cambiamenti della giurisprudenza e riconosce che non tutte le restrizioni alle vendite online sono considerate restrizioni fondamentali.

Il nuovo regolamento di esenzione per categoria per gli accordi verticali ha anche introdotto modifiche al modo in cui il cosiddetto *dual pricing* e le clausole di parità sono trattati nel contesto *online*. Ha inoltre incluso una categoria di accordi verticali che riguardano le restrizioni all'uso dei servizi di comparazione dei prezzi, canali pubblicitari *online* che non permettono un acquisto diretto, ma reindirizzano i clienti al negozio *online* del rivenditore.

Il regolamento fornisce anche un'analisi delle restrizioni all'uso dei cosiddetti *marketplace*, dei siti *web* di commercio elettronico che mettono in contatto commercianti e potenziali clienti al fine di consentire acquisti diretti. Attraverso le osservazioni finali sull'indagine sul commercio elettronico, la Commissione aveva rilevato che i produttori possono decidere di limitare l'uso dei mercati *online* da parte dei loro distributori per ottenere, ad esempio, la protezione dell'immagine dei propri prodotti.

Queste restrizioni verticali possono andare da un divieto totale a restrizioni su specifici siti che non soddisfano determinati requisiti qualitativi e possono beneficiare dell'esenzione del VBER a condizione che non impediscano l'uso effettivo di Internet da parte dell'acquirente.

Nel VBER, la Commissione ha confermato la possibilità di estendere ai negozi *online* gli standard qualitativi stabiliti per i negozi *offline*, sebbene resti difficile giustificare un divieto assoluto di vendita *online* se non supportato da particolari caratteristiche del prodotto. La recente giurisprudenza, come il caso Pierre Fabre, ha fornito indicazioni sull'applicazione di queste disposizioni e sul bilanciamento degli interessi tra produttori e distributori, sia tradizionali che *online*. Tuttavia, sono ancora in corso dibattiti e pressioni da parte delle piattaforme *online* su alcune disposizioni, come il prerequisito di avere un anche negozio fisico prima di consentire le vendite *online*.

Confrontando l'attuale e il precedente VBER, risulta evidente come le nuove norme mirino a chiarire e aggiornare il quadro di riferimento per la valutazione delle restrizioni alle vendite *online* e a favorire approcci più uniformi da parte delle autorità garanti della concorrenza.

Nel caso Coty, uno dei più importanti casi giurisprudenziali consolidati nel nuovo VBER, la Corte di Giustizia europea ha chiarito che un produttore che adotti un sistema di distribuzione selettiva può legittimamente vietare, ai propri distributori, di utilizzare società terze per le vendite *online* (i "*marketplace*").

La sentenza Coty ha chiarito che un sistema di distribuzione selettiva conforme all'articolo 101, paragrafo 1, del TFUE può essere utilizzato per i beni di lusso al fine di preservare la loro immagine di lusso, a condizione che siano soddisfatti i criteri Metro.

La questione principale che rimane in sospeso è che cosa sia esattamente l'idea di "prestigio" e fino a che punto si possa ritenere che un prodotto abbia tale caratteristica. Ad oggi, i tribunali e le autorità nazionali ed europee non sono stati particolarmente chiari sulla questione.

Risulta peraltro evidente come il concetto di lusso sia diventato più ambiguo negli ultimi anni a causa della maggiore accessibilità dei prodotti di lusso e dell'emergere di nuove percezioni di ciò che costituisce tali prodotti. Un'opzione possibile è che una definizione di lusso possa basarsi su tre criteri chiave: una solida base concettuale, un'ampia applicabilità ai marchi di lusso in generale e la capacità di essere empiricamente valutato mediante misurazione.

Considerata la crescente importanza dei mercati del lusso nel contesto *online*, va tuttavia valuta la possibilità di un approccio diverso al concetto classico di immagine di lusso di un prodotto. È necessario valutare il panorama in evoluzione dell'*e-commerce* di lusso, con i marchi che sviluppano le proprie piattaforme *online* e allo stesso tempo utilizzano i *marketplace* digitali per raggiungere un pubblico più ampio, e investono sempre maggiormente nel *marketing* digitale e nelle campagne sui *social media*.

In definitiva, la definizione di prodotto di lusso è un concetto sottile, che richiede un’analisi attenta, da lasciare, almeno in ultima parte, alla valutazione caso per caso del giudice competente affinché tenga in considerazione tutte le dinamiche ad essa legate.

INTRODUCTION

This thesis aims to provide a clear overview of European antitrust law regarding selective distribution, in particular, with respect to that carried out by undertakings operating in the luxury market in the context of online sales. The ultimate goal is to provide a clear study of the current laws governing this context, making careful references to the precedents of European and non-European courts. It will also be useful to conduct an analysis of the new features introduced by the new Vertical Agreements Regulation (VBER) and the related Guidelines promulgated by the European Commission. Finally, doubts that remain unresolved to date will be explored.

The analysis of the current European antitrust environment and the provisions applicable to vertical distribution agreements, located within the so-called common market, starts first with the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Article 101 of the latter constitutes one of the cornerstones of antitrust law. It prohibits all agreements between undertakings, decisions and practices that prevent, restrict or distort competition in the internal market. Undertaking, subject to the application of Article 101, understood as any entity engaged in an economic activity.

Agreements between undertakings are usually distinguished between those of a horizontal and vertical nature; the latter are concluded between undertakings operating at different levels of the distribution chain, thus not between competitors, but rather between partners working to maximize profits. Such agreements can generate positive effects (*e.g.* an increase in sales and a reduction in distribution costs) but also negative effects, leading to an obvious reduction in competition.

Usually, vertical agreements are looked upon most favourably by legislators, and the Guidelines provided by the European Commission list examples of vertical restraints in them and their possible effects.

In order to avoid conducting a single analysis of each vertical agreement on a case-by-case basis, and in order to exclude those that do not have an appreciable effect on trade between Member States or do not appreciably restrict competition, the European Commission issues block exemption regulations (VBERs), most recently Regulation 720/2022, which apply a general presumption of legality to certain categories of agreements. Such agreements are thus exempted from the scope of Article 101(1) TFEU without the need to fulfil all the requirements of Article 101(3) TFEU.

The VBER first uses share thresholds to assess a vertical agreement and determine whether it qualifies for block exemption. The market share of the supplier and the buyer must not exceed 30% for the agreement to fall within the scope of the regulation. However, if the agreement contains certain hardcore restrictions, such as resale price maintenance or market sharing, it may not be covered by the exemption. In cases where the VBER does not apply, a case-by-case analysis will be carried out.

Vertical agreements, covered by the VBER, mainly revolve around certain distribution models, which “dominate” the sector. Distribution agreements may contain various restrictions and take different forms; one of these is the exclusive distribution agreement, in which a supplier chooses a distributor as exclusive seller of its products in a defined territory or for a specific group of customers. These agreements must respect the general limits set by the VBER and are permitted despite the fact that they restrict competition to a certain extent in order to respond to specific market problems and create efficiencies.

The other main distribution system is the selective system, based on qualitative or quantitative criteria, or a combination of both. Qualitative criteria limit the number of distributors indirectly by imposing conditions that distributors must fulfil in order to be selected, whereas quantitative criteria directly limit the number. The most typical examples of qualitative criteria relate to the range of products to be sold, the training of sales personnel, the service provided at the point of sale, advertising and product presentation.

With regard to selective distribution, a legal milestone is provided by the Metro case, in which the European Court of Justice established the rule that when three criteria are met (the nature of the goods or services requires a selective distribution system, the dealers are selected on the basis of objective qualitative criteria, and the criteria do not go beyond what is necessary), the distribution agreement may be presumed not to give rise to anti-competitive effects.

In the context of selective distribution agreements, a key element to consider in the analysis is the image of a product, particularly for luxury goods. Selective distribution systems for luxury goods can be implemented to preserve the image of the product and protect the investments and prestige of manufacturers and distributors, while ensuring a high level of quality for consumers.

In the past, while legal provisions were more defined in a physical market context, the development of e-commerce has opened up endless possibilities for companies to implement new distribution strategies and methods, thus creating 'gaps' in the legal field. At the same time, the need to understand the online world has emerged to enable competition law to penetrate this field and respond to emerging competition issues.

E-commerce, or electronic commerce, refers to the buying and selling of products through the Internet. There are two main types of e-commerce: business-to-business (B2B) and business-to-consumer (B2C). Today, e-commerce has become a vital component of business strategies and an important catalyst for economic development. Suffice it to say that e-commerce turnover is expected to reach $4.48 trillion in 2023, continuing to grow year on year at a rate of around 9.3%.

In this market context, the European Commission aims to break down all barriers to online trade and promote full access to goods and services. An initial approach in this respect is the E-Commerce Directive (Directive 31/2000/EC), adopted in 2000, which played a key role in the development of online platforms in Europe and aimed to ensure a high level of Community legal integration. From an antitrust perspective, the main provisions are contained in Article 6, which deals with the general rules for electronic advertising and sets out the requirements for the identification of commercial communications.

The strategy adopted by the European Commission to eliminate virtual borders, increase digital connectivity and facilitate consumer access to cross-border online content is the Digital Single Market (DSM). Launched in 2015, the initiative is based on three pillars: improving consumer and business access to digital goods and services across Europe, creating the right conditions and level playing field for the development of digital networks and innovative services, and maximising the growth potential of the digital economy through digital investments and skills. The aim of the strategy is to reduce differences between Member States and to ensure fair competition and data protection.

Among the various activities promoted by the Commission in this regard, the investigation launched in 2015 on the e-commerce sector was notable. The aim was to identify business practices that may restrict competition, enabling the Commission to direct the application of EU antitrust rules in e-commerce markets. The investigation focused on consumer goods and digital content and found that certain practices, such as price transparency and contractual restrictions, may restrict competition and prevent consumers from benefiting from a greater choice of products.

In recent years, as part of the Digital Single Market strategy, the European Commission has introduced two new initiatives: the Digital Services Act (DSA) and the Digital Markets Act (DMA). The DSA aims to improve content moderation on social media platforms and create transparency, while the DMA aims to regulate the behaviour of large technology companies by introducing rules such as interoperability with third parties and clear advertising conditions.

Moreover, the latest versions of the VBER were also and above all introduced to address the challenge of recognising and regulating e-commerce sales in competition law. Indeed, the old VBER provided for a strict distinction between active and passive sales, and any prohibition of passive sales was recognised as a fundamental restriction and therefore considered illegal. The current VBER has incorporated the changes in case law and recognises that not all restrictions on online sales are considered hardcore restrictions.

The new Block Exemption Regulation for vertical agreements has also introduced changes to the way so-called dual pricing and parity clauses are treated in the online context. It also included a category of vertical agreements covering restrictions on the use of price comparison services, online advertising channels that do not allow a direct purchase but redirect customers to the retailer's online shop.

The regulation also provides an analysis of restrictions on the use of so-called marketplaces, e-commerce websites that connect merchants and potential customers in order to allow direct purchases. In its final comments on the e-commerce investigation, the Commission noted that manufacturers may decide to restrict the use of online marketplaces by their distributors in order to achieve, for instance, image protection for their products.

These vertical restraints can range from a total ban to restrictions on specific sites that do not meet certain quality requirements and can benefit from the exemption of the VBER as long as they do not impede the buyer's actual use of the Internet.

In the VBER, the Commission confirmed the possibility of extending the quality standards set for offline shops to online shops, although it remains difficult to justify a total ban on online sales if not supported by particular product characteristics. Recent case law, such as the Pierre Fabre case, has provided guidance on the application of these provisions and the balancing of interests between manufacturers and distributors, both traditional and online. However, there are still ongoing debates and pressure from online platforms on certain provisions, such as the prerequisite of having a physical shop as well before allowing online sales.

Comparing the current and previous VBERs, it is clear that the new rules aim to clarify and update the framework for assessing restrictions on online sales and to foster more uniform approaches by competition authorities.

In the Coty case, one of the most important consolidated case law cases in the new VBER, the European Court of Justice clarified that a manufacturer adopting a selective distribution system may legitimately prohibit its distributors from using third-party companies for online sales (“marketplaces”).

The Coty judgment clarified that a selective distribution system compliant with Article 101(1) TFEU may be used for luxury goods in order to preserve their luxury image, provided that the Metro criteria are met.

The main question that remains unanswered is what exactly the idea of “prestige” is and to what extent a product can be considered to have such a characteristic. To date, national and European courts and authorities have not been particularly clear on this issue.

It is also evident that the concept of luxury has become more ambiguous in recent years due to the increased accessibility of luxury products and the emergence of new perceptions of what constitutes such products. One possible option is for a definition of luxury to be based on three key criteria: a solid conceptual basis, broad applicability to luxury brands in general and the ability to be empirically assessed by measurement.

However, given the growing importance of luxury markets in the online context, the possibility of a different approach to the classic concept of a product's luxury image should be considered. The evolving landscape of luxury e-commerce needs to be assessed, with brands developing their own online platforms and at the same time using digital marketplaces to reach a wider audience, and increasingly investing in digital marketing and social media campaigns.

Ultimately, the definition of a luxury product is a subtle concept, which requires careful analysis, to be left, at least to the ultimate extent, to the case-by-case assessment of the competent judge to take into account all the dynamics involved.

CHAPTER ONE

VERTICAL AGREEMENTS UNDER THE EUROPEAN COMPETITION LAW

1.1. Art 101 TFEU

One of the core objectives of the European Union has always been the development of a Common Market, offering free movement of goods, services, people, and capital. Among all the treaties signed by the different countries part of the Union, two of the most important ones are the Treaty on the Functioning of the European Union (TFEU)[1] and the Treaty on European Union (TEU)[2]. The first, in its article 3(1)(b), provides the EU with an exclusive competence in "*the establishing of the competition rules necessary for the functioning of the internal market*"[3]. While the second, in article 3(3), provides (amongst other things):

> "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*"[4]

Are exactly these two treaties to lay the groundwork of EU Competition law, consisting in a set of rules that are intended to protect the process of competition, so that goods and services are sold at competitive prices and that consumer have a choice as to the goods and services they wish to purchase[5].

Chapter 1 of the title VII of the TFEU contains this set of rules, consisting in Article 101 to Article 109, the first of which is of great importance for the development of this thesis.

Article 101 consist of three paragraphs: 101(1) that prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of

[1] Treaty on the Functioning of the European Union available at https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html.

[2] Treaty on European Union, available at https://eur-lex.europa.eu/eli/treaty/teu/sign.

[3] Article 3(1)(b) TFUE.

[4] Article 3(3) TEU.

[5] BELLAMY & CHILD, *European union law of competition*, 4.

competition within the internal market; 101(2), that, as interpreted by the Court of Justice[6], states that any part of agreements or decision's prohibited by article 101(1) shall automatically be void; and 101(3) that consists in an exemption from the application of 101(1) whenever four cumulative and exhaustive conditions are satisfied. These four conditions are used to operate the assessment of the efficiencies against the anti-competitive effects and consist in:

(i) objective economic benefits;
(ii) fair share of benefits for consumers;
(iii) the indispensability of the restriction;
(iv) no elimination of competition for a substantial part of the products covered by the agreement.

To properly understand the provision of article 101 and who are its subject we must set some definitions. First, Article 101 refers to undertakings, which are not defined in the treaties[7] but variously analysed in Case Law. According to case law, "*the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity*"[8].

A person, for example, can be qualified as an undertaking, when it carries out economic activity, but the same person will not be an undertaking when its activities are non-economic in character. The legal test to establish whether an entity is acting as an undertaking is contained in the opinion of the Court of Justice in *Hofner and Elser v Macrotron*[9], where the activity concerned was defined economic in nature since "*employment procurement has not always been and is not necessarily carried out by public entities*"[10]. The only fact that an activity can be carried out by a private entity or the fact that the activity entails the offering of goods and services, are indications that the activity is an economic one. Another indication that an activity is economic in character is whether it is carried on under market conditions[11].

In the same way a physical person can or cannot be recognised as an undertaking depending on the

[6] Judgment of the Court of 30 June 1966, Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, European Courts reports, 235 – 250; Judgment of the Court (Fourth Chamber) of 14 December 1983, Case 319/82 *Soc de Vente de Ciments et Bétons v Kerpen & Kerpen*, ECR, 4173, 4184-4185.
[7] Even though the EA agreement defines them as "*any entity carrying out activities of commercial or economic nature*".
[8] Judgment of the Court (Sixth Chamber) of 23 April 1991, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, European Court reports, I-01979, § 21.
[9] *Ibid.*
[10] *Ibid.*
[11] See opinion of AG Maduro in the Judgment of the Court (Grand Chamber) of 11 July 2006, Case C-205/03 P, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, European Court Reports, I-06295.

activity that he or she performs, a state can be undertaking whenever it carries on an economic activity[12]. On the other hand, a state is not an undertaking when the activity that it performs consists in an essential function of the entity and it covers a public interest[13].

Finally, we must also consider that an undertaking is a single economic entity, as defined by the General Court as economic units which "*consists of a unitary organisation of people, tangible and intangible elements, which purse a specific economic aim on a long-term basis and can contribute to the commission of an infringement*"[14].

Once it has been established who are the subject of article 101, the next necessary step is to understand what the function of the article is and when could there be an infringement. Article 101 aim is to prevent competition from being distorted to the detriment of the public interest, individual undertakings, and consumers, thereby ensuring the well-being of the European Union[15]. Such a distortion can be caused by an infringement of article 101 only where there are concerted practises, agreements between undertakings, and decisions by association of undertakings. These terms "*are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves*"[16].

Despite the fact that article 101 distinguishes between these terms, the aim of their introduction is to catch different forms of coordination and collusion between undertakings, while on the other hand unilateral conducts fall outside of the article provision[17]. An agreement does not require any particular formalities, it is irrelevant, for instance, whether it is written or oral, put in practice or not, legally binding or not. The essential thing is the presence of a concurrence of wills, *i.e.*, it is sufficient that the undertakings have expressed their joint intention to conduct themselves on the market in a specific

[12] Judgment of the Court of 16 June 1987, Case 118/85 *Commission v Italy*, ECR 2599, § 7; Case T-128/98 *Aéroports de Paris v Commission*, ECR II-3929, § 108 (upheld on appeal, Judgment of the Court (Sixth Chamber) of 24 October 2002, Case C-82/01P *Aéroports de Paris*, ECR I-9297); Judgment of the Court of First Instance (Second Chamber) of 12 December 2006, Case T-155/04 *SELEX Sistemi*, ECR II-4803, § 54; Judgment of the Court (Third Chamber) of 12 July 2012, Case C-138/11 *Compass-Datenbank v Republik Österreich*, §s 37-38.

[13] Judgment of the Court of 18 March 1997, Case C-343/95 *Diego Cali & Figli v Servizi Ecologici Porto di Genova*, ECR I-1547, § 22 (activity of anti-pollution surveillance carried out by a limited company set up by public port authority did not come within Art 102 although financed by dues paid by port users). See also Decision of the Court of 2 May 2005 COMP/38469 *Athens International Airport*, § 49 (carrying out passenger security checks on behalf of the Greek State were not exercising an economic activity).

[14] Judgment of the Court of First Instance (Fourth Chamber) of 20 March 2002, Case T-9/99 *HFB v Commission ('Pre-Insulated Pipe)*, ECR II-1487, § 54; Cases C-628/10P, etc, *Alliance One International v Commission ('Spanish Raw Tobacco)* EU:C:2012:479, § 42.

[15] BELLAMY & CHILD, *European union law of competition*, 149.

[16] *Ibid*, 106.

[17] *Ibid*, 106.

way[18]. In other words, the key element is the subjective one and the form of the agreement is not important.

Agreements can either be horizontal or vertical: the first ones are conducted between undertakings at the same level of supply, usually competitors (*e.g.* an agreement not to compete on price, or an agreement to share out or allocate markets), and will not be covered, for the purpose of academic studies by this thesis; while the latter will be broadly analysed in the following chapters.

1.2. Definition of Vertical Agreements

A vertical agreement, in competition law, is it a term used to indicate agreements between firms that operates at different levels of the supply chain. The Vertical Block Exemption Regulation (Regulation 730/2022, hereinafter "VBER"), in Article 1, describes them specifically as: "*an agreement or concerted practice 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*"[19].

Vertical agreements are not concluded by competitors: manufacturers and distributors are, in fact, partners that cooperate to maximising both of their profits. Consequently, "*normally their self-interests action leads to greater welfare society. That is to say, when a manufacturer restrains its distributors, it normally does this because it expects that as a result sales will increase, and such an effect benefits manufacturer and distributors, and also consumers*"[20].

Article 1(1)(c) defines a competing undertaking as an actual or potential competitor. Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market and if, absent the vertical agreement between the undertakings, it is likely that one of them would, within a short period of time (normally a year), make the additional necessary investments or incur other necessary costs to enter the relevant market in which the other undertaking

[18] Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 26 October 2000, Case T-41/96, *Bayer AG v Commission*, European Court Reports II-03383.

[19] Art 1(a) Commission Regulation (EU) 2022/720 of 10 May 2022 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 (Text with EEA relevance), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R0720, hereinafter "VBER".

[20] MONTI, *Restraints on Selective Distribution Agreements*, 489, 490.

is active[21]. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context. The mere theoretical possibility of entering a market is not sufficient, there must be real and concrete possibilities for the undertaking to enter the market and no insurmountable barriers to entry. Contrarily, there is no need to demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there[22].

A manufacturer of a product is, therefore, not solely concerned with manufacturing, and when it does not use the product for himself, it must plan for its distribution[23]. The different options of distribution are represented by vertical integration, distribution through agency or other intermediaries, distribution through independent distributors and distribution through E-commerce. These different approaches will be covered deeply in the development of this thesis.

1.3. Effects of Vertical Agreements

Despite vertical agreement contain restraints on the conduct or commercial freedom of one of more parties, as mentioned before, they enjoy more favourable treatment than horizontal agreement[24]. To answer the key question whether these restraints restrict competition or generate efficiencies recognisable under article 101(3) a prima facie analysis on the possible effects of vertical agreement is necessary.

Many could be the positive effects of vertical restraints and, according to the opinion of many legal scholars of the famous Chicago school, Competition law should rarely, if at all, be troubled by vertical restraints which led to increase sales and the minimization of distribution costs[25]. In reality, the situation is not that simple, and it is fundamental to understand whether there are possible and negative effects and whether the firsts justify the latter.

If a contractual agreement between a supplier and a buyer would only set the price and the quantity of that transaction, it could often lead to sub-optimal levels of investments and sales. In fact, in doing

[21] Guidelines on Vertical Restraints (hereinafter Guidelines), § 90.

[22] Judgment of the Court (Fourth Chamber) of 30 January 2020, *Generics (UK) and Others v Competition and Markets Authority*, Case C-307/18, Official Journal of the European Union, § 36 to 45; Judgment of the Court (Fourth Chamber) of 25 March 2021, Case C-591/16 P, *H. Lundbeck A/S and Lundbeck Ltd v European Commission*, § 54 to 57.

[23] JONES & SUFRIN, *EU Competition Law*, 737.

[24] Request for a preliminary ruling from the Administratīvā apgabaltiesa (Latvia) lodged on 9 July 2020, *SIA Visma Enterprise v Konkurences padome*, Case C-306/20, §graph 78.

[25] JONES & SUFRIN, *EU Competition Law*, 746.

so, they would not consider vertical and horizontal externalities arising from the complementary nature of the activities of the supplier and its distributors[26]. The guidelines explains that when these externalities are present, suppliers may have an incentive to control certain aspects of the distributor's operation and vice versa.

The guidelines also give a list, neither complete nor exhaustive, of the various possible justification for the provision of a vertical restraint[27]:

(i) to address the vertical externality issue (such as the setting of a too high price by the distributor without considering the effects on the distributors);
(ii) to address the 'free-ride' problem (where customers will benefit from service and promotions from a certain distributor or channel and then operate the transaction on a different channel and with a different distributor, resulting in a disincentive for the first to keep offering its services);
(iii) to open up or enter new markets (*e.g.*, providing territorial protection to a distributor that is willing to invest in that market)
(iv) to address the certification free-rider issue (a supplier could need to ensure that the distribution of its product is limited to premium distributors)
(v) to address the "hold-up" problem (where either the supplier or the buyer may be not willing to make relationship specific investments without a guarantee to not be held up during negotiations);
(vi) to address the specific hold-up problem in the presence of a transfer of a substantial know-how;
(vii) to achieve economies of scale in distribution;
(viii) to ensure uniformity and quality standardisation (such as the luxury imagine of a product) or
(ix) to address capital market imperfections.

Particularly problematic and widely analysed by the academics is the "free-rider" problem. "Free rider" is a term referred to an undertaking (or individual) which benefits from the actions and efforts of another without paying or sharing the costs. For example, a customer could be persuaded to buy a good by the activity of one distributor but then proceeds to buy it from another distributor that may have lower prices. This second retailer is viewed as "free riding" on the efforts and the costs incurred by the first retailer. If such a situation persists, the first retailer will not have the incentive to continue.

[26] Guidelines on Vertical Restraints, 12.
[27] VBER, § 16.

The difference in price mostly originates from the fact that the second distributor may not bear additional costs because of not performing any additional services, such as customers advice, goods advertising, or premises maintenance. "*The free-rider is an increasingly prevalent problem with increasing use of Internet based transactions*"[28] and will therefore, as well as some of other problems, need a deeper and more accurate analysis in relationship to the various vertical arrangements in the development of this thesis.

To eliminate these inefficiency problems different vertical restraints could, at the same time, be suitable, nevertheless the same vertical restraints could also result on different negative effects that must be assessed as well in analysing the indispensability required by article 101(3).

The vertical restraints guidelines identify four negative effects on the market that could be the result of vertical restraints[29].

(i) anti-competitive foreclosure of access to the market for other suppliers or other buyers, by raising barriers to entry or expansion that would hinder any undertaking willing to invest in a new market;

(ii) softening of competition between the supplier and its competitors and/or the facilitation of explicit or tacit collusion between competing suppliers (*i.e.*, reduction of inter-brand competition);

(iii) softening of competition between the buyer and its competitors or the facilitation of explicit or tacit collusion between competing buyer (*i.e.*, reduction of intra-brand competition, concerning distributors of the goods or services of the same supplier); and

(iv) the creation of obstacles to market integration, including limitations on the consumer's choice to purchase goods or services in any Member State.

All the negative effects could therefore result in restriction of competition both at the supplier and at the distributor level, resulting respectively in, *e.g.*, higher prices to buyers, lowered quality of goods or reduced innovation, and higher retail price, limited choice, or limited availability.

The extent to which a particular vertical restraint would be likely to create anti-competitive foreclosure effects would depend on the nature or the duration of restraints, or at which level the restriction would be in force. Intra-brand competition, for example, is by itself unlikely to lead to

[28] BELLAMY & CHILD, *European union law of competition,* 495.
[29] VBER, § 18.

negative effects for the final consumers when inter-brand combination is strong[30].

The previous paragraphs explained why it is so important to recognise that vertical agreement could have positive effects on the market, in order to assess whether an agreement, even though it restricts the competition, could be exempted by the application of article 101(1) that would have made them void. In order not to make this evaluation for every single agreement, since 1965 the European legislator have decided to establish a regulation that would provide a presumption of legality for all vertical agreements that contain some characteristics. This regulation today has the name of Vertical Block Exemption Regulation ("VBER") and its often followed by a Commission Notice containing the guidelines on vertical restraints (Guidelines).

1.4. Vertical Agreements That Generally Fall Outside The Scope of Article 101(1) TFEU

The best instrument that the Commission gives to understand the provisions of the VBER are the Guidelines, that explain the proper way to interpret and analyse the statements of the Regulation and the article 101. As before mentioned, the VBER refers to a series of similar agreements whose pro-competitive benefits are supposed to outweigh their anticompetitive effects. The Guidelines prior to the analysis of these, help to exclude some agreements which by their nature generally fall outside the scope of article 101[31], agreements that are not capable of affecting in an appreciable way trade between Member States or which do not appreciably restrict competition (*i.e.*, agreements of minor importance)[32], as also highlighted by the Commission in prior guidelines: the Effect on Trade Guidelines[33] and the De Minimis.

The first one helps to interpret the concept of the appreciable effect on trade applying the principle developed by the Union Courts highlighting as not capable to have such an effect all the agreements in which *(a)* the aggregate market share of the parties on any relevant market within the union affected by the agreement does not exceed 5%, and *(b)* the aggregate annual Union turnover of the supplier, or in cases involving agreements concluded between a buyer and several suppliers the buyer's combined purchases of the products, covered by the agreements does not exceed EUR 40 million[34].

[30] VBER § 21 and, in particular, judgment in Case C-306/20 - *Visma Enterprise*, §graph 78.

[31] Guidelines, § 23-47.

[32] Judgment of the Court (Second Chamber), 13 December 2012, Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, § 16, 17 (hereinafter 'Case C-226/11 - *Expedia*').

[33] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, § 81).

[34] *Ibid*, § 50 to 52.

The De Minimis, in addition, explains that vertical agreement between non-competitors whose market share does not exceed 15% are considered outside of the scope of the article 101, except in cases where in a relevant market there are parallel networks of agreement that restrict the competition with cumulative effects, in which case the threshold is reduced to 5%, and where the agreement will contain restrictions by object, such as hardcore restrictions[35].

Moreover, as previously mentioned, for the application of Article 101 the agreements between the manufacturer and the network of distributors must follow a hierarchical or contractual model not corresponding to any unilateral decision. Guidelines give extensive space to agency agreements, defining an agent as "*a legal or natural person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal*"[36]. The Guidelines states that agency agreements do not fall within the scope of Article 101(1) TFEU when the agent does not independently assume: any commercial or financial contract-specific risks in relation to contracts concluded or negotiated on behalf of the principal; risks related to market-specific investments (*i.e.*, sunk investments, that cannot be used for other activities or sold other than at a significant loss); and risks related to other activities undertaken on the same product market requested by the principal[37]. Otherwise, the agent will be treated as an independent undertaking and, therefore, subject to antitrust enforcement.

In the guidelines the Commission set a list, non-exhaustive, of various risk in which the agent may incur, and also recommends a *modus procedendi* of self-assessment. [38] Of particular note is the possibility for a person to be both an independent distributor for some products, and an agent for other products from the same supplier (so-called dual role), if the role of agent is freely assumed and the supplier covers all the risks and investments required for the agent to start operating in the relevant market.

Finally, the last category of agreements that the Guidelines recognise as falling outside the scope of article 101(1) are the subcontracting agreements, defined in the Subcontracting Notice[39] as

[35] In relation to the latter, it is important to notice that part of the doctrine hypothesizes a small opening to the analysis of the effect of the hardcore restrictions in relation to the American Case Law that modified a *per se* centuries-old rule of ban on resale price maintenance into an effect base rule. On the point, CATRICALÀ, *Diritto Antitrust*, 274.

[36] Guidelines, § 29.

[37] VBER, § 30.

[38] *Ibid*, § 32 ff.

[39] Commission Notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (OJ C 1, 3.1.1979, 2).

agreements under which one firm, the so-called "contractor", whether or not in consequence of a prior order from a third party, entrusts to another, the so-called "subcontractor", the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf. The Subcontracting Notice include further guidance on the application of the general rule.

1.5. Vertical Block Exemption Regulation (VBER)

Block exemptions are regulations issued by the European Commission to apply a general presumption of lawfulness that excludes from the scope of Article 101(1) TFEU a category of agreements. These regulations identify categories of agreements that are automatically exempted without the need to meet all the requirements of Article 101(3) TFEU[40].

The first example of a block exemption for vertical agreements is represented by the Council Regulation 19/65[41], that empowered the Commission to grant exemption to all vertical agreements regarding finished or intermediate goods and services, disapplying the prohibition of article 101(1)[42]. The explicit prohibitions of competition limiting clauses, that would distinguish which agreements could not be granted the exemption, where applied without any actual analysis of their restrictive impact and the power of parties in the market.

In the second half of the 90s this *per se* prohibition approach was severely criticised, creating one of the most intense discussions has ever been registered in the history of Competition Law[43]. As part of the Commission policy of reviewing the provision regarding vertical restraints, in 1999 the adoption of Regulation 2790/99 finally removed the straitjacket effect of the previous block exemption regulation[44].

Recognizing that vertical agreement could have brought positive and negative effects, and therefore a general presumption of unlawfulness was senseless, the Commission decided to use share thresholds to assess the likely efforts of a vertical agreement and determining whether it could benefit from block

[40] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008/C 115/01. Available from: https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL&from=EN.

[41] Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31965R0019

[42] BELLAMY & CHILD, *European union law of competition*, 490.

[43] CATRICALÀ, *Diritto Antitrust*, 275.

[44] Chapter 7 BELLAMY & CHILD 4th edition and Supp, 1996.

exemption. This "*simpler, more flexible and better targeted*"[45] approach led to a system that balanced presumption and concrete analysis case by case, introducing a market share threshold of 15% where the De Minimis Notice ("De Minimis")[46] would apply and a market share threshold of 30% that would set the limit under which all agreements were granted the block exemption, beyond which an analysis of the impact of the specific agreement would be necessary. The Commission also introduced the notion of "hardcore restrictions" that when contained in an agreement, would most likely make the agreement void.

"*In view of the overall positive experience*"[47] with the Regulation 2790/99 and as a result of the emerging first considerations of the online commerce[48] in May 2010 the Commission replaced that regulation with Regulation 330/2010[49] taking the same broad approach as its predecessors. That regulation has been widely adopted in the European Community until the recent days when the Commission, "*taking into account the new market developments, such as the growth of e-commerce, and new or more prevalent types of vertical agreements*"[50], decided that is appropriate to adopt a new block exemption regulation: Regulation 720/2022 (hereinafter VBER).

Assessed which vertical agreements generally fall outside the application of the article 101(1), and consequently of the VBER as well, the Guidelines proceed to the analysis of the structure of the VBER, consisting in 5 main articles. Article 2, which rule the application of the exemption to some agreements that meet certain requirements; Article 3, which established the market share the undertakings involved in the vertical agreement must and must not have; Article 4 which sets a list of a particularly serious, from an antitrust perspective, restrictions called "*hardcore restrictions*", that would disapply the exemption without any regards to the market share; Article 5 which list some specific restriction excluded from the application of the VBER, that will need a case by case analysis; and Article 6 and Article 7 which, respectively, set out the possibility for the Commission to establish

[45] Recital 9 to Reg 1215/1999, OJ 1999 L148/1.

[46] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (OJ C 291, 30.8.2014, p. 1). Further guidance is provided in Commission Staff Working Document – Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD (2014) 198 final.

[47] Recital 1 to Reg 330/2010, OJ 2010 L102/1.

[48] BREENING-LOUKO, GURIN, PEEPERKO, VIESTO, *Vertical Agreements: new competition rules for the next decade*, Competition Policy Newsletter, in the CPI antitrust journal, 2010, 2.

[49] Commission Regulation (EU) No 330/2010 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 (Text with EEA relevance), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330

[50] VBER, Recital 2.

by regulation a withdrawal or a non-application of the VBER.

As before mentioned, the main rule granting a general provision of lawfulness to vertical agreements is represented by Article 2(1) that exclude all vertical agreements containing vertical restraints from the application of article 101(1) TFEU. In the subsequent paragraphs of Article 2, the VBER set out some agreements to which that provision shall not apply if particular conditions are not met.

The first category of agreement analysed is the one regarding agreements entered into by an association of retailers. The exception shall apply only when all members of the agreements are retailers, sells only goods to final customers and do not have an annual turnover exceeding EUR 50 million[51].

Secondly, under Article 2(3) of the VBER, vertical agreements that contain certain provisions on the assignment or use of intellectual property rights (IPRs) can be granted the exemption only when the IPR is assigned to or licensed for use by the buyer, is nor the primary object of the agreement, is directly related to the use, sale or resale of goods or services and does not refer to any object other vertical restraints not covered by the VBER do. IPRs relevant to the implementation of vertical agreements within the meaning of Article 2(3) of the VBER generally concern three main areas: trademarks, copyright, and know-how[52]. The latter is very important in relation to franchise agreements, in which the IPRs help the franchisee to resell the product supplies by the franchisor or to use this product to sell the resulting goods or services.

In addition, another category of vertical agreements taken into consideration by article 2 VBER, is of the ones concluded between competitors, which are normally outside of the application of the VBER. Pursuant to Article 2(7) of the VBER and on which guidance is provided in section 4.5. of the Guidelines, the regulation does not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such other regulation.

There are only two cases in which an agreement between competing undertakings, at the condition that they entered a non-reciprocal agreement (*i.e.*, when the buyer of the contract goods or services does not also supply competing goods or services to the supplier), can benefit from the presumption

[51] VBER, § 69 ff.

[52] VBER, § 71 ff.

of lawfulness of art 2 of the VBER.

The first case, regarding goods, is when the supplier operates as a wholesaler, importer or, respectively as a manufacturer and retailer, at a downstream and upstream level, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods; while the latter, regarding services, is when the supplier is a provider at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services[53].

It is important also to notice that a wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the brand name of that wholesaler or retailer is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer.

The two exemptions analysed both refer to the scenario of a so-called dual distribution (*i.e.*, where supplier of goods or services is also active of the downstream level competing with its independent distributors). The rationale for introducing an exception in this scenario is that in dual distribution the potential negative impact is considered to be less important than the potential positive impact on competition, in particular regarding to the optimization of production and distribution process.

The exemption covers all the exchange of information between the parties that are directly linked to the implementation of the agreement, and necessary for the optimization of production and distribution process. The Commission also gives some examples of information usually considered not to be problematic (*i.e.*, whitelist, as logistic information), and, on the contrary, information that should never be exchanged, (*i.e.*, blacklist, as retail prices). One important case law example in this scenario is represented by the case Hugo Boss v Denmark (2021)[54], where a not necessary exchange of information regarding future prices, discounts, and volumes of sales between a retail division of Hugo Boss and two independent distributors, was considered capable to arise a risk of coordination of future sells. In order to avoid problematic exchange of information it is, therefore, advisable to exchange only historical or aggregate data and to implement internal so-called Chinese-wall.

Finally, the last category of agreement analysed by Article 2 VBER regards vertical agreements with providers of online intermediation services ("OIS") that have a hybrid function. Nowadays OIS play an increasingly important role in the distribution of goods and services in the online platform

[53] VBER, Art 4(2) and Guidelines, Section 4.4.4.

[54] Judgment of the Danish Competition Appeals Tribunal of 23 June 2021, *Hugo Boss v Denmark*.

economy. The new VBER defines them as services that enable businesses to offer products to other businesses or end consumers, facilitating the initiation of direct transactions, regardless of whether they are actually concluded[55], and will be widely discussed in the development of this thesis, in particular in relation with the so called "Parity Clause"[56].

Once the assessment of Article 2 VBER is completed, it is appropriate to follow the before mentioned scheme and examine art 3 VBER, that define the limits of the safe harbour into which the exemption of art 2 VBER shall apply. As mentioned, the market share of the supplier on the market where it sells the contract goods or services to the buyer and the market share of the buyer on the market where it purchases the contract goods or services must not exceed 30%. For example, where a supplier sells products only to one distributor and held a market share of 25% of the relevant market, but that distributor buys also similar products from another supplier, for an aggregate market share of 40% of the market of the purchase of these products, and agreement between the first supplier and the distributor will not be covered by the application of the provision of the VBER. It is essential to understand, nevertheless, that falling outside of the provision of the VBER does not mean that the agreement will be automatically unlawful, but only that will need an individual assessment under the provisions of article 101(3). In the presence of a multiparty agreement each party should be analysed both as a buyer an as a supplier when they operate such activities relating to the goods and services object of the agreement, and the exemption can be granted only when all the market share respects the limit of 30%.[57]

The 30% market share, introduced by Regulation 270/1999, is a manifestation of the so-called more economic approach, and it is the main index to the evaluation of the existence of market power in the hands of an undertaking. The threshold chosen logically exceeds the De Minimis threshold (15%) and identifies the perimeter of application of the Regulation. If a higher threshold had been chosen (*e.g.*, 40 percent), in fact, only vertical restraints imposed by dominant firms, in addition to hardcore restrictions, would have been problematic in an antitrust perspective[58].

The calculation of the market shares should be done on the basis of value data, taking into account all sources of revenue generated by the sales of goods or services, and when these data are not available, can be substantially estimated on other reliable market information, such as volume figures,

[55] Guidelines Section 4.3 as analyzed in this thesis at page 45 ff.

[56] *Infra*, 64.

[57] VBER, § 173.

[58] WHISH AND BAILEY, *Competition Law (10th edn)*.

as defined by Article 8(a) of the VBER and its dedicated paragraph in the Guidelines.

We have demonstrated that whenever a vertical agreement falls into any category covered by "the umbrella" of Article 2 VBER[59] and respect the market share limit of Article 3 VBER, it can be suitable for the application of the exemption. Nevertheless, these elements are not sufficient for a presumption of lawfulness, in fact, article 4 VBER sets a list of hardcore restrictions that when are contained in a vertical agreement remove the benefit of the block exemption. These restrictions regard a) resale price maintenance; b) online sales ban; c) customer or territory restrictions; and d) restrictions on spare parts sale.

Furthermore, Article 5 VBER focuses on certain obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty, and therefore will be excluded by the application of the exemption. There is nonetheless no presumption that the obligations fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3) of the Treaty, their exclusion from the VBER means only that they are subject to an individual assessment under Article 101 of the Treaty.

It must be noticed that, contrary to hardcore restrictions, the restriction examined in Article 5, will not necessarily exclude the whole agreement from the application of the block exemption. In fact, they may be rather severed from the agreement which will continue to benefit from the block exemption[60].

Under the VBER, excluded restrictions are non-compete obligations and wide parity clauses. The latter are applicable only, in an online context, to online platforms and their analysis will therefore be operated in the second chapter of this thesis[61], for the moment it is sufficient to understand that they will consist of obligations which prohibit trading partners from offering better terms on competing online platforms.

Non-compete obligation, on the other hand, are obligations imposed on the buyer not to manufacture, purchase, sell or resell goods or services; or to purchase contracted goods/services exclusively from the seller for a percentage of at least 80% of its requirements. The exclusion applies only if their duration is indefinite or exceeds five years; in the case in which they are tacitly renewable beyond a

[59] JONES AND SUFRIN, *EU Competition Law*, 787.
[60] Guidelines, Section 6.2.
[61] *Infra* pg 64

period of five years, they can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement with a reasonable period of notice and at a reasonable cost[62]; while in cases where the contract goods or services are resold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, the obligation can be imposed until the end of occupancy. It is important to notice that obligations which have the characteristic not to be excluded from the "safe umbrella" of Article 2 VBER, they must however be part of agreements which have all the characteristic to benefit from the exemption of the application of art 101(1) (*i.e.*, market share <30%).

Post-term non-compete obligations can benefit from the application of the exemption only when they are indispensable to protect know-how (secret and substantial for the agreement) transferred by the supplier to the buyer; limited to the point of sale from which the buyer has operated during the contract period; and limited to a maximum period of 1 year[63].

Non-compete obligations are also excluded from the exemption provided by Article 2 VBER whenever they result in a direct or indirect imposition by the buyer on its authorized distributors from buying products for resale from one or more specific competing suppliers.

In conclusion, the last fundamental part of the VBER is represented by article 6 and 7 that respectively regulate withdrawal and disapplication of the VBER. The commission or National Competition Authority ("NCA") of member state may withdraw the benefit of the VBER pursuant to Article 29(1) of Regulation (EC) No 1/2003, if it finds that, in a particular case, a vertical agreement to which VBER applies has certain effects that are incompatible with Article 101(3) TFEU, either in isolation or in combination with similar agreements entered into by competitors, so-called parallel networks.

"*Parallel networks of vertical agreements are to be regarded as similar if they contain the same type of restrictions producing similar effects on the market. Such cumulative effects may arise, for example, in the case of retail parity obligations, selective distribution or non-compete obligations*"[64].

The responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings that make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall within the scope of Article

[62] Guidelines, § 248.
[63] Guidelines, § 249.
[64] Guidelines, § 258.

101(1) of the Treaty[65]. They are therefore not subject to the withdrawal mechanism[66].

According to Article 29(1) of Regulation (EC) No 1/2003, where the Commission withdraws the benefit of the VBER, it has also the burden of proving, first, that the vertical agreement concerned restricts competition within the meaning of Article 101(1) VBER and secondly, that the agreement has effects that are incompatible with Article 101(3) of the Treaty.

Alternatively, the disapplication of the VBER can be authorized by Regulation by the Commission to parallel networks that cover over 50% of the market share in the relevant market. The instrument, at least in theory, suppose a general disapplication of the VBER to all the agreements of undertaking in that parallel network, the instrument, therefore, is not aimed at individual firms, unlike the withdrawal cases, and restores the full application of Article 101(1) and (3) TFEU[67].

The burden of proof for the Commission would be quite complex in this instrument as well, since the specific regulation would apply in derogation of the general application of the VBER, and it limits should be precisely identified. The commission, in fact, should define the product and the geographical market, and the specific restriction to which the VBER would not apply[68]. Scholars hypothesize that it is exactly for this complex burden of proof and the complexity of the instruments that both the disapplication and the withdrawal of the VBER have never been applied in the EU until today[69].

1.6. Enforcement Policy in Individual Cases

In the previous paragraph we have examined the whole procedure to which an agreement must be submitted in order to understand whether it can benefit from the application of the VBER's provisions. On the other hand, where the block exemption does not apply (*e.g.*, because the market share of the undertakings exceeds 30%), it is necessary to assess whether, in the individual case, the vertical agreement falls within the scope of Article 101(1) TFEU and, if so, whether the conditions of Article 101(3) TFEU are fulfilled. Provided that the agreement does not contain restrictions of competition by object or hardcore restrictions, there is no presumption that vertical agreements fall

[65] Individual suppliers or distributors with a market share not exceeding 5% are in general not considered to contribute significantly to a cumulative foreclosure effect, see the De Minimis Notice, § 10; and Judgment of the Court of 28 February 1991, Case C-234/89 - *Delimitis v Henninger Bräu*, § 24 to 27.

[66] Guidelines, § 261.

[67] Guidelines, Sections 7.1 and 7.2.

[68] CATRICALÀ, *Diritto Antitrust*, 312.

[69] *Ibid*.

within the scope of Article 101(1) TFEU or fail to satisfy the conditions of Article 101(3) TFEU[70].

In case the Commission considers an agreement particularly critical, it bears the burden of proof that the vertical agreement in question restricts competition within the meaning of Article 101(1) TFEU, while undertakings, which claim the benefit of Article 101(3) TFEU, bear the burden of proving that the conditions of that provision are fulfilled[71].

The Guidelines, in section 8.1, while expressly stating that the Commission is not obliged to follow the structure indicated, set a detailed evaluation process of a vertical agreement, that also allows undertakings to have a valuable tool for self-analysis.

"*The assessment of whether a vertical agreement has the effect of restricting competition is made by comparing the situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the vertical agreement*"[72]. The negative effects on competition must be appreciable and are more likely to occur when at least one of the parties to the agreement obtains, maintains or increase some degree of market power, as defined in the Guidelines as "*the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time*"[73].

As mentioned, the Guidelines suggests, with an economic approach, a case-by-case analysis of vertical agreement following the rules of Article 101(1) and Article 101(3). In any case, there is no avoidance of carefully weighing all relevant factors of market dynamics and relating them to each other, also in relation to the specific vertical restraints contained, in an always original application exercise. Before examining the different types of vertical restraints, the commission set a list of such factors that must be taken into account for the assessment of Article 101 paragraph 1 and 3.

In assessing vertical agreements outside the limits of the VBER, under Article 101(1) it is therefore particularly relevant to examine:

(i) the nature of the agreement (*e.g.*, in which way the agreement is implemented by the parties and the incentives that they face);

[70] Guidelines, § 275.
[71] CATRICALÀ, *Diritto Antitrust*, 314.
[72] Guidelines, § 277.
[73] *Ibid*.

(ii) the market position of the parties (*e.g.*, being a first mover on the market, holding essential patents or having superior technology);

(iii) the market position of upstream and downstream competitors (*e.g.*, stronger or lower market power of the individuals);

(iv) the market position of buyers of the contract goods or services (*e.g.*, the possession or not of buyer power);

(v) entry barriers (*e.g.*, ones resulting from economies of scale and scope, government regulations, State aid, import tariffs, IPRs, essential facilities…);

(vi) the level of the production or distribution chain affected (*e.g.*, intermediate or final goods or services);

(vii) the nature of the product (*e.g.*, homogeneous or rather differentiated, expensive or rather inexpensive); and h) the dynamics of the market (*e.g.*, a market prone to tipping or rather stable)[74].

Conversely, the relevant factors in the assessment of Article 101(3) must be considered within the actual context in which they occur[75]. As mentioned above, in the presentation of the provisions of Article 101, the four conditions of Article 101(3) are cumulative and, therefore, the provisions apply only as long as all the condition are fulfilled, ceasing to apply when that is no longer the case.[76]

In particular, the Guidelines explain that when applying the indispensability test contained in Article 101(3) TFEU it is fundamental to understand whether individual restrictions make it possible to perform the production, purchase or sale of the contract goods or services more efficiently than it would have been the case in the absence of the restriction concerned. Undertakings invoking the benefit of Article 101(3) TFEU are not required to consider hypothetical and theoretical alternatives, but they must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would not produce the same efficiencies and lead to a significant loss of efficiencies[77].

Regarding the element of the non-elimination of competition, it is noticed that its aim consists in

[74] *Ibid* § 290.

[75] Judgement of the Court, Joined Cases 25/84 and 26/84, *Ford v Commission*, § 24 and 25; Article 101(3) TFEU Guidelines, § 44.

[76] See, for example, Commission Decision 1999/242/EC (Case No IV/36.237 - TPS), (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition enshrined in Article 101(1) of the Treaty only applies as long as the agreement has a restrictive object or restrictive effects; Article 101(3) TFEU Guidelines, § 44.

[77] Guidelines, § 295.

maintaining effective competition on the market, the same of Article 101 and 102 TFEU in their entirety; therefore, not only the application of Article 101(3) TFEU cannot prevent the application of Article 102 TFEU[78], but also consistency requires Article 101(3) to be interpreted as precluding any application of the exception rule to restrictive vertical agreements that constitute an abuse of a dominant position[79].

1.7. Vertical Restraints

In the first part of this chapter, it has been explained the whole process a vertical agreement must be subjected to, whether by the undertakings in a self-assessment or by the Commission or other competent Authorities in the exercise of their powers. The whole process can be synthesized in the following scheme: first it must be assessed whether an agreement falls under the provisions of Article 101(1), in that case, secondly, it must be assessed whether that agreement can benefit from the application of the block exemptions under the VBER provisions and lastly, if the second condition is not granted or the intention is to confute the presumption of lawfulness, it must be assessed whether the agreement could benefits from the application of article 101(3), even though it restricts the competition under article 101(1). The previous paragraph was dedicated to the introduction of the procedure to complete the third step just mentioned, the individual assessment. The Guidelines, in their final part, gives guidance on the analysis of specific vertical restraints, defined as "*a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty*", the Guidelines also mention the fact that this exercise is merely explicative and any vertical restraints not specifically addressed, will be assessed in accordance with the same principles taking into account the relevant factors, as set out in section 8 and before explained in this thesis.

1.7.1. Hardcore Restriction

The first category of vertical restraints that must be analyzed for the academic purpose of this work are the before mentioned hardcore restriction contained in Article 4 VBER. These restrictions concern the object of the relationship (types of coordination between undertakings which can be regarded as being harmful by their very nature to the proper functioning of normal competition)[80], are

[78] Article 102 TFEU governs abusive conduct by dominant undertakings. See Judgment of 16 March 2000, Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, § 130.

[79] Judgment of the Court of First Instance of 10 July 1990, Case T-51/89, *Tetra Pak v Commission*. See also §106 of the Article 101(3) Guidelines.

[80] Judgment of the Court (Second Chamber) 20 January 2016, C-373/14 P, *Toshiba Corporation v Commission*, §26.

automatically excluded from the application of the VBER[81] and are considered very unlikely to benefit from the application of art 101(3).

The first restraints recognized as hardcore restrictions by Article 4 (a) VBER are the so-called Resale Price Maintenance ("RPM") restraints, included in agreements that, directly or indirectly, restrict the buyer's ability to determine its sale price, setting a fixed or minimum price.

Any action through which the manufacturer manages to:

(i) fix the resale margin;
(ii) fix the maximum level of discount that the distributor can grant from a prescribed price level;
(iii) make the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;
(iv) impose minimum advertised prices ("MAPs"), which prohibit the distributor from advertising prices below a level set by the supplier;
(v) link the prescribed resale price to the resale prices of competitors;
(vi) threat, intimidate, warn, penalize, delay or suspend the deliveries or contract terminations in relation to the observance of a given price level,

is recognized as a hardcore restriction and therefore prohibited under the VBER[82].

Nevertheless, it is always permissible for the supplier to impose a maximum selling price or recommend a price list if these are not, in fact, equivalent to a fixed or minimum selling price. The supplier can, moreover, monitor prices charged by distributors provided that such activity is not combined with pressure to impose certain prices; such an activity is increasingly used in e-commerce, where both suppliers and retailers often use price monitoring software[83].

Finally, the distributor can also set resale prices in fulfillment contracts, which are contracts between the manufacturer and the distributor aimed at executing a contract previously concluded between the manufacturer and the end customer.

[81] The Court of Justice of the European Union has held that certain types of coordination between undertakings reveal a sufficient degree of harm to competition for it to be considered unnecessary to assess their effects. See Judgment of the Court (Fifth Chamber) of 2 April 2020, Case C-228/18, *Budapest Bank and Others*, §35 to 37 and case law cited.

[82] VBER, §187.

[83] E-commerce Sector Inquiry Final Report, §602 to 603 and the dedicated § of this thesis, 50.

As before mentioned, and widely confirmed in Case Law[84], RPM is a restriction of competition by object within the meaning of Article 101(1) TFUE, nevertheless, it is still possible to demonstrate RPM to be efficiency-enhancing. In particular when a manufacturer introduces a new product, to induce distributors to better take into account the manufacturer's interest in promoting that product; where the supplier applies a uniform distribution format, to organise a coordinated short term low-price campaign; where there is the need to preventing a distributor from selling below the wholesale price, by imposing on it a targeted minimum resale price or MAP; or in the case of complex product to provide extra margin for the aim of providing additional pre-sales services.

It should be mentioned that some American legal scholars speculate about the possibility for an RPM to be neutral for the competition, but such a theory does not seem to be completely acceptable, and the European approach is still to be preferred[85].

The second hardcore restriction, pursuant to Article 4, regards territorial or customer restrictions. Are considered hardcore all the restrictions that directly or indirectly limits the ability of buyers to resell in certain territories and/or to certain types of clients, with some particular exceptions in the online context and/or in combination with specific distribution systems.

Indirect measures to induce the buyer not to sell to particular customers can consist, for example, in:

(i) requiring the buyer to request the supplier's prior approval for sales to such customers[86];
(ii) refusing or reducing bonuses or discounts if the buyer sells to such customers[87] or making compensatory payments to the buyer if it stops selling to such customers;
(iii) threatening to terminate the vertical agreement[88] or not to renew it if the buyer sells to such customers;
(iv) charging a higher price to the distributor for products that are to be sold to such customers[89]; or
(v) limiting the proportion of sales made by the buyer to such customers[90].

[84] Judgments of 3 July 1985, Case C-243/83, *Binon v AMP*, §44; 1 October 1987, Case C-311/85, *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, §17; 19 April 1988, Case C-27/87, *Erauw-Jacquery v La Hesbignonne*, §15.

[85] For a further understanding and study of the topic see Catricalà, *Diritto Antitrust*, 280.

[86] See, for example, Case T-77/92 - *Parker Pen v Commission*, §37.

[87] See, for example, judgment of the Court of First Instance (Fifth Chamber) of 9 July 2009, Case T-450/05, *Peugeot and Peugeot Nederland v Commission*, §47.

[88] See, for example Judgment of the Court (Sixth Chamber) of 18 September 2003, Case T-62/98, *Volkswagen AG v Commission*, §44.

[89] See, for example, Commission Decision, AT.40433 - *Film merchandise*, recital 54.

[90] For a more complete list of examples of indirect conducts see Guidelines, § 204 ff.

The supplier may, however, restrict the distributor's place of establishment (location clause), the sale to consumers by its wholesale distributors, and the sale of components to competitors of the supplier. Other exceptions are to be analyzed in respect to the different distribution system operated[91].

To understand these exceptions, the definition of active and passive sales is crucial. Sales are active whenever there is contact with individual customers (*e.g.*, sending unsolicited messages, operating customer visits or online advertisements targeting specific customers) while sales are considered passive when come from response to spontaneous requests from individual customers or general promotional initiatives (*e.g.*, promotional campaigns aimed indiscriminately at the public through mass mailings).

Where the supplier operates an exclusive distribution system, it is lawful to reserves for itself or for one or more retailers (up to a maximum of five, so-called shared exclusivity) the distribution of products in a given territory or to a given customer group, in order to preserve their investment incentives, prohibiting their distributors (and their direct buyers) from active sales in those territories or to those customers. It also lawful for a distributor to restrict its exclusive distributors (and their direct buyers) from selling actively or passively to unauthorized distributors located in the territory where the supplier already operates a selective distribution system or which it has reserved for the operation of such a system.

Where the supplier operates a selective distribution system, in which the supplier establishes a "closed" distribution network (in such network are admitted only those dealers who meet certain quality/quantitative criteria, so-called authorized distributors), it is lawful to prohibit its authorized distributors (and their direct and indirect buyers) from active and passive sales outside the network (so-called ban on parallel sales).

Finally, it must be noticed that the combination of selective distribution with exclusive distribution in the same territory cannot benefit from the exemption provided by Article 2(1) VBER, including where the supplier applies exclusive distribution at the wholesale level and selective distribution at the retail level[92].

The last two categories of hardcore restrictions are represented by the ban on online sales, consisting in any prevention of the effective use of the internet by the buyer or its customers, and in the

[91] Guidelines, section 6.1.2.3.

[92] Guidelines, § 236.

prevention of the use of an entire online advertising channel[93]; and the prevention for the supplier to sell spare parts to subject not entrusted by the buyer who incorporates those components[94].

1.7.2. Single Branding

The Guidelines give an orientation on the category of agreement regarding the single branding, term used in reference to agreements containing non-compete obligations and quantity agreements with similar effects, which lead to an obligation or inductions to concentrate buyers' orders for a particular type of product with one supplier[95]. Non-compete, as before explained, force a *de facto* ban of competing goods or services, while quantity forcing is a weaker form of non-compete (*e.g.*, minimum purchase requirements, stocking requirements or conditional rebates)[96].

The single branding agreement must be individually assessed when the market share threshold of 30% is not respected, the agreement last for more than 5 years, and it is not renegotiable. The assessment must take into consideration the market position of the supplier (manufacturer). Other manufacturers may not be able to compete for the entire demand of an individual customer (a distributor) and the latter would be practically forced to buy from the supplier in question, making him an unavoidable trading partner for at least part of the demand on the market. That could be case when the supplier's brand is a must stock item, preferred by many consumers, or because the other suppliers cannot guarantee the supply for a relevant part of the demand[97]. If manufacturers can compete on equal terms for each individual customer's entire demand, or if buyers' competitors are sufficiently numerous and strong, single branding obligations imposed by a single supplier are generally unlikely to restrict competition appreciably.

In the assessment of single branding agreement to determine whether anti-competitive foreclosure is likely, it is necessary to evaluate: the scale of entry barriers (where competing suppliers can relatively be easy to create an own integrated distribution network or find alternative distributors for their product, foreclosure is unlikely to be a real problem); the countervailing buyer power (to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part,

[93] The restrictions in an online context will be properly analyzed in the second chapter of this thesis (*infra*, page 67).
[94] VBER, Article 4(e) and 4(f).
[95] BELLAMY & CHILD, *European union law of competition*, 560.
[96] The Guidelines also mention the fact that a so-called English clause, requiring the buyer to report any better offer and allowing the buyer to accept such an offer only if the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer must reveal who makes the better offer, § 298.
[97] Judgment of the Court of First Instance (Fifth Chamber) of 23 October 2003, Case T-65/98, *Van den Bergh Foods v Commission*, §104 and 156.

for the loss in competition resulting from the exclusivity, although it is wrong to think that consumers as a whole will benefit if the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings); and the level in the production or distribution chain (if the supplier is not dominant, the competing suppliers still have a substantial share of demand). However, single branding may lead to anti-competitive foreclosure even where there is no dominance but a cumulative effect situation (typically were more than 50% of the market is tied).

Where single branding produces appreciable restrictive effects, it is necessary to assess whether the agreement generates efficiencies that fulfil the conditions of Article 101(3) VBER. As regards the resulting efficiencies, described in the first paragraphs of this thesis, and in particular points b) (answer to the free-ride problem), e) (answer to the hold-up problem) and i) (answer to capital market imperfections), it is possible that quantity forcing on the buyer may be a less restrictive alternative, while, conversely, a non-compete obligation may be the only viable means to achieve the efficiency in point f) (hold-up problem related to the transfer of know-how).

One of the first and most famous case on point is the one known as the Delimits Case[98], that set the bases for the following decisions. In Delimitis v Henninger Brau AG, there was a beer supply agreement between Mr Delimitis, and the brewery, Henninger Brau AG. The latter allowed Mr. Delimitis to set up a beer house and imposed on him an obligation to get exclusive supply from the brewery of all the beer sold in the beer house.

The dispute was brought before the German national court, which referred the matter to the European Court of Justice for interpretation of Article 85 EEC (now 101 TFEU) asking whether the agreement had detrimental effect on the competition.

The ECJ ruled, as regards the tying effect, that the agreement did not have the object of restricting competition, based on many relevant factors, including the percentage of beers involved, duration of the agreement, possibility of opening of new beer houses, the number and size of producers.

1.7.3. Exclusive Supply

The restrictions that oblige or induce the supplier to sell the contract products only or mainly to one buyer are known as exclusive supply, which can take the form of an exclusive supply obligation or

[98] Judgment of the court of 28 February 1991, Case C-234/89, *Delimitis v Henninger Brau ag.*

of a quantity forcing, providing some incentive for the supplier[99]. Again, if the agreement does not exceed the 30% market share, even in combination with other specific restrictions, can benefit from the VBER, otherwise it will need an individual assessment.

Similar to the exclusive distribution[100], the main competition risk emerging is the foreclosure of other buyers. Assumed that the 30% market share limit is exceeded, the market power of the buyer grows in importance simultaneously with the risk for competition, especially in the downstream supply market. Regarding the extend and the duration of the agreement usually when the agreement is exceeding 5 years are, for most types of investments, not necessary to achieve the claimed efficiencies, or these are not sufficient to justify the foreclosure.

Foreclosure of competitive buyers is very unlikely to exist in a relevant way whenever the former have a similar power to the foreclosing one; entry barriers at the supplier level are considered for the foreclosure only when competing buyers cannot provide the goods or services themselves via upstream vertical integration; countervailing power will take relevance in the case of weak suppliers and strong buyers; and lastly, level in the production or distribution chain and the nature of the product are relevant the more the latter are heterogeneous[101].

Efficiencies that can be expected to emerge from these categories of restraints are *(a)* answer to the hold-up problem,[102] and *(b)* economies of scales, even though the latter seems not likely to justify the implementation of an exclusive supply.

1.7.4. Tying

Tying is the last category of single vertical restraint to which the Guidelines dedicate a comment on its individual assessment[103]. They refer to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter[104], and its relevant in a vertical contest if it consists in a single branding obligation of the tied product.

[99] Guidelines, section 8.2.2
[100] *Infra* page 30.
[101] A product is considered homogeneous whenever there are similar products with which it can be replaced, while heterogeneous ones are quite unique and with a certain degree of qualities and grades. On the point see Commission Notice on the Definition of the Relevant Market § 8 to 20
[102] *Infra* point e), f) and g).
[103] Guidelines, section 8.2.8.
[104] Such a behavior can also constitute an abuse of a dominant position under the provision of art 102 TFEU.

According to Case Law, two products are distinct where, in the absence of the tying, a substantial number of customers have the intention to purchase the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product"[105]. Indirect evidence of this differentiation can emerge from the presence on the market of undertakings specialized in the manufacture or sale of the tied product without the tying product[106], or the fact that other less powerful undertakings operates on the market without operating a tying.

Tying means that there is at least a form of quantity forcing on the buyer in respect of the tied product and where, in addition, there is a non-compete obligation in respect of the tied product, the possible foreclosure effect on the market of the tied product is increased. Tying may also lead to: (a) sub competition level prices when their needed proportion for the creation of an output is variable (*i.e.*, when facing an increase in the price of a product customers would redirect to the other one); (b) price discrimination for complementary products (such as photocopy machines and ink cartridge); (c) or to the hiding of disadvantages in the case of long-term contracts of replacement of long lasting equipment.

When the agreement exceeds the 30% market share limit or it is combined with any hardcore restriction and therefore not under the VBER, the assessment must be made in consideration to the importance of the supplier on the market of the tying product (usually the main reason why a buyer may find it difficult to refuse a tying obligation). As long as its competitors are sufficiently numerous and strong, anti-competitive effects are not expected, as buyers would have sufficient alternatives to purchase the tying product alone. In addition, the position of the supplier may be considerably strengthened by entry barriers, or when tying is combined with a non-compete obligation in respect of the tying product.

The efficiencies that must be considered for the possible application of Article 101(3) are those arising from joint production or joint distribution. Cost reduction, in order to justify the restrictions must be at least in part passed on to the consumer, rarely happening when similar or better condition can be obtained otherwise; or where tying helps to ensure a certain uniformity and quality standardization. Nevertheless, to benefit from the application of article 101(3) it should be specifically demonstrated that the requirement of the tied product is related to high standard quality, and minimum standard

[105] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, Case T-201/04, *Microsoft v Commission*, §917, 921 and 922.
[106] Judgment of the Court of First Instance (Second Chamber) of 12 December 1991, Case T-30/89, *Hilti v Commission*, §67.

quality is not possible, or the supplier does not derive a direct financial benefit from the tying[107].

1.8. Exclusive Distribution System

An exclusive distribution agreement is, as a general definition, one where supplier select a distributor to be the exclusive outlet for his products either for a defined territory or a particular class of customers.

In previous paragraphs we have discussed how to assess whether an agreement benefits the general exemption of the VBER, and in particular, for exclusive distribution systems the cases are when the agreement does not exceed the 30% market share limit and does not contain any hardcore restrictions (with particular attention to the cases in special distribution excluded from that definition[108]).

The rationale of this instrument is the possibility for the manufacturer to incentivise distributors to make the investments needed to develop distribution of the brand in territory where it is not well known, to sell a specific new product, or just to focus their selling on a specific one. the main characteristic of such a distribution system is the protection provided by the exclusivity of the activity. An important change from the past, introduced by the current VBER is the possibility of the manufacturer to reserve a territory or a group of customers to a maximum of five different distributors, at the same time maintaining the very nature of the agreement itself, the exclusivity[109] (above that number there is in fact a substantial risk of free-ride issues).

The problematic that may be raised by such an agreement are various[110]. In assessing their risk on the market one must consider, in particular:

(i) the position of the supplier's competitors, that if sufficiently strong any reduction in intra-brand competition will be outweighed by sufficient inter-brand competition:
(ii) the presence of multiple exclusive dealerships, when a distributor is appointed by multiple suppliers, restricting substantially inter-brand competition with the possibility of a reduction of the wholesale price that will not be passed on to the consumers;
(iii)entry barriers, which are not very relevant unless there is an impossibility of finding alternative

[107] Guidelines, §397.
[108] *Infra*, § on hardcore restrictions, 22.
[109] Guidelines, §121.
[110] Guidelines, §157 to 162.

solution on the market when the exclusive distribution[111] is, for example, combined with a single branding restraint;

(iv) the presence of an exclusive sourcing agreement, which requires the exclusive distributors to buy the supplier's brand directly from the supplier, increasing the risk that of the supplier applying dissimilar conditions of sale to the detriment of consumers;

(v) the foreclosure of other distributors, where, in large territories, an exclusive distributor becomes the exclusive buyer, from one or more suppliers, for a whole market (e.g., a supermarket chain that becomes the only distributor of a leading brand on a national food retail market)

(vi) buying power, increasing the risk of collusion by several important buyers

(vii) the dynamics of the market, that will be less likely to be affected when there are growing demand or changing technologies;

(viii) the nature of the product, as effects are less acute if online sales may facilitate purchases from beyond the exclusive agreement; and

(ix) the level of trade (e.g., when the exclusive territories are large, usually an entire member state area, consumers may have little possibility to choose between a high price/high service distributor and a low price/low service distributor for a leading brand, even though efficiency in logistics could justify such an intra-brand loss).

Although the negative effects that could be generated are not few[112], in making the assessment under Article 101(3) one must take into consideration *(a)* that the exclusivity could be necessary for the distributor investments (it is "*doubted whether there is an interference with the competition if the agreement seems really necessary for the penetration of a new area by undertaking*[113]"); *(b)* that objective efficiencies are very likely to exist when a product is an experience[114] or credence product[115]; *(c)* that exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.

In relation to exclusive costumer allocation, more efficiencies could be generated where investments for specific equipment, skills or know-how are necessary to serve a category of consumers, stronger for new or complex products and for products that require special adaptation.

[111] On the point, CATRICALÀ, *Diritto Antitrust*, 288.
[112] BELLAMY & CHILD, *European union law of competition*, 521.
[113] As demonstrated by the Commission in the *Sociètè Techinique Miniere* case.
[114] Whose qualities are difficult to judge before consumption
[115] Whose qualities are difficult to judge even after consumption

In Société Technique Minière[116] the Court of Justice adopted a formalistic interpretation of the concept of restriction of competition under Article 101(1).[117] The French company Technique Minière had the exclusive right to sell in France certain levelling machines manufactured by the German company Maschinenbau Ulm and agreed not to sell competing machines.

The Court of Justice rejected the Commission's argument that the restriction accepted by Maschinenbau Ulm not to compete with Technique Minière necessarily amounted to a restriction of competition prohibited under the antitrust law. The Court of Justice established that it was first necessary to determine the object of an exclusive distribution or supply agreement.

In the present case, granting the exclusive right of distribution was found not to be aimed at restricting competition. In order to make such an assessment it was necessary to consider the concrete or potential effects of the agreement upon competition, taking into account also the legal and economic context in which the agreement was operating. The effects of the agreement were assessed by reference to the competition that would occur in case the agreement would have not been in place, framework of analysis which was adopted and elaborated upon in the Vertical Restraints Guidelines in effect at the time, demonstrating how such provisions can directly influence any decision of competitions authorities.

1.9. Selective Distribution System

It frequently occurs that a manufacturer believes that the best way for him to efficiently penetrate a market is limiting the distribution of his product only to those sellers he reputes better corresponding to its policies[118]. In order to do so, he proceeds to establish a selective distribution system, where he undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria. Distributors, on their end, undertake not to sell such goods or services to unauthorised distributors within the territory reserved by supplier to operate the system[119].

The rationale of such an agreement can be assuring, for example: (a) the quality of pre, during and after sales assistance; (b) the prestige of brand image; (c) the rapidity of distribution; (d) the rationalization of sales costs; and so on.

[116] *Société Technique Minière* Case.

[117] BELLAMY & CHILD, *European union law of competition*, 525.

[118] CATRICALÀ, *Diritto Antitrust*, 290.

[119] Guidelines, §160

Similarity to the exclusive distribution systems, the selective distribution limits the number of authorised distributors and the possibilities of resales. However, this limitation does not depend on the number of territories assigned, but rather on the criteria the distributor must guarantee to be admitted in the network[120]. Moreover, the nature of the protection granted to the distributors is different in the two systems: in an exclusive distribution system the distributor is protected against active sales from outside the territory, whereas, in a selective distribution system the distributor is protected both against active and passive sales by all the subjects that are not authorised to be in the network.

For a long time, the selective distribution was not legally defined and its limits, both theoretical and practical, were object of description by law scholars and Case Law[121]. From its first decisions in the 70s, the Commission distinguished systems that would use selective criteria and others that would limit the number of the distributors possibly admitted in the network. At the time, the former were not included in general exemption while the latter could be only included in worthy cases. It was only with the case Metro-Saba[122] that selective distribution was finally included in the lawfulness presumption.

In its decision, on the 25th of October 1977, the European Court of Justice recognised that, depending on the product or services and on the economic structure of the relevant markets, and in particular, "*in the sector covering the production of high quality and technically advanced consumer durables* - where a small number of producers offer a varied range of items- *readily interchangeable, the structure of the market does not preclude the existence of a variety of channels of distribution adapted to the peculiar characteristics of the various producers and to the requirements of the various categories of consumers"*[123]. In doing so, the Court recognised the lawfulness of selective distribution under the profile of the freedom of contract (and consequently of the freedom to refuse to deal), provided that the potential distributors were valued in a non-discriminative way and their selection would be performed according to objective qualitative criteria, recognising as not infringing the antitrust rules a restriction of the competition on a specific product, if there is sufficient intra-brand add inter-brand competition. Finally, the court defined the selective element as implicitly obliging the exclusion of wholesale trade to unauthorized subjects[124].

[120] CATRICALÀ, *Diritto Antitrust*, 291.
[121] *Ibid*.
[122] *Infra* Case Metro-Saba.
[123] Case Metro-Saba, §1904.
[124] Case Metro-Saba, §1892.

1.9.1. Quantitative and Purely Qualitative Selective Distribution, The Metro Criteria

As previously anticipated selective distribution system can be based on qualitative criteria, quantitative or both of them combined. Quantitative criteria limit the number of distributors directly while qualitative criteria limit the number of distributors indirectly by imposing conditions that distributors must respect in order to be selected (such criteria cannot be met by all distributors). The most typical examples of qualitative criteria are relating to *(a)* the product range to be sold, *(b)* the training of sales personnel, *(c)* the service to be provided at the point of sale, or *(d)* the advertising and presentation of the products. Especially in the recent years with the current global situation qualitative criteria may refer to the achievement of sustainability objectives, such as contributing to the protection of the environment and its natural resources[125].

From an antitrust point of view, differentiating the purely qualitative agreement is a necessary step in the assessment of whether a vertical distribution system fall outside the scope of article 101(1) TFEU, provided that, as for all the agreement examined until now, the general presumption of lawfulness granted to any agreement respecting the 30% market share limit (in which case VBER provision would apply regardless the nature of the product concerned and the nature of the criteria, that would not be mandatory to publish[126]), is not applicable.

The so-called Metro judgement[127] is an absolute landmark in the competition law, in which the ECJ established the rule that when three criteria ("Metro Criteria") are fulfilled, it can be assumed that the restriction of intra-brand competition resulting from purely qualitative selective distribution is offset by an improvement in inter-brand quality competition[128].

The three Metro Criteria are the following:

(x) the nature of the goods or services in question must necessitate a selective distribution system;

[125] Guidelines, §144.

[126] See also, by analogy, Judgment of 14 June 2012, Case C-158/11, *Auto 24 SARL v Jaguar Land Rover France SAS*, §31.

[127] Inclusive of all the relevant judgements: Judgment of the Court of 25 October 1977, Case 26/76, *Metro v Commission*, §20 and 21 (hereinafter 'Case C-26/76 - *Metro v Commission'*); Judgment of the Court of 11 December 1980, Case C-31/80, *L'Oréal v De Nieuwe AMCK*, §15 and 16 (hereinafter 'Case C-31/80 - *L'Oréal v De Nieuwe AMCK'*); Judgment of the Court of 13 October 2011, Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, §41 (hereinafter 'Case C-439/09 - Pierre Fabre Dermo-Cosmétique'); Judgment of the Court of 6 December 2017, Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, §24, (hereinafter 'Case C-230/16 - *Coty Germany*).

[128] Case C-26/76 - *Metro v Commission*, §20 to 22; judgments of 25 October 1983, Case C-107/82, *AEG v Commission*, § 33, 34 and 73 (hereinafter 'Case C-107/82 - AEG v Commission'); Case C-75/84, Metro v Commission, §45; 12 December 1996, Case T-88/92, *Leclerc v Commission*, §106.

(xi) resellers must be selected on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential distributors and not applied in a discriminatory manner; and

(xii) the criteria laid down must not go beyond what is necessary to achieve the objective (proportionality principle).

The goods referred to in the first criterion may legitimate a selective distribution system, as this thesis aims to demonstrate, when they have high-quality or high-technology characteristic, or a luxury image[129] which can be the rationale for the definition of a high-quality product itself. That necessary element can be referred also to the way in which the goods are displayed and presented, in order to preserve their quality[130]. The store is the place where the brand and its products are presented to the consumers, in order to set or rise their desire to purchase[131], and, therefore, must be shown at its best. The assessment of the Metro criteria must refer both to the distribution agreement in general and to each single potential restrictive clause contained therein.

In addition to the qualitative criteria, a selective distribution agreement can also provide quantitative ones. Quantitative criteria may, for example, set a minimum or maximum level of purchases, or specifically limiting the number of distributors. In general, clauses that require the distributor to achieve a certain turnover, or maintain a minimum stock or assortment are more favourably considered by the Commission then others that sets the number of distributors according to the importance of the served population or that re distribute them geographically[132].

1.9.2. Effects on Competition

Once it has been established that the agreement does not benefit from the application of the VBER or that is not a purely quantitative selective distribution agreement that respects the Metro criteria, the mixed selective distribution, qualitative and quantitative, to benefit from the Article 101(3) requires the individual assessment of its effect, for which assistance is provided by the Guidelines[133].

An important factor to bear in mind is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier, quantitative selective distribution generally does not lead to anti-competitive effects, on the contrary, if it is applied by

[129] See Case C-230/16 - *Coty Germany.*

[130] See Case C-230/16 - *Coty Germany*, §25 to 29.

[131] Think of apple's policy of opening physical stores in strategic places in large cities like Rome, London or New York that act more as showcases than just distributors.

[132] CATRICALÀ, *Diritto Antitrust*, 296.

[133] Guidelines, section 4.6.2.3.

several suppliers the effects on the market can be more tangible (so called cumulative effect).

In the case of a cumulative effect, the market position of the all the suppliers is relevant. Where selective distribution is used by most of the leading suppliers, it may lead to foreclosure of certain types of distributors (e.g. discounts). Imagine a technical clothing market where the 4 main manufacturers (cumulatively more than 80% of the market) undertake selective distribution agreement, that would leave the remaining general distributors with less of 20% of the market available. Foreclosure of such distribution formats reduces the possible advantages for consumers, such as lower prices, more transparency and wider access to the product.

It is important to remember that the assessment of the cumulative effects can depends on the market share covered, if the total market share covered is less than 50%, or the largest five suppliers aggregate market share is less than 50%, cumulative effects are very unlikely to emerge. Where both exceed 50%, the assessment may vary depending on whether all five of the largest suppliers apply selective distribution, "*the stronger the position of the competitors that do not apply selective distribution, the less likely that other distributors will be foreclosed*[134]". On the contrary, competition concerns are likely to exist where the agreements of the largest suppliers contain quantitative selection criteria directly limiting the number of authorized distributors or applying foreclosure on certain distribution formats. (e.g., a requirement to have one or more brick and mortar shops or to provide for specific services in a particular distribution format).

The conditions of Article 101(3) are generally unlikely to be fulfilled where the cumulative effects result in an exclusion, to the detriment of consumers, from the market of new distributors, especially price discounters or online-only distributors, that are capable of adequately selling the products in question. On the other hand, as anticipated, indirect form of quantitative criteria are less problematic.

Entry barriers could be significant only where selective distribution is applied by manufacturers of branded products since it will take time and investment for distributors to compete with their own brands or obtain supplies elsewhere.

Buying power may greatly increase the risk of collusion between distributors, since strong distributors may induce the suppliers to apply selection criteria, thus foreclosing market access to new and more efficient distributors.

[134] Guidelines, §155.

Competition concerns relating to the foreclosure of other suppliers will generally not arise as long as other suppliers are not prevented from using the same distributors (e.g., the combination of selective distribution and a non-compete obligation may pose such a risk). However, where the leading suppliers apply not only purely qualitative selection criteria, but also impose on their distributors certain additional obligations (*e.g.*, an obligation to reserve a minimum shelf-space for the supplier's products, or to ensure a minimum share of the distributor's total turnover resulting from the sales of the supplier's products) may still be a concern in completion only in the cases of a cumulative presence on the market[135].

Assessing the dynamics of the market is also important, since, *e.g*., in mature markets growing demand, changing technologies, and changing market positions may make negative effects less likely[136].

Efficiencies may be created by a selective distribution system whenever it leads to logistical cost savings due to economies of scales, even though such efficiencies are usually marginal in this system. On the other hand, selective distribution system can be fundamental to address the free-rider problem or to help maintain a brand image, in general, the use of selective distribution to achieve those types of efficiencies is more likely to be justified for new products, complex products, or experience or credence products.

A great example of the latter products is represented by high quality perfumes. Manufacturer of perfumes such as Chanel or Dior actually spend more money in creating the image and packaging of the product rather than on the chemicals of the products itself. In general, chemicals, research, and development of the perfume, represents only a small portion of the total manufacturer's costs.[137] Brand image is a critical element for manufacturer that therefore require certain standards in sales assistance, exclusive showrooms, and a comfortable shopping experience, vital elements to the enhancing of the likeness of a product.[138]

Finally, the combination with a location clause, to protect an authorized distributor against competition from a new shop of another authorized distributor, may be lawful if it is indispensable to

[135] See previous § on the cumulative effects on market share conditions.
[136] Guidelines, §161.
[137] BUETTNER, COSCELLI, VERGE, AND WINTER, (2009), *Selective Distribution by Luxury Goods Suppliers: A response to Kinsella et al.,* European Competition Journal, Vol. 5, I. 2, 613-621.
[138] CLARK, HUGHES AND WAELBROECK, (2009), *Selective Distribution and Luxury Goods: The Challenge of the Internet?*, The Online Magazine for Global Competition Policy. Available at: https://competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Waelbroeck-AUG-09_1_.pdf.

protect substantial and relationship-specific investments made by the first. *To ensure that the least anti-competitive restraint is used, it is relevant to assess whether the same efficiencies can be obtained at a comparable cost by, for instance, imposing service requirements alone*[139].

1.9.3. Luxury Aura: The Copad vs Christian Dior SA Case

As it has been demonstrated in the previous paragraphs, the image of a product is one element taken into great consideration in the analysis of a vertical agreement. The protection of a that image, in particular for luxury products, is a legitimate aim for the implementation of different verticals restraints. Manufacturers, in designing distribution systems for their products, rarely only set a wholesale price, and let their distributors sells their products without any contractual restrictions. In its opinion in the Coty Case that will be central in the development of this thesis, General Advocate Wahl confirmed the legitimacy of selective distribution systems for luxury goods directed at preserving their image whenever the Metro Criteria are fulfilled.[140]

A Selective distribution, by respecting the legal provisions examined, respond not only to the protection of luxury image to the benefits of manufacturers and distributors, but also, to the benefits of consumers, guaranteeing a high level of quality. While the former would be protected over their investments and prestige, the latter would be aware of and satisfied with the "extra" they are paying for. A great example for the understanding of the provision relating to luxury goods, and in particular in the case where the vertical distribution system aims to answer the free-riding problem is provided by the Case Copad vs Christian Dior SA[141].

In May 2000, Dior signed with the *Société Industrielle Lingerie* ("SIL") an agreement containing a trademark license to manufacture and distribute luxury corsetry goods under the Christian Dior trademark. The agreement provided that SIL would not sell to wholesalers, buyers' collectives and discount stores without prior written consent from Dior, "*in order to maintain the repute and prestige of the trademark the licensee*"[142] ensuring that this obligation was also complied with by its distributors or retailers.

Thereafter, SIL, in clear economic distress, asked Dior for permission to sells its goods outside the selective distribution network, but Dior refused. SIL, in breach of its contractual obligations, sold the

[139] Guidelines, §162.
[140] Advocate General's Opinion in Case C-230/16, 2017, Court of Justice of the European Union press release No 89/17.
[141] Judgment of the Court of Justice of 23 April 2009, Case C 59/08, *Copad vs Christian Dior SA and others*
[142] Case C 59/08, *Copad vs Christian Dior SA and others*, §5.

Christian Dior trademark bearing goods to Copad, a company operating a discount store business. Therefore, Dior brought an action before the French Court[143] against SIL and Copad for trademark infringement.

The case revolved around to what extent Dior could rely on its trademark rights against SIL and Copad. On appeal, the Court de Cassation stayed the proceeding and referred three questions to the European Court of Justice on its interpretation of the Trademark Directive[144].

The ECJ stated that "*the quality of luxury goods…is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury. Since luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods*"[145], and that the owner, in the case of a violation of the trademark license, can still exercise its rights against the licensee after the commercialization of the products.

The above dealt with the issue of enforcing trademark rights in the context of a selective distribution system, but it was essential to set the rules to prove that the products in questions are luxury items and that the selective distribution system is necessary to protect their luxury image against *e.g.*, different forms of free riding. The ECJ clearly stated that

> "*setting up a selective distribution system such as that at issue in the main proceedings which, according to the terms of the license agreement between Dior and SIL, 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', contributes… to the reputation of the goods at issue and therefore to sustaining the aura of luxury surrounding them*".

This landmark case, resolved in 2009, set one of the fundamental phases to the understanding of the nature of the luxury image, and therefore of this whole thesis. Setting the first legal orientation on a such subtle matter, yet it later proved to be insufficient to cover all issues related to luxury products (with particular focus to their definition) and, evidently, issues emerging from the development of a wide and complex online market.

[143] The Tri*bunal de Grande Istance di Bobigny*.
[144] Directive (Eu) 2015/2436 of The European Parliament and of The Council of 16 December 2015 to Approximate the Laws of the Member States relating to Trademarks.
[145] Case C 59/08, Copad vs Christian Dior.

The next chapter will proceed in an analysis of all the relevant provision, Case Law and scholars' opinion to present the European Competition Law in the online field, with the aim of the final assessment of the luxury image protection in such a context.

CHAPTER TWO

THE ONLINE CONTEXT: E-COMMERCE AND COMPETITION LAW

2.1. Significance of E-Commerce

E-commerce (electronic commerce) is generally defined as the activity of electronically buying or selling of products on online services or over the Internet[1]. "*The most profitable and visible segments of the e-commerce market are business-to-business (B2B) and business-to-consumer (B2C). When goods are purchased and sold online between two businesses, it is defined as B2B commerce. When online transactions take place between a retailer and a private user or consumer, B2C commerce is the term that best describes the process*"[2]. According to Statista data, Global e-commerce revenues are projected to reach 4.48 trillion U.S. dollars in 2023 incrementally growing to about 9,30% per year, to reach in 2027 a market volume of 6.39 trillion U.S. dollars[3].

The use of computer networks for companies to conduct business can be dated back to the 1960s, even though with entirely different characteristics. In 1968, ARPA (Advanced Research Projects Agency) commissioned the world's first routers. Within a year, a network called Arpanet was created to ensure that crucial lines of communication would be maintained in the event of a nuclear attack.[4]

The birth of e-commerce can be dated only after 20 years, in 1979. That year, English inventor Michael Aldrich created what would eventually become known as e-commerce by connecting television and telephone lines.[5] The story goes that Aldrich was inspired while on a walk with his wife, complaining about the nuisance of making regular trips to the market, which made him think whether would be easier just to order what you needed through the TV. That thought brought him to invent the 'teleshopping', a system that gave viewers the ability to call in to a processing center to place orders of advertised goods and services on television.

After a long development and further inventions, technically, the first e-commerce company (primarily an online market that served people who wanted to sell their used computers) was Boston

[1] RAINER, CEGIELSKI, *Introduction to Information Systems*, 58.

[2] Statista description on e-commerce, available at https://www.statista.com/markets/413/e-commerce/#:~:text=Current%20e-commerce%20statistics%20state%20that%2040%20percent%20of,online%20buyers%20and%20is%20projected%20to%20continuously%20grow.

[3] Statista data, available at https://www.statista.com/outlook/dmo/ecommerce/worldwide.

[4] W*hat is arpanet*, available at https://www.techtarget.com/searchnetworking/definition/ARPANET.

[5] *Online shopping: The pensioner who pioneered a home shopping revolution*, available at https://www.bbc.com/news/magazine-24091393.

Computer Exchange, launched all the way back in 1982,[6] exactly 12 years before Jeff Bezos left his job at a New York hedge fund, and launched a book online selling company from a Seattle garage[7].

In the emerging global economy, e-commerce has increasingly become a vital component of any business strategy and an excellent catalyst for economic development. Current e-commerce statistics highlights that 40% of worldwide internet users have bought products or goods online via desktop, mobile, tablet or other online devices[8]. This amounts to more than 1 billion online buyers and is projected to continuously grow.

It would be impossible to discuss of e-commerce without mentioning the biggest players on the market, such as Amazon, or Ebay, which still have the upper hand, but new competitors are measuring up. In fact, recently two third-party marketplaces owned by online commerce company Alibaba, TaoBao and Tmall, although focused exclusively on the Chinese market, proved themselves to be the world's leading online marketplaces based on gross merchandise volume (GMV) in 2020, with roughly 600 billion U.S. dollars each.[9]

Not only B2B commerce, but also B2C marketplaces are dramatically increasing, driven by big names such as eBay, Etsy, and Taobao. Most recent developments in global e-commerce have driven the market towards a more mobile direction and an everyday symptom of this tendency can be found in the very common practice of online marketplaces to entice the download and use of their mobile app granting a first purchase discount or special prices list. As a result, today, in addition to online platforms on desktop and mobile devices, many e-commerce players and online retailers sell their products via mobile shopping apps.

E-commerce gives customers the possibility to overcome geographical barriers and purchase products anytime and from anywhere in the world. Online and traditional markets have different strategies for conducting business. Contrarily to traditional retailers which cannot offer a significant wide assortment of products because of the limitation of space, online retailers often hold no inventory. Their activity also differs in the pricing strategies, since generally brick-and-mortar stores focus on store traffic and the inventory costs, while online players mostly base their prices on the speed of delivery[10].

[6] *A Beginner's Guide to E-commerce*, Concordia Saint-Paul University, available at https://online.csp.edu/resources/article/a-beginners-guide-to-ecommerce/.

[7] *Amazon Was Founded 25 Years Ago This Friday. Here's What the World Was Like When Jess Bezos Incorporated the Company in 1994*, available at https://www.inc.com/bill-murphy-jr/amazon-cadabra-jess-bezos-25-year-anniversary-1994.html

[8] Statista data, *infra*.

[9] STEPHANIE CHEVALIER, *Online marketplaces - statistics & facts*, Statista.com.

[10] LI, LU, MASOUD, "*Online versus bricks-and-mortar retailing: a comparison of price, assortment and delivery time*",

Business through e-commerce can be conducted entirely online or along with a brick-and-mortar store. Online marketers can offer lower prices, greater product selection, and can deliver quickly and at relatively low price, which represents the main concern for many customers. On the other hand, online retailers cannot offer the experience of being in a physical store, which lets customer esteem the quality of a desired product and assures the security of the purchase.

On the supply chain level, e-commerce has the ability to integrate all inter-company and intra-company functions, improving the way companies arrange product and inventory movement.

From a physical flows' perspective, e-commerce allows for more efficient movement of goods and inventory through the use of advanced logistics and transportation technologies. This can lead to cost savings and increased efficiency in the supply chain. Additionally, e-commerce allows for the optimization of information processing, which can improve the way companies collect and analyse data and make better informed decisions.

For example, a brand could use advanced logistics and transportation technologies to track the movement of its products from the manufacturing facility to the warehouse, and finally to the customer's doorstep. This could be done by using real-time tracking systems that allow to monitor the location of products at all times, and consequently make adjustments to the supply chain as needed. Optimizing the way a company manages its inventory, could also be done by using inventory management software in order to make decisions about when to restock items based on data about sales and customer demand.

On the financial flows, e-commerce allows for more efficient payment and settlement solutions, leading to cost savings and increased efficiency in financial transactions. This can be done by using payment gateway solutions that allow the brand to process payments and manage financial transactions in a secure and efficient way, also having in mind the best interests and needs of the consumers[11].

The cost reduction would even raise incrementally in cases of goods or services that can be fruited in a digital form, such as any kind of course or advice on a matter (legal, financial, free-time, fitness etc), e-books, audiobooks, videos or any similar audio-visive output and so much more.

International Journal of Production Research, 53; DIMOKA, HONG, PAVLOU, *On Product Uncertainty in Online Markets: Theory and Evidence*, Management Information Systems Quarterly, 36, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976541.

[11] On this point could be interesting to mention the new tendency of big e-commerce players to introduce new way of payment such as Klarna or Scalapay. See, for example, *Italian BNPL Scalapay raises $155m Series A from (you guessed it), Tiger Global*, available at https://sifted.eu/articles/scalapay/.

E-commerce has been having a tremendous impact on competition, and since "*antitrust law is not a static discipline, because the economic and social dynamics behind it are changing*"[12], new developments have demanded, from the legislative point of view, a stream of change and legislative actions. The following subchapters will focus on the main European initiatives on the e-commerce environment.

2.2. European E-commerce Environment

The considerations made regarding the influence of the e-commerce on a global level can be transposed, to some extent, also to the European environment. As a matter of fact, Europe has accounted for almost 1/5 of the worldwide annual sales, with an amount of revenues projected to reach 827.90 billion U.S. dollars at the end of 2022. Such revenues are also expected to grow even more in the near future with an annual expected rate of 13.86%, to reach a total of 1222 billion U.S. dollars by 2025[13].

After the peak of the COVID-19 pandemic, e-commerce has become even more firmly anchored in the economy and society. Luca Cassetti, Secretary General of E-commerce Europe, commented: "In the past two years, retailers have gained a lot of experience in digitalization. This acceleration was significantly pushed by the pandemic, during which e-commerce and retail played an essential role."[14]

To understand to what extent online commerce is part of the everyday life, it is sufficient to mention that user penetration will be 57.3% in 2023 and is expected to hit 66.2% by 2027[15]; meaning that from 6 to 7 person out of 10 will make a daily use of the online market services. In the eCommerce market, the number of users is expected to amount to 5.2 bln users by 2027.

The European Commission, as the main authority on this environment, aims to break down online barriers, so that people can enjoy full access to all goods and services offered online by businesses in the EU[16]. Nowadays, European consumers are able to shop online no matter where they are in the EU, and, to reach the full potential of e-commerce, the EU has worked on different initiatives, such as the revised Payment Services Directive[17] and new rules on cross-border parcel delivery services,

[12] "*il diritto antitrust non è una disciplina statica, perché mutevoli sono le dinamiche economiche e sociali che lo ispirano*", MONTI, introduction to CATRICALÀ, *Diritto Antitrust*.

[13] Statista data on European Area, available at https://www.statista.com/outlook/dmo/ecommerce/europe.

[14] *European E-Commerce Report 2022*, and press release, available at https://wp.eurocommerce.eu/european-e-commerce-report-2022/.

[15] *Ibid*.

[16] *e-Commerce rules in the EU*, available at https://digital-strategy.ec.europa.eu/en/policies/e-commerce-rules-eu.

[17] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, available at https://eur-lex.europa.eu/legal-

new rules for unjustified geo-blocking[18], revised consumer protection rules and new VAT rules for the online sale of goods and services. Finally, the ultimate EU initiative, relevant for the development of this thesis, is the so-called Digital Services Act package. To have a complete understanding of this initiative, it is helpful to evaluate, from the competition law's point of view, the legislative background.

2.2.1. The Cornerstone of Digital Regulation: The E-Commerce Directive

The e-commerce Directive (Directive 31/2000/CE)[19] was adopted in 2000 and has played a key role in the development of online platforms in Europe[20].

The Directive aimed to ensure "*a high level of Community legal integration in order to establish a real area without internal borders for information society services*"[21], meaning that the main scope of the European Electronic Commerce Directive is to remove obstacles to cross-border online services in the Internal Market[22], guaranteeing the proper functioning of the internal market, particularly the free movement of "Information Society services"[23] between the Member States of the European Union.

An information society service is defined as "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service"[24].

Being the first main legislative initiative, the Directive focused on various aspects, such as setting the

content/EN/TXT/?uri=celex%3A32015L2366.

[18] Geo-blocking prevents from buying from a website based in another EU Member State. This creates barriers for consumers in cross-border shopping. See *Rules against unjustified geo-blocking enter into force | Shaping Europe's digital future*, available at https://digital-strategy.ec.europa.eu/en/news/rules-against-unjustified-geoblocking-enter-force.

[19] Council Implementing Regulation (EU) 1042/2013 of 7 Oct. 2013 amending Implementing Regulation (EU) 282/2011 as regards the place of supply of services, available at https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:284:0001:0009:EN:PDF.

[20] DE STREEL, HUSOVEC, *The e-commerce Directive as the cornerstone of the Internal Market - Assessment and options for reform*, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, study requested by the IMCO committee, available at http://www.crid.be/pdf/public/8579.pdf.

[21] The European Parliament and the Council of the European Union, Directive 2000/31/EC, Directive on electronic commerce. Available at: https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32000L0031&from=IT.

[22] See CRABIT, *La directive sur le commerce electronique: le projet "Mediterranee*, Revue du Droit de l'Union Européenne.

[23] Article 1 e-Commerce Directive.

[24] *Ibid* Article 2(a).

‘Internal Market Clause’[25], the ‘Freedom of establishment’[26] or considering the possible liability of intermediaries[27]. On the other hand, from an antitrust point of view, in addition to the harmonisation of the general requirements, the main relevant provisions were contained in Article 6.

First of all, it dealt with the general rules for the electronic advertising, establishing that anyone making electronic advertisements to promote its products or services must make it clear that it constitutes a commercial communication, and for the benefits of whom the commercial communication is being made.[28] In consideration of those requirements, it can be noticed that the use of banners or a hyperlinks containing information on the subject of the advertisement are sufficient to his identification.

Moreover, the last two sections of Article 6, regarded rules on promotional offers, such as discounts, premiums gifts and promotional competitions, which, under the law of the company’s place of establishment, could be permitted only to the extent that they were clearly identifiable as promotional actions.

The Directive was an absolute necessity at the time to set the basis for a safe e-commerce environment. It at least declared what that ethereal place was, who its players were, and what the ‘game’ that was being played there was. For this intrinsic basic characteristic, with the development of the game, new rules were going to be needed.

2.2.2. Digital Single Market Strategy

The Digital Single Market (DSM) represents the strategy of the European Commission to ensure the removal of virtual borders, to grant a boost in digital connectivity and to make it easier for consumers to access cross-border online content[29]. The initiative was born with the idea of creating a European single market for the digital age[30].

[25] Article 3 of the e-Commerce Directive, which article establishes the country-of-origin principle, also referred to as the Single Market clause, ensuring the freedom to provide online services across the Single Market. Online service providers are, under this principle, subject to the rules of the Member State in which they are established and not the rules of the Member State where the service is accessible, state that must therefore refrain from applying its national legislation.

[26] Article 4 of the e-Commerce Directive, which establishes that information society service providers may not be made subject to prior authorization by Member States before starting any activities

[27] Articles 12-14 of the e-Commerce Directive, which set out the limited liability exemptions, containing the conditions under which certain intermediary service providers are exempted from liability for third party content: the types of activities of a mere conduit; caching; and hosting.

[28] A rule that still in the present day is fundamental for the maintenance of a fair competition.

[29] European Economic and Social Committee, *The digital single market - trends and opportunities for SMEs (own-initiative opinion)*, available at https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/digital-single-market-trends-and-opportunities-smes-own-initiative-opinion.

[30] Eurostat, *What is the Digital Single Market About?*, available at https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.htm

The president of the European Commission at the time, Mr. Jean-Claude Juncker, in its Political Guidelines for the next European Commission[31] stated:

> "*I believe that we must make much better use of the great opportunities offered by digital technologies, which know no borders. To do so, we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law.*
>
> *[...] We can create a fair level playing field where all companies offering their goods or services in the European Union are subject to the same data protection and consumer rules, regardless of where their server is based. By creating a connected digital single market, we can generate up to EUR 250 billions of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger jobseekers, and a vibrant knowledge-based society.*
>
> *To achieve this, I intend to take, within the first six months of my mandate, ambitious legislative steps towards a connected digital single market*".

His strong convictions made that idea a reality, and on 6 May 2015, the European Commission, officially communicated the Digital Single Market Strategy.

> "*Today, we lay the groundwork for Europe's digital future. ... I want to see every consumer getting the best deals and every business accessing the widest market – wherever they are in Europe. Exactly a year ago, I promised to make a fully Digital Single Market one of my top priorities. Today, we are making good on that promise. The 16 steps of our Digital Single Market Strategy will help make the Single Market fit for a digital age.*"[32]

The DSM was initially put in place a strategy for the period 2014 – 2019 and aimed to give citizens and businesses better access to the digital world. This strategy is based on 3 pillars (each with 3 actions, and with the objective of achieving 16 measures)[33]:

(i) *Better access for consumers and businesses to digital goods and services across Europe.*

Involving a number of legislative proposals, the first pillar would regulate cross-border

[31] JUNKER, *Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change.*

[32] Press Release European Commission, *A digital Single Market for Europe: commission sets out 16 initiatives to make it happen*, available at https://ec.europa.eu/commission/presscorner/detail/en/IP.

[33] *Ibid*

markets in order to reduce the differences between Member States, and ensure that "*consumers who seek to purchase goods or services in another EU country, whether online or by visiting a shop in person, are not discriminated against in terms of price, conditions of sale or payment arrangements, unless objectively justified on grounds such as VAT or certain legal provisions in the public interest*"[34].

It would also guarantee parcel delivery services throughout Europe and combat unjustified access restriction based on geographical location ("geo-blocking"); therefore, ensuring that no consumers can be discriminated against on any basis[35].

(ii) *Creating the right conditions and a level playing field for digital networks and innovative services to flourish.*

The second pillar was dedicated to providing a safe environment, simpler and more sustainable, for the development of fair competition in the digital network, with a strong attention to the protection of personal data. The European common market must be shaped by a series of European regulations, especially in the field of telecommunications, but also in terms of cybersecurity and everything that concerns audio-visual media services. The provisions would ensure fair competition between traditional telecommunication companies and new internet players and guarantee a standard of safety.

The provisions would also guarantee that access to any networks and services is reliable but also affordable for the different consumers.

(iii) *Maximising the growth potential of the digital economy.*

The third pillar is strictly related to the first two and necessitate them to be put in place. First it would foster the digital switchover of industry and services in all economic sectors in Europe[36]; it would allow a fair and controlled access to capital and data, removing any unjustified data localization restrictions. Regarding the latter, it would, in particular, protect personal data, grant free movement of non-personal ones and the creation of a group of easily accessible European cloud service providers.

The Digital Single Market has demonstrated to be one of the most outstanding European projects. It allowed to set more simple rules for the e-commerce, regulate the world of data transfer and ultimately encourage any entity to enjoy the possibility of selling freely online across borders.

[34] BARREAU, *Le marché unique numérique et la régulation des données personnelles,* Annales des Mines - Réalités industrielles, 37.

[35] European Commission, *Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions – A Digital Single Market Strategy for Europe*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192.

[36] BARREAU, Catherine, *Infra.*

Nevertheless, as demonstrated before, the fast development of new technologies and the fluidity of modern society have requested the legislative actions, in particular the antitrust one, to keep the same pace. Hence, the digital single market strategy has been implemented or re-developed by some new initiative as the Geo-Blocking directive and the Digital Services Act and Digital Markets Act.

The aim of the first one is to legislate and concentrate all the provisions regarding behaviours of companies willing to limit the online environment through restriction of the access to Internet content based upon the user's geographical location.[37] For example, at the present time, a manufacturer cannot request a distributor to ban online sales to foreign buyers, neither oblige the consumer visiting the site of a foreign distributor to be redirected to the one of his nationality. It could only suggest it via a banner or an alert.

An interesting case of unjustified geo-blocking, that has been recently examined by the European Commission, is the case of Valve's platform "Steam". In February 2017, the Commission launched an investigation into geo-blocking practices on Valve's Steam store (a game distribution platform) and five PC video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax)[38]. The investigation was focused on the "activation keys", whose primary function is to combat piracy. After buying the physical copy of a game, users need to submit an activation key to prove they own it and add it to their Steam library. Only after that, the game is available on any user's device.

The Commission found that the distribution agreements concluded between the owner and the publishers provided for geographical limitations for keys marketed in certain States of the Union (namely, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Romania). Specifically, consumers cannot activate such keys in the owner's platform where they are residents of States other than those for which the keys were issued (*e.g.*, if the owner issued a key for Hungary the consumer residing in Italy will not be able to activate it).

At the same time, in the distribution channel via physical channels, publishers allegedly set up distribution systems that assigned certain Member states to each distributor and prohibited the distribution of video games outside the assigned territory.

In the Commission's view, the geographic limitations just described constituted agreements contrary

[37] See for example the "Nike Case", European Commission, Case AT.40436, *Ancillary Sports Merchandise*.

[38] Commission Press Release, *Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce*, *investigating the online sales practice in video games sector in EU*, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_201.

to Article 101 TFEU, as they are likely to divide markets along national boundaries and restrict passive sales to consumers.

Such case raised a concerning regarding the relationship between the investigation and the Geo-blocking Regulation. In fact, in the investigation, the Commission applied only Article 101 and the inquiry under analysis was only complementary to the Regulation. The new release of the decision's summary[39] has not resolved the doubt. Even in the decision, the only provision applied by the Commission is Article 101 TFEU and, at least in the summary, no reference is made to the Regulation. This seems to be in line with Recital 34 of the Regulation, which states that the latter "should not affect the application of competition rules, in particular Articles 101 and 102 TFEU". Thus, no particular insights were yet offered on the future coordination of antitrust enforcement and application of the Regulation.

2.2.3. E-Commerce Sector Inquiry: Commission Final Report

One fundamental initiative in the context of the e-commerce was the launch of the so-called "e-commerce sector inquiry" in May 2015, which permitted to gather "*evidence from nearly 1900 companies operating in e-commerce of consumer goods and digital content and analyse around 8000 distribution and license contracts*"[40]. The final report on the e-commerce sector inquiry, emitted on May 2017, had as main aim to identify business practices which may restrict competition, allowing the Commission to target its enforcement of EU antitrust rules in e-commerce markets[41].

According to the Commissioner Margrethe Vestager:

> "*Certain practices by companies in e-commerce markets may restrict competition by unduly limiting how products are distributed throughout the EU. Our report confirms that. These restrictions could limit consumer choice and prevent lower prices online. At the same time, we find that there is a need to balance the interests of both online and 'brick-and-mortar' retailers. All to the benefit of consumers. Our findings help us to*

[39] *Summary of Commission Decisions of 20 January 2021 relating to a proceeding under Article 101 of the Treaty on the functioning of the European Union and Article 53 of the EEA Agreement* (Cases AT.40413 – Focus Home, AT.40414 – Koch Media, AT.40420 – ZeniMax, AT.40422 – Bandai Namco and AT.40424 – Capcom (Video Games Cases)), available at https://eurlex.europa.eu/legalcontent/EN/TXT/?uri=uriserv%3AOJ.C_.2022.320.01.0005.01.ENG&toc=OJ%3AC%3A2022%3A320%3ATOC.

[40] European Commission Press release, *Antitrust: Commission publishes final report on e-commerce sector inquiry*, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1261.

[41] Report From the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry*, available at https://ec.europa.eu/competition/antitrust/sectorinquiryfinalreporten.pdf

target the enforcement of EU competition rules in e-commerce markets"[42].

The initiative was part of the Digital Single Market strategy, complementing the Commission's legislative proposals in order to ensure better conditions to business and consumers, and serving as a tool to identify possible competition concerns.

The Sector Inquiry main focus was on consumers goods (*e.g.*, clothing, electronics, electrical computer games, software…), media (books, CDs, DVDs…), cosmetics and healthcare products, sports and outdoor equipment, and house and garden products and any digital content. The findings, confirming the growth of e-commerce over the previous decade, can be differentiated in: *(a)* finding on e-commerce of consumer goods, and *(b)* finding on e-commerce of digital goods.

Finding on consumer goods, showed a particular use of price transparency, which resulted on a significant impact in the choices of consumers and distributors. As a matter of fact, 53% of distributors have tracked the prices of their competitors. 70% of them used automatic software programs for this purpose. When such players were large-scale distribution companies, distributors started to increase contractual restrictions to better control the distribution, to react to the possibility for them and consumers to better track prices.

In particular, around 42% of distributor reported they have been subjected to some type of price restriction, and 80% of manufacturers recommend prices to their distributors. Contractual restrictions could also regard marketplace (platform) bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks[43].

Moreover, many manufacturers had also opened their own online retail shops, operating in competition with their distributors and, in order to better control their distribution networks, had started a selective distribution system, in order to let distributors sell their products only if pre-authorised.

Some of these practices were at the time justified, for example to contrast counterfeiting or improve the quality, while others "*unduly prevent[ed] consumers from benefiting from greater product choice*"[44].

On digital content, on the other hand, the results confirmed the necessity of licenses from copyright holders (e.g., owners of licenses on films, TV, sports, music, and news content). Nevertheless, certain

[42] Press release on the final report on e-commerce sector inquiry, *supra*.

[43] *Ibid*

[44] *Ibid*

licensing practices might have made more difficult for new online business models and services to emerge.

The Report showed that online licenses were usually given within national territories of a single Member State (57% of the rights were licensed for a single Member State, and only 66% of them were licensed on an exclusive basis). The most relevant discovery was that almost 60% of the licenses were bonded to a geo-blocking requirement, as geo-blocking appeared in the majority of licensing agreements for fiction TV (74%), films (66%), sports (63%), music (57%), children's TV (55%), and non-fiction TV (51%)[45].

Content providers can engage in geo-blocking for objectively justified reasons, (e.g., to deal with VAT issues or to comply with certain public interests). The geo-blocking legislation[46] ensures that consumers seeking to buy products and services in another EU country, physically or online, are not discriminated against in terms of access to prices, sales or payment conditions, unless this is objectively justified for a specific reason.

The report also showed that licensing agreements were usually under long-term agreements, and therefore they were not easy to be accessed by any player. Around 80% of the agreements submitted were at least two-year-long, with 10% lasting for over ten years.

The last competitive concern showed regarded 'bundling' strategies, consisting in joining products or services together in order to sell them as a single combined[47], irrespective of the actual proportionate needs or convenience from buying as a bundle.

The report has not only been a critical instrument to understand the different obligations and strategies that manufacturers and distributors have been using (e.g., it was detrimental in the reasoning for the development of new legislative provisions such as the Geo-Blocking directive or the new VBER), but it also represented a good instrument for companies operating in different sectors (e.g., clothing ones, like Mango, Oysho and Pull & Bear, or Dorothy Perkins and Topman; or of other sectors, like De Longhi or Manfrotto, respectively coffee machine and photo equipment manufacturer) to review

[45] Final report on the E-commerce Sector Inquiry, § 66.

[46] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

[47] The most famous example is the case of an agreement between a distributor of printing machines requiring its clients also to buy paper stock from them and not from any other competitor.

their commercial practices on their own initiative[48].

2.2.4. Digital Services Act and Digital Markets Act

In recent years, as part of the Digital Single Market strategy, and in consideration to all the relevant elements not considered in the e-commerce directive, the European Commission has introduced, for the first time, in the European Commission proposal from 15 December 2020[49], two new initiatives: the Digital Services Act (DSA)[50] and the Digital Markets Act (DMA)[51]. The two acts jointly have as their purpose "*to create a safer digital space in which the fundamental rights of all users of digital services are protected* – and – *to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally*".

The difference between them lies on the fact that the first is directed to ensure that the biggest digital players do not abuse of their position and nature on the market, while the second is focused on the nature and the protection of users in such a complex environment.

The DSA, in order to harmonise different national laws, depending on the nature, role and position on the market, have set some general rules for the online intermediary services' providers. In particular, in respect to its predecessor (the e-commerce directive), the DSA is meant to improve content moderation on social media platforms in order to address concerns about illegal content, maintaining the general non-liability rule for contents that are not to be known as illegal. Finally, it aims to disclose to regulators how the algorithms work and to create transparency.

The DMA, instead, more relevant for antitrust purposes, narrowly defines objective criteria for the identification of a 'gatekeeper'. a large online platform can be a gatekeeper if possess *(a)* strong economic position, significant impact on the internal market and is active in multiple EU countries, *(b)* strong intermediation position, meaning that it links a large user base to a large number of businesses and *(c)* an entrenched and durable position in the market, meaning that it is stable over time (or it likely will be)[52].

Gatekeepers, as their own name would suggest, naturally raise competition concerns by raising strong

[48] Press Release on Final Report, *supra*.
[49] European Commission, *Proposal for a Regulation of The European Parliament and of The Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN.
[50] *Ibid*.
[51] European Commission, *Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=COM:2020:842:FIN.
[52] Proposal for a DSA, *supra.*

market entry barriers. Therefore, the DMA aims to introduce toward them some particular rules. For example, they must allow inter-operation with third parties in some circumstances, users access on their own generated data, clear and transparent advertising conditions, nonexclusive use of their services. Moreover, they cannot favour their goods and services, to the detriment of other operators and, ultimately, consumers.

The main objective of this regulation is, therefore, to regulate the behavior of the Big Tech firms (presumably they will all be gatekeepers)[53], in several fields known as Core Platforms Services (CPS).

CPS, considered problematic for the presence of gatekeepers, are[54]:

(i) online intermediation services (*e.g.*, Google Play Store, Apple's App Store);
(ii) online search engines (*e.g.*, Google Search);
(iii) online social networking services (*e.g.*, Facebook);
(iv) video sharing platforms services (*e.g.*, YouTube);
(v) number-independent interpersonal communication services (*i.e.*, communication platforms like WhatsApp or Gmail);
(vi) operating systems (*e.g.*, Android, iOS);
(vii) cloud computing services (*e.g.*, Amazon Web Services);
(viii) advertising services (*e.g.*, Google Ads).

Following the same principle of innovation and continuous mutation of the online environment before mentioned, the Commission established that the impact of the Digital Services Act and the Digital Markets Act on the European digital market shall be monitored every two years.

Once a presentation of all the legislative European initiative on the online context has been done, this thesis will now focus on vertical agreements in such context.

2.3. Online Vertical Agreements and Restraints

Chapter one focused on establishing which are the vertical restraints and vertical agreements in their entirety. In the past, restraints have mostly applied on a classic analogic brick-and-mortar commercial environment, which could be categorised as general vertical restraints. As we have widely demonstrated in the previous paragraphs, the development of the internet, and subsequently of e-commerce, has revolutionised the world in which competition is placed. Markets and economic

[53] *Ibid*.
[54] Article 2, Proposal for a DMA, *supra*.

systems were deeply pervaded by the stream of change, and consequently the emerging of new possibilities created the rise of new possible issues.

Undertakings, reacting to the new possibilities of competing in a market, have created new methods and instruments to adjust their behaviour. In the context of undertakings placed at different levels of the production chain, these methods to reach agreements between them have consolidated into what we call "vertical online restraints".

"*Undertakings that are active in the online platform economy play an increasingly important role in the distribution of goods and services*"[55]. They enable new ways of conducting business, ways that have not been and still are to the present day not easy to categorise under the classic enumeration.

In commercial or contractual law is not so unusual that undertakings active in the online platform economy could be qualified as agents. However, from an antitrust point of view, this qualification is not significant for the categorisation of their agreements under the provisions of Article 101(1) TFUE. As it was already explained in the first chapter, vertical agreements entered by undertakings could be categorised as agency agreements, and therefore falling outside the scope of Article 101(1), to the extent that they fulfil the conditions which are proper of an agent (*e.g.*, not bearing any own risk in the performing of the contract). Those conditions will generally not be fulfilled in the case of agreements entered by undertakings active in the online platform economy.

The first step in the identification of an online vertical agreement regards whether it refer to any online intermediation services. The VBER defines them, within the meaning of Article 1(1), point (b), of Directive (EU) 2015/1535 of the European Parliament and of the Council[56], as any information society service "*which allow undertakings to offer goods or services: (i) to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings, or (ii) to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings and final consumers, irrespective of whether and where the transactions are ultimately concluded*"[57]. Most obvious examples of online intermediation services may include e-commerce marketplaces (*e.g.*, Amazon or eBay), app stores (Apple's App store or Google Play), price comparison tools and social media services used by undertakings.

The providers of online intermediation services are undertakings that "*facilitate the initiating of direct*

[55] Guidelines, § 62.

[56] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

[57] VBER article 1(e).

transactions between two other parties"[58]. Obviously, qualifying as such does not imply any activity performed by the undertaking would be performed representing such a figure. To the same extent that public bodies can be recognised as undertakings when not performing their functions, the same undertaking performing different functions in different vertical agreements can be qualified differently. As a matter of fact, undertakings active in the online platform economy often apply different business models in various situation. For example, one undertaking can be both engaged in purchasing and reselling goods or services, and at the same time provide online intermediation services (in some cases performing both functions in relation to a single counterparty)[59].

A provider of online intermediation services can also offer ancillary services (e.g., advertising services rating services, guarantees *etc*) other that its main activity.

In vertical agreements, undertakings can play the role of suppliers or buyers. According to the VBER, a provider of online intermediation services it's a supplier of those services while a buyer of online intermediation services (also known as distributor) is qualified as such irrespective of whether he pays any price for it.

It must be noticed that, as the first chapter of this thesis has demonstrated, agreements between competitors do not fall under the application of the vertical block exemption regulation, except the cases of dual distribution, but rather on the horizontal legislative provisions. In the online context, the exceptions of the dual distribution "*shall not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services*", even though, the difference between competitive undertakings and vertically related undertakings is not that immediate.

One example of this situation can be the platform Amazon, which on one hand provides online intermediation services in the form of a marketplace on which an undertaking can independently sell its goods or service, but on the other it also competes directly on the market of those product and services operating on its own account. Such situation may raise serious concern for the competition, as the platform may have both an incentive to favour its own sales and the ability to influence the competition between undertakings that use its online intermediation services.

The Guidelines regard this kind of providers as having an 'hybrid function' and provide a specific

[58] Guidelines, § 65.
[59] Judgment of the Court (Grand Chamber) of 19 December 2019, *Criminal proceedings against X*, Case C-390/18, § 58 to 69.

section to the understanding of their nature[60], considering that, as plenty discussed until now, an agreement not falling under the general 'safe umbrella' of the VBER does not necessarily restrict competition under Article 101 TFEU.

If an agreement made with a hybrid provider does not contain restrictions of competition by object, and the market power of such provider is not strong (*e.g.*, it is of new development, as start-ups), appreciable anti-competitive effects are unlikely to emerge. In the online platform economy, the providers revenues may be only a first proxy for the extent of its market power, as it may also be necessary to consider, for example, the number of transactions intermediated by the provider, the number of users on the provider infrastructure or the actual use these make of the provided services.

The competition authorities are very focused on prioritising enforcement actions in respect to the biggest players in such environment. Of absolute interest is the recent action taken by the Commission, which has sought feedback on commitments offered by Amazon concerning marketplace seller data and access to Buy Box and Prime, in order to solve a competition concern created by its dual position on the market.

On July 14th, 2022, the Commission invited interested parties to submit comments on Amazon's commitments to the proceedings in which it is suspected of using private data of independent traders selling products to consumers on Amazon's online marketplace platform and manipulating the terms of access to the Buy Box (a privileged space where a particular seller's offering is prominently displayed) and its premium service, Amazon Prime.

Through its activities pertaining to the Marketplace, according to the Commission, Amazon would collect commercial and private data pertaining to independent sellers operating on the Marketplace and use this data to compete as a seller with other operators. In addition, the Commission believes that the terms of access to the Buy Box and Amazon Prime unduly favour both Amazon itself, as a seller on the Marketplace, and sellers using the logistics and delivery services offered by Amazon.

In order to address these concerns, Amazon has proposed several commitments, some of which anticipate measures that will be required by the Digital Markets Act.

(i) As for data, Amazon will waive the use of private data related to the activities of independent sellers (e.g., sales terms, revenue, shipping, inventory information, consumer visits, seller performance);

[60] Guidelines, section 4.4.4.

(ii) as for the Buy Box, Amazon agrees to apply non-discriminatory conditions and criteria for the selection of sellers and to match the selected offer with an additional offer, competing with the first one;

(iii) as for Amazon Prime, Amazon commits to: *(a)* apply non-discriminatory conditions and criteria for the selection of sellers and offers, *(b)* allow affiliated sellers to freely choose the logistics operator for the delivery of their products, and *(c)* waive the use of terms and performance data related to logistics operators, competing with Amazon's logistics service.

On December 20th, 2022, the Commission approved the commitments proposed by Amazon, considering that the initially proposed commitments were amended following the market test initiated by the Commission on July 14th in order to:

(i) make the presentation of the second competing Buy Box offer more prominent and include a review mechanism if it does not effectively attract consumers' attention;

(ii) increase transparency and timely information to sellers and carriers on commitments made and rights newly acquired by them;

(iii) provide means for independent carriers to contact Amazon customers directly by enabling them to provide equivalent delivery services;

(iv) improve data protection for carriers;

(v) increase the powers of the independent trustee by introducing additional reporting requirements;

(vi) introduce a centralised complaints mechanism open to all sellers and carriers in case they suspect non-compliance by Amazon with the proposed commitments and

(vii) increase the duration of the commitments relating to the Prime and Buy Box programmes by a further two years, to a total of seven.

The considerations made until now are not of immediate comprehension and the Guidelines regard to them a specific section examining the consequences that these provisions would make on the competition environment[61].

As a matter of fact:

(i) An undertakings providing online intermediation services cannot be qualified as a distributor of the goods and services offered on its digital markets on behalf of another undertaking. In other words, Amazon could not be qualified as a distributor for the sales made by a buyer of

[61] Guidelines section 4.3.

hits services.

(ii) in the calculation of the market share threshold, main element of the provision of the VBER, the market consists of the one for the supply of these services, not the ones offered into it. Whether it constitutes a different market from the offline intermediation services depends on the degree of substitutability of these services. A relevant example off such a non-trivial differentiation can be the issue of substitutability of intermediating services for taxi reservations in Italy examined by the Latium Regional Administrative Court recently.[62]

(iii) any provision introduced regarding hardcore restrictions cannot be avoided changing the context in which it applies. Therefore, any restriction, imposed by the provider to distributors using its intermediate channel, relating to the price, the territories, or the customers, must be considered as hardcore even in the online context. For example, the exemption provided by Article 2(1) of the VBER does not apply to an agreement under which a provider of online intermediation services imposes a fixed or minimum sale price for a transaction that it facilitates;

(iv) any agreement that imposes a different price in all the available retail platform other than the one owned by the provider part of the agreement (*i.e.*, across-platform retail parity obligations) cannot benefit from the general exemption from Article 101;

(v) where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services, the agreement in which its part cannot be regarded as purely vertical, giving its hybrid function on the market, and therefore must be assessed by taking into consideration also the Horizontal Guidelines.

In conclusion, it is of fundamental importance to understand that the presence of players providing online intermediation services introduce in the normal agreement's scheme (*i.e.*, manufacturer to distributor) another subject, even though this addition does not modify the role of the "original" players. As a matter of fact, the reseller (or in this thesis the "distributor", for the sake of clarity and uniformity) would always be the undertaking effectively performing the transaction, not the one which only provide a connection between the former and the consumer.

2.3.1. Online Sales as Passive Sales

Since the early development of e-commerce, a great challenge for the Competition Law was to recognize and deal with an enormous amount of sales possibility opening up from that new ethereal world. The use of Internet for distributors was the main development of Regulation 330/2010 (old

[62] Judgments 5338, 5339, 5417, 5418 e 5419, TAR Lazio.

VBER), which was founded on the difference between active and passive sales. As we have already anticipated active sales mean:

> "*actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established*[63]";

while passive sales mean:

> "*sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender*".

Any ban on passive sales was recognized as a hardcore restriction and therefore any agreement restricting any kind of online sales was considered to be unlawful under the old VBER. The guidelines to which Regulation 330/2010 was complemented by explain that at any distributor must be consented the use of Internet to perform their selling activity. If a client where to visit an Internet site and, resulting, a sale was performed, that sale must have been considered as passive, therefore completely lawful in any kind of distribution.[64]

That strict distinction was eventually overcome by the introduction of the actual VBER which has incorporated the jurisprudential changes developed by the Case Law. Despite the fact that in the actual legislation any ban of online sales is not regarded as a hardcore restriction, there are still some cases considered as such, while the others require a clear assessment and evaluation of their elements.

The restrictions, often contained in a vertical distribution system, which are still recognized as hardcore restrictions, by Article 4 point (e), are (a) the ones that, directly or indirectly, have the object of preventing the effective use of the internet by a distributor (or its customers) to sell the contract goods or services to particular territories or customers, and (b) any restriction, directly or indirectly,

[63] VBER, Article 1.l.

[64] CATRICALÀ, *Diritto Antitrust*, 297.

have the object of preventing the use of an entire online advertising channel.

Any agreement that consists in a *de facto* prohibition for the buyer from using the internet to sell the contract goods or services must be considered as not able to benefit from the exemption of the VBER. The same rule applies, for instance, to the case of vertical agreements which have the object of significantly diminishing the aggregate volume of online sales of the contract goods or services or the possibility for end users to buy the contract goods or services online. Similarly, the benefits of the VBER must not apply in the case of vertical agreements that have the object of preventing, even indirectly the use of one or more entire online advertising channels by the distributor, such as search engines[65] or price comparison services. The same goes for preventing the buyer from establishing or using its own online store, which will be further demonstrated in this thesis by relevant Case Law.

The guidelines provide a list of cases in which hardcore restriction can indirectly be the result of specific obligations[66]:

(i) the requirement for the distributor to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller (via the so-called Geo-Blocking)[67];

(ii) the obligation for the distributor to deny consumers' online transactions made via credit card related to a foreign address[68];

(iii) the requirement for the distributor to perform their activity related to the contract goods or services only in a physical space or in the physical presence of specialized personnel[69];

(iv) the requirement for the distributor to ask, before making individual online sales transactions, for the manufacturer's authorization;

(v) the prohibition for the distributor to use the producer's trademarks or brand names on its website or online store;

(vi) the prohibition for the distributor to establish or operate online stores, irrespective of whether the online store is hosted on the distributor's own server or on a third party one;

(vii) the prohibition, direct or indirect, for the buyer to use an entire online advertising channel[70] or price comparison services. For example, the prohibition to use the supplier's trademarks or brand names for bidding to be referenced in search engines, would, as a matter of fact, have

[65] European Commission, Case AT.40428 - *Guess*, § 118 to 126.
[66] Guidelines, § 206.
[67] Regulation (EU) 2018/302, article 3.
[68] *Ibid*, article 5.
[69] European Commission, Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, § 36 and 37.
[70] See also European Commission Decision, case AT.40428 - *Guess*, § 118 to 126.

the object of preventing the effective use of the internet by the distributor. He might be excluded from selling goods or services to particular territories or customers, as he will not have the ability to target customers beyond its physical trading area, presents his offers and attract them to its selling channels. As this thesis will further demonstrate, prohibiting the use of particular price comparison services or search engines is generally not a hardcore restriction considering that the distributor can always use other online advertising. However, when the prohibition is directed to the most widely used advertising services it may be regarded as a hardcore restriction if the remaining advertising services players are *de facto* not capable to be a suitable substitution and attract customers.

2.3.2. Dual Pricing

One of the main introductions of the new VBER regarding the online context, as a development from the discoveries of the final report beforementioned and some important Case Law[71], regards the so-called dual pricing.

A dual price is considered when there is a requirement that the distributor pays a different wholesale price for products sold in different channels, online and offline[72]. In the former VBER, dual pricing was considered a hardcore restriction, and therefore eliminating the presumption of lawfulness[73]. According to the current Guidelines, dual pricing can benefit from the exemption of Article 2(1) VBER, as it may incentivize or reward an appropriate level of investments in online or offline sales channels. On the other hand, it must be provided that it does not have the object of restricting sales in particular territories or customers, falling, in that case, under the restriction of Article 4 VBER.

A similar change of attitude towards the application of a different price, depending on the different selling channel, is symptom of online economy's development, the increase of the multitude of online shops and the legislator's awareness of the different situation that an online, rather than a brick-and-mortar, shop faces whenever processing a sale.

As it was brilliantly held by the Zutphen district court (*Rechtbank Zutphen*) in the Groen Trend case[74], which has deemed antitrust-neutral a dual price application, in the online context exist different costs of production and sales' transaction value that must be taken in consideration. A dual price application

[71] Zupthen District Court, Case 74100, *Groen Trend B.V. and Schouthen Keukens B.V./Atag Etna Pelgrim Home Products B.*V and DERTWINTE-KALT, HAUCAP, & WEY, *Procompetitive dual pricing*.
[72] Guidelines, § 209.
[73] Guidelines on the 2010 VBER, § 61.
[74] *Supra*, Zupthen District Court, Case 74100.

can be completely lawful when such differences are proven and significant.

While dual pricing would still be a hardcore restriction whenever the difference in the wholesale price makes the activity of selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the distributor, a dual pricing could be useful also in the case of a combination of both online and offline channels.

The manufacturer may charge a different wholesale price for products that are to be sold through a combination of offline and online channels, where the price difference takes into account investments or costs related to that type of distribution. An appropriate method to implement dual pricing could be agreed between the parties, for example, including an ex-post balancing of accounts on the basis of actual sales[75].

At the present time there is yet few developments and usage of such a provision, but it is beyond any reasonable doubt that this implementation will, in the immediate future, improve the repression of the free-riding problem.

A consumer enjoying a pre-sale service and advice on a product will not be tempted to buy such product on a different channel if the final price would be the same. Since, as we have demonstrated in this thesis, fixing a resale price is not permitted, presenting a higher price to an online distributor which does not bear the same costs of a physical one, seems to be one of the most efficient ways to maintain the same margin for the distributors while protecting the presence of high-quality services for the consumer.

It must be noticed that the price difference seems to be not exclusively related back to the evaluation of costs incurred. Nevertheless, the difference in the costs and investments required by distributors can be a good, if not the best, benchmark to justify dual pricing.

2.3.3. Parity Obligations

Price parity clause oblige the manufacturer to offer the best price on a specific platform or, on the contrary, oblige not to offer better prices or conditions on other platform or sales channels[76]; these are also known as Most Favoured Nation Clauses (MFN)[77].

Such clauses are they manifestation of the relevant market power assumed by online distributors and

[75] Guidelines, § 209.
[76] CATRICALÀ, *Diritto Antitrust*, 282.
[77] *Ibid.*

were justified by the necessity of giving them effective incentives to promote the product and to constantly improve the consumer shopping experience (which is absolutely essential to attract new customers).

MFN clauses resulted in a relevant number of cases and a wide debate amongst scholars. One of the most famous one is the Apple e-book case[78] in which the main worldwide editors have undertaken an agency agreement for the selling on "i-Bookstore", through which they exercised direct control over the selling price of the titles on the platform, while Apple would get 30% of the revenues as an agency fee. That agreement consisted, *inter alia*, in an obligation for the editors not to sell the same products at different prices via other online shops (namely Amazon, that before the implementation of the agreement had around 90% of the market). After many years of litigation and dispute the case was finally ended by the Supreme Court of the United Stated, confirming the previous decisions which found Apple guilty of conspiring with the editors to e-book price fixing.

In Europe, on the same matter, once the Commission opened an investigation, preoccupied by the potential striction of such an agreement, Apple ended the agreement with four of five editors and therefore the case was closed with obligations (*inter alia*, not to enter into or enforce retail price MFN clauses for duration of 5 years)[79].

Similarly, in the United Kingdom and in Germany, Amazon had to remove a similar clause which granted the best online resale price on its platform, obliging sellers to market the same product at worse prices or conditions on their own or third parties' site[80].

The VBER distinguish between different types of parity obligations, which applies only on online platforms and commercial partners. Article 5(1)(d) recognized as excluded from the application of the VBER only the so-called 'Wide parity clause', which prohibit trading partners from offering better terms on competing platforms. On the contrary, 'Narrow parity clause', which prohibit trading partners from offering better terms on their own direct channel of sales, but not also on competing platforms, are presumed lawful and thus benefit from the exemption if they fall under the safe harbour.

The VBER stipulates that could benefit from the exemption provided by Article 2(1) also those clauses that *(a)* relate *"to the conditions under which goods or services are offered to undertakings that are not end users*", and *(b)* relate "*to the conditions under which manufacturers, wholesalers or*

[78] United States District Court for the Southern District of New York, *United States v. Apple Inc., et al.; The State of Texas, et al., v. Penguin Group Inc., et al.*

[79] European Commission, Case AT.39847, *E-Books*, available in the public case register at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_39847

[80] CATRICALÀ, *Diritto Antitrust*, 282.

retailers purchase goods or services as inputs ('most favoured customer' obligations)[81]. The latter are especially suitable in long-term relationship involving sunk investments, since they address a hold-up problem for the distributor, whereby, for example, it might refrain from investing in or launching a new product due to fears that the supplier of the input may lower its price to subsequent distributors[82].

The first two categories of parity clauses are more likely to produce anti-competitive effects, inasmuch as they facilitate collusion between providers of online intermediation services. That would be the case in which the providers will be able to raise the price or reduce the quality of their intermediation services without losing market share and to foreclose entry or expansion by new or smaller providers by limiting their ability to offer distributors and customers differentiated price-service combinations.

In the assessment of such parity clause, it is fundamental to take into account *(a)* the market position of the provider, *(b)* the share of distributors covered by the agreement, *(c)* any barriers to entry and *(d)* the extent to which the distributors can actually remove their products on the provider infrastructure (*i.e.,* de-listing).

It is important to notice, for example, that in most cases, users tend to single-home (*i.e.*, use only one platform). Distributor multi-homing is incentivized by platform business models under which he has to pay for using the online intermediation service, only when the service generates a transaction. In applying such a method, distributors can increase the share of total demand for such services, decreasing the provider's bargaining power and its ability to impose retail parity obligations. Most of the time costumers do not realize the loss of competition they could generate counting always on the same online provider, since, once the possible competitors have all been foreclosed by the market, there would not be an actual free choice on their end anymore.

"*The most common justification for the use of retail parity obligations by providers of online intermediation services is to address a free-rider problem*"[83]. In fact, the provider may not have an incentive to invest in the development of its platform (*e.g.*, in pre-sales services) if the benefits of such investments go to competing platforms, or direct sales channels which can offer the same goods or services on more favourable conditions.

To make such assessment it must be understood whether the investments made by the provider of

[81] Guidelines § 254.
[82] Guidelines § 378.
[83] Guidelines, § 372.

online intermediation services create objective benefits for the consumers, whether the free-riding issue is relevant and substantial, and not just a theoretical justification to protect an unlawful disguised provision. Moreover, for such an obligation to be considered not infringing competition, it must be the only possible method to achieve such efficiencies (*e.g.*, if the provider or its competitors operate in similar markets without using retail parity obligations this may indicate that the latter are not actually indispensable).

The most prominent cases on parity clause are the one regarding the online platform Booking.com, where the Swedish, Italian and French competition authorities, with some coordination activities also with the European commission, have accepted conditions in three parallel proceedings relating to MFN[84].

The proposed commitments, accepted and made mandatory by the authorities, regarded the editing of a parity clause on hotel rates for a period of five years, also providing the elimination of the standard agreement between Booking and hotels regarding availability of rooms and other commercial condition not only in regard to Booking's competitors but also on some hotels direct channel.

The commitments reflected an evident separation between wide and narrow parity clauses, evidently limiting the obligation applicable only to prices and conditions for the hotels online channels while granting freedom for the hotels to choose conditions applicable to other OTA (Online Travel Agencies) and in their offline channels, symptom that from an antitrust point of view the main competition concern was the risk of loss of competition between different providers[85].

2.3.4. Restrictions on The Use of Price Comparison Services

A category of vertical agreements implemented in the new VBER regards the restrictions applicable to the use of price comparison services, defined as services that do not provide a direct purchasing functionality[86] (*i.e.*, online advertising channel only). Unlike online marketplaces where this is a purchase option, they instead only redirect customers to the online store of the retailer, operating just as intermediaries and enabling transactions between the customer and the distributor on its own channel.

Restriction on the use of these online comparison services is most of the time related to the

[84] CATRICALÀ, *Diritto Antitrust*, 284.
[85] *Ibid*, 283.
[86] On the contrary, services enabling users to conclude purchase transactions by providing sale and purchase functionality are classified as online marketplaces and will be analyzed lather in this thesis.

characteristic of the products and their brand image. As a matter of fact, by their intrinsic nature, these comparison services focus only on price and have absolutely no regard to the range or quality services and product have. The restriction can be also justified by the will to contrast counterfeiting, or to protect the distributors' business model (*e.g.*, when it relies on specialization or high-quality/high-cost ratio)[87].

Restrictions on the use of price comparison services can differ widely, ranging from an actual direct or indirect ban (*e.g.*, a restriction on providing price information, a requirement to obtain the manufacturer authorization before using price comparison services, or a restriction on the use of the manufacturer's brand) to lighter restrictions that would, for example, require the provider to include specific content in the offers[88].

Restriction on the use of price comparison services, mostly directed to undertakings in a selective distribution agreement, could generate in the market an increase of the consumer search costs, softening retail price competition, or a restriction to the distributor's ability to reach potential customers. The wider type of restrictions could amount to a ban of an entire online advertising channel, and therefore amount to a hardcore restriction.

Similarly, if the restraint is intended to restrict the sales to a particular territory or a customer group (*e.g.*, banning the use of a price comparison service which use a language spoken in that territory or by that group and not by the distributor), it will be considered a hardcore restriction, unless it pursues a lawful protection aim under a selective distribution system.

Whenever a restriction on the use of a marketplace cannot benefit from the general presumption of lawfulness (*e.g.*, because it has a restriction by object or the agreement exceed the 30% market share threshold), its effects on competition (substantially its capacity of significantly restricting it) must be assessed considering different factors.[89]

Where restrictions on the use of price comparison services are used in a selective distribution agreement, they must demonstrate to be appropriate and proportionate means to preserve quality. In that regard, it must be considered that price comparison services re-direct potential customers to the online store of the authorized distributor, usually already "controlled" by the selection criteria and the requirements imposed in the selective distribution agreement.

[87] E-commerce Sector Inquiry Final Report, Section B.4.5.

[88] Guidelines, § 346.

[89] Guidelines, § 350ss.

The biggest risk for competition of such restriction is the possible impact on inter-brand and intra-brand competition, softening price competition or partitioning markets. For example, such restrictions may restrict the possibility for a distributor to inform potential customers about its lower prices. The supplier could restrict the use of a price comparison services that he or some specific distributor will keep using, foreclosing others from reaching more costumers resulting in a limited competitive power, to the ultimate detriment of consumer benefit.

The assessment of the severity of a restriction on the use of price comparison services must take into consideration the market position of every party, the importance of the specific price comparison channel (the economic consequences for a distributor of foreclosing the use of the globally most used advertising channel could be beyond repair) and if there are at least other possible forms of online advertising for the distributor (*e.g.*, on modern dates, so much focused on social media image, advertising on such platforms could result quite effective).

On the other hand, restrictions on the use of price comparison services may lead to efficiencies that could justify the restriction themselves. That could be the case when, according to the provision of article 101(3) VBER, they would be preventing counterfeit, protecting brand image or granting high quality level. It must always be considered whether any such efficiencies could be achieved through less restrictive means, like conditioning the use of price comparison services to the providing of comparisons or reviews on quality, level of customer service, or other features of the distributor offerings.

2.3.5. Restrictions on The Use of Online Marketplaces

Fundamental for the development of this thesis is the analysis of vertical restraints known as ‘restrictions on the use of online marketplaces. Online marketplaces can be defined as a type of e-commerce website where product or service information is provided by multiple third parties. Online marketplaces are the primary type of multichannel e-commerce[90].

“*Online marketplaces connect merchants and potential customers with a view to enabling direct purchases and are generally providers of online intermediation services*”[91]. Since their activity also entails a direct purchasing functionality, they can’t be considered only as advertising services.

When talking about e-commerce, it is almost impossible not to think of Amazon or eBay. “*Their reputation precedes them not only because they have forged the path of online retail sales for more*

[90] BUTTE, BRIAN, *Cloud: The engine of the omni-channel customer experience*, Network World.

[91] Guidelines, § 332.

than two decades, but for having maintained their leadership over time"[92].

As of 2021, they both still stand as the most visited online marketplaces worldwide. However, in recent years, the e-commerce boom "*spawned a plethora of digital marketplaces*"[93].

For producers and distributor, online marketplaces are nowadays a fundamental sales channel, providing them with access to an enormous number of customers. End users, on the other hand, enjoy the possibility to buy anything on online marketplaces. From a commercial point of view, online marketplaces may allow distributors to start selling with lower initial investments and facilitate cross-border sales, increasing the visibility of small and medium-sized players that otherwise would have been left in the shadow of the 'big players'.

According to the Final Comments on the e-commerce Sector Enquiry, the commission found that it is interest of manufacturers to restrict the use of online marketplaces by their distributors[94], to achieve, for example, an image protection, an effective response to counterfeiting, the granting of sufficient pre- and post-sale services, or a dedicated line of costumer care. Vertical restraints regarding online marketplaces can be various, ranging from a total ban to restrictions on specific ones that do not meet certain qualitative requirements.

Manufacturers may decide to prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialized marketplaces, in order to ensure certain quality standards regarding the environment in which their goods or services may be sold[95]. A ban of the use of online marketplace could also result from impossible qualitative requirements, since no online marketplace would be capable of meeting these requirements, which may result in a *de facto* ban (*e.g.*, the requirement that the logo of the online marketplace is not visible, or any website's domain name contains the name of the distributor).

Vertical agreement containing online marketplace restriction can benefit from the VBER exemption whenever they respect the elements necessary to be covered by the 'safe harbour umbrella' (*e.g.*, less than 30% market share) and they do not directly or indirectly, have the object of preventing the effective use of the internet by the buyer.

The peculiarity of restriction or ban of sales on online marketplaces lies within the fact that it concerns the manner in which the buyer may sell online and does not restrict sales to a particular territory or

[92] CHEVALIER, *Online marketplaces - statistics & facts*.
[93] *Ibid*.
[94] E-commerce Sector Inquiry Final Report, section 4.4.
[95] *Infra*, Coty case.

customer group. Other online sales channels remain available to the buyer, as the buyer may still sell the contract goods or services via its own online store and other online channels, or it may still use search engines, online advertisement, and third-party platforms to increase the possibility of sales.

To assess to which extent agreements exceeding the market share threshold - therefore not eligible for the application of the VBER provisions - could still be considered lawful and not restricting actual competition, the Guidelines give the reader recommendations in a specific section[96]. Most the development on this matter were the consolidation of the "Coty Case", that will be analysed later in this work in the context of luxury image protection; yet it appears necessary to understand the general rule applicable in several context.

In the context of a vertical distribution agreement, where a distributor make use of specific marketplaces and where the manufacturer has not entered into an agreement with the online marketplace, the former may be unable to verify if the latter meets the conditions which its authorized distributors must fulfil for the sale of the contract goods or services. In that case, a restriction or ban may be appropriate and may not go beyond what is necessary to preserve the quality or ensure the proper use of the contract goods or services.

Nevertheless, where a manufacturer selects an operator of an online marketplace as a member of its selective distribution system, where he restricts the use of online marketplaces only to some authorized distributors but not others, or where he restricts the use of an online marketplace while still using himself, it very unlikely that such restrictions could be regarded as being lawful in an antirust point of view.

The main competition risk which could arise from this category of restrictions regards intra-brand competition at the distribution level. For instance, small or medium-sized distributors may depend mostly on online marketplaces to attract customers and make their business economically sustainable. Restrictions on the use of online marketplaces may deprive those buyers of a potentially vital sales channel, and to the extent that they could not sustain anymore that kind of agreement, their exclusion from the market would substantially result on a reduction of the competitive power they would otherwise exert on other authorized distributors.

In order to confirm whether there are such anti-competitive effects on the market, it is first necessary to assess the degree of inter-brand competition. It should be considered in fact that these two types of competition, despite being completely independent from one another, could mitigate or increase the

[96] Guidelines, § 337 ss.

effect a restriction which they could singularly have on the market. Market position of the distributor competitors is fundamental if considered that reduction of intra-brand competition by itself is unlikely to lead to negative effects for consumers where inter-brand competition is strong at the supplier and distributor levels[97].

Moreover, it is necessary to understand the type and scope of the restrictions, since, for example, a ban on all sales through online marketplaces could result in much more detrimental effects than a restriction on the use of specific online marketplaces or a particular qualitative criteria requirement to allow its use.

The agreement must also be analysed having particular attention also to the importance a specific online marketplace would have on the relevant product and geographic markets (*e.g.*, the restriction of the most used online e-book marketplace in the context of selling audiobooks could not be seen as justified as it could for a manufacturer which only produce physical books).

The assessment must consider whether the efficiencies before mentioned (*e.g.*, image protection or combating counterfeiting) could be achieved through less restrictive means in accordance with the conditions of Article 101(3) TFEU. As would be the case, for instance where the online marketplace allows distributors to create their own brand shop within the marketplace, thus exerting more control over the manner in which their goods or services are presented and sold.

Finally, as we have already mentioned, quality-related justifications relied on by the manufacturer will be unreasonable where: *(a)* the supplier itself uses the online marketplace; *(b)* the supplier imposes the restriction only on some distributor; and *(c)* the operator of the online marketplace is itself an authorized member of the selective distribution system.

2.4. Selective Distribution Agreements and Online Sales

In the first chapter we have analysed all the antitrust provisions which form the application field of any kind of vertical agreement in the classic brick-and-mortar context, in particular in the context of a vertical distribution agreement. In the second chapter, until now we have focused on the understanding of all the vertical online restraints, and in the following paragraph we will summarize their application to vertical distribution agreement in an online context.

Finally, with the publication of the new VBER the Commission have confirmed, after a long debate, all the development of the case law, giving a unite guidance, from which to elaborate all the possible

[97] *Supra*, Case C-306/20 - Visma Enterprise, § 78.

application of vertical restraints in vertical distribution system in an online context.

The Commission has confirmed the possibility to extend the qualitative standards set for the offline shop also to online shops. The manufacture can, for example, require a distributor to have a non-virtual shop, therefore consequently limiting the online distributors on the access of his selective system (yet respecting the limits set by the already mentioned actual total ban of online sales)[98].

An absolute ban of online sales appears to be very hard to justify if not sustained by special characteristic of the product. The landmark on this matter is the Pierre Fabre case that have subverted the, at the time quite recent, decision by the Belgique Cassation court which had considered lawful an absolute ban justified by the nature of the product of Makro (a cash and carry operator)[99].

The protection of a specialized commerce, capable of providing a high-level quality or technologic development can be a lawful choice in the form of restrictions in selective distribution systems, provided that the selection is performed following the objective Metro criteria established for all the distributors[100].

The Pierre Fabre judgment have created some uncertainty in the legislative field in the way courts and undertakings were to construe agreements, which was finally interpreted in the Coty judgement, main focus of this thesis in regard to the *allure* concept it entails. For now, it is important to highlight that the ban on online sells can be justified as long as does not entail a complete ban of all the online channels.

The present European position on the point is the result of a compromise, if not of conflict, between manufacturers' positions on their recognizable brand products and distributors (also conflicted between traditional and online distributors)[101].

Manufacturers, hardly capable of justifying a *tout court* ban on online sales, considering that most of them actually use their own online channel, have tried repeatedly to impose *mutatis mutandis* the same criteria applicable to the offline selective distribution channel also to the online context, since the early implementation of the Regulation 330/2010 (old VBER).

The result of such conflict on the point is that a manufacturer which would prefer a traditional brick-and-mortar shop can legitimately exclude purely online distributors, obliging them to at least maintain

[98] CATRICALÀ, *Diritto Antitrust*, 299.

[99] *Ibid*.

[100] European Court of Justice, C-26/76, *Metro SB-Grossmärkte GmbH ('Metro') & Co. KG v. Commission of the European Communities*, *infra* "Metro Case".

[101] CATRICALÀ, *Diritto Antitrust*, 305.

one physical area of sales (provided of course that would respect the criteria to access the selective distribution). Such provision was naturally strongly contrasted by the biggest online players. eBay comments on such a provision stated:

> "*eBay regrets the Commission's choice of several proposals that are inconsistent with competition and consumer choice. For example, allowing a supplier to require a retailer to have a brick-and-mortar presence before they may sell online will increase costs to consumers without any qualitative benefits and protect inefficient, incumbent retailers. This provision addresses a free-riding risk that recent survey data disputes and which, even if substantiated, could be confronted by substantially less far-reaching measures*"[102].

However, the opinion and the pressure of the big online platforms managed to remove some obstacles to the development of selective distribution systems in an online context, such as the complete ban on online sales, the imposition of quantitative limits to the online sales or the possibility of use of online third-party platforms, even within the limits sets by the Coty case.

2.4.1. The Pierre Fabre Dermo-Cosmétique Case

It has been mentioned that one of the landmark cases regarding vertical distribution and online sales is represented by the case Pierre Fabre Dermo-Cosmétique. The imposition of online restrictions set in this case brought the Court of Justice of the European Union (CJEU) to held that a distribution agreement, from which result a substantial absolute ban of online sales, cannot be considered lawful[103], placing this decision in the group of rules and principles fundamentals to understanding of the use of Internet in selective distribution networks[104].

Pierre Fabre Dermo-Cosmétique (PFDC) is a company part of the Pierre Fabre group, that manufactures (mostly via the subsidiaries Klorane, Ducray, GalÇnic and Aväne) and sells various cosmetics and products for the personal care, mainly in pharmacies across Europe. Nevertheless, in France, even though commercialized via such channel, these products are not recognized by the law as medicines, and therefore are not covered by the pharmacist's legal monopoly[105].

The general conditions of distribution of such brands provides that sales of their products must be

[102] *Ibid*, 306.
[103] *Kings College Eu Competition Law*, Unit 9, 24.
[104] COLANGELO, TORTI, *Selective Distribution and Online Marketplace Restrictions Under EU Competition Rules after Coty Prestige*, 13.
[105] Judgment of the Court (Third Chamber) of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, Case C439/09, hereinafter "Pierre Fabre Case".

made exclusively in a physical space, in which a qualified pharmacist must be present,[106] resulting in a *de facto* complete ban of the products over the Internet[107].

The case was opened in 2006 when the French Competition Authority commenced *ex officio* a proceeding against Pierre Fabre and concluded that the abovementioned contractual clause amounts to an unlawful ban under the national and European Law[108] ordering its removal from the contracts and extensively the removal of all the terms consisting in an equivalent ban.

In 2008 Pierre Fabre appealed the decision before the Paris Court of Appeal that referred the question to the CJEU asking whether a

> "*general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a 'hardcore' restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU]"*[109].

The CJEU concluded that those provisions amounted to a restriction of competition by object and therefore fell under the scope of application of the now Article101(1) TFEU[110], also remarking that in order to be exempted, the agreement should have fulfilled the Metro criteria.

The court ruled that the prestigious image of the products could not be a sufficient justification for the restriction of sales of such products in an online context[111], notwithstanding the possibility of avoiding the risks of counterfeiting and the free-riding problem arising between authorized pharmacies.

Moreover, it explained that the possible ratio, presented by Pierre Fabre, of such a ban consisting in a protection of the well-being of the consumers (granted by the presence of a well-trained personnel for a correct advising) could not justify its existence. Pierre Fabre argued that this "*cosmètovigilance*" would have obligated the distributor to protect the customers controlling and

[106] Article 11 e 12, General Condition of distribution and sales.

[107] Opinion of Advocate General of the Curia Europe, delivered on the 3 March 2011, Case C-439/09, on Pierre Fabre Case.

[108] Article 81 EC (now 101 TFEU) and Article L. 420-1 of the French Commercial Code

[109] See EU Reference for a preliminary ruling under Article 234 EC 2011, from the Cour d'Appel de Paris (France), made by decision of 29 October 2009, received at the Court on 10 November 2009, in the proceedings, § 24.

[110] EU Judgment of the Court, Case C-439/09 2011, in the proceeding of Pierre Fabre Case.

[111] Applicable in this case, as it will be further explained in this thesis, only because relating to a complete ban of the internet channel.

reporting the undesired effects of the cosmetics. Nevertheless, the court noticed that the products where not recognized as medicines, and that a ban of online sales would therefore only unreasonably restrict passive sales to end users located outside the physical trading area of the relevant member of the selective distribution system.

The court explained that the agreement could neither benefit from the, at the time in effect, VBER (Regulation No 2790/1999)[112], as it did not fall under the provision of article 4 point c, permitting "*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 unauthorized place of establishment*"[113]. Examining the term place of establishment, the court ruled that it cannot be considered as also referring to the place where Internet services are provided.

To sum up, the case has demonstrated that an actual ban of online sales in a hardcore restriction under the EU Competition Law, setting one of the main rules regarding the online context. Secondly, it was of great interest for the entire antitrust environment, not only as one of the cornerstones of European antitrust law, but also because it has been one of the first approaches for the implementation of a "luxury products" definition.

Even though the court decision was subject to many critiques, since it rejected the different needs of prestigious products, it opened up the discussion on the possibility to introduce peculiar restriction depending on the quality and the aura of the products themselves, which ultimately led to the Coty Case principle and its consolidation in the new Vertical Block Exemption Regulation.

[112] European Commission, Regulation no 2790/1999 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.
[113] *Ibid*.

CHAPTER THREE

THE NEW VERTICAL BLOCK EXEMPION REGULATION AND THE PROTECTION OF LUXURY AURA

3.1. Commission Regulations 2022/720 and 2010/330 Compared

On 10th May 2022 the European Commission has adopted the new Vertical Block Exemption Regulation (VBER) accompanied by the new Guidelines, following a thorough evaluation and review of the 2010 rules.

The revision was intended to provide undertakings with simpler and up-to-date guidance, in order to assist them in assessing the compatibility of their supply and distribution agreements with EU competition rules "*in a business environment reshaped by the growth of e-commerce and online sales*"[1].

Executive Vice-President Margrethe Vestager, in charge of competition policy, pointed out that "*the rules are important tools that will help all types of businesses, including small and medium enterprises, to assess their vertical agreements in their daily business*"[2].

One of the main changes to the previous rules focused on adjusting the perimeter of the safe harbour. In particular, the new rules narrowed the scope of the safe harbour as regards dual distribution and parity obligation. A common ground in all the provision introduced by the new rules is the principle that certain aspects of exempted agreements cannot automatically be considered lawful but must instead be assessed individually.

On the other hand, the new rules enlarged the scope of the safe harbour, provided that all other condition for the exemption are met, as regards the possibility for the distributor to actively approach individual customers in specific ways (*i.e.* active sales) and certain practices relating to online sales (namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems).

Regarding sales restrictions and distribution models, area of interest for the purpose of this

[1] European Commission, Press Release on the adoption of new Vertical Block Exemption Regulation and Vertical Guidelines, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2844.
[2] *Ibid.*

work, the new rules allowed suppliers greater flexibility. Specifically, Article 4 of the VBER has been reworked to identify hardcore restrictions for each distribution model (exclusive distribution; selective distribution; 'free distribution') introducing new rules allowing the supplier to designate up to a maximum of 5 exclusive distributors (so-called shared exclusivity), with the possibility of preventing active sales in the territory/customer group assigned to these exclusive distributors (as before explained, above this number, the distributors' incentives to make investments to promote and sell the supplier's goods/services would be lost and the risks of free-riding would increase). In addition, the supplier is now also allowed to require the buyer (i.e., exclusive distributor, selective network member) to pass-on to its direct customers the aforementioned restrictions.

Regarding selective distributions systems, the supplier can now, in a territory where he operates such a distribution system, extend applicable restrictions to distributors regardless of whether the buyer is located inside or outside that territory.

With respects to online sales, in view of the growth of the online sales channel (which no longer requires special protection compared to physical sales channels) the dual pricing does not constitute anymore a hardcore restriction, provided that it does not have the object of preventing cross-border sales or the actual use of the Internet for the sale of the contracted goods/services. Similarly, the so called principle of equivalence is no longer mandatory, provided that do not indirectly have the object of preventing the effective use of the internet to sell the contracted goods/services in particular territories or to particular customers.

More generally, the new rules aim to clarify and update the framework for assessing online sales restrictions and foster more uniform approaches by NCAs. To this end, the new provisions of the VBER and the Guidelines incorporated developments in the case law of the Court of Justice, in particular the principles set out in the Pierre Fabre and Coty Germany judgments.

Specifically, Article 4(e) of the new VBER established that online sales restrictions are considered hardcore (i.e., territorial or customer restrictions) when, directly or indirectly, in isolation or in combination with other factors, have the object of preventing the actual use of the Internet by the buyer or its customers to sell the contracted goods or services or of preventing the use of an entire online advertising channel (*e.g.* price comparison tools or search engine advertising). Conversely restrictions on online advertising which do not preclude the use of an entire advertising channel may qualify for the block exemption, such as where they relate to meeting certain quality standards or the content of online advertising.

The Guidelines contained even further guidance on when online sales restrictions configure hardcore restrictions as well as specific guidance for evaluating restrictions on the use of online platforms and price comparison tools.

Incorporating the principles of the Coty case, the guidelines clarified that, in principle, such restrictions are covered by the block exemption, as they restrict only one of the modes of online sales that can be used by the distributor (who remains free to sell through its own online store and other online channels and to use online advertising), provided, again, that the restriction does not have the object of preventing the actual use of the Internet for the sale of the contracted goods/services in particular territories or to particular customers.

The Guidelines specified that unlike marketplaces, price comparison sites do not constitute a separate sales channel but rather an advertising channel, since the purchase takes place on the site of the retailer to which customers are redirected. Accordingly, restrictions on the use of price comparison services are considered restrictions that prevent the use of an entire advertising channel and configured as hardcore restrictions. However, restrictions that do not prevent the use of all price comparison services, such as a requirement that the service meet certain quality standards, may qualify for the block exemption.

The new provisions, while incorporating the principles stated in such antitrust law landmarks, did not fill the void left in regard to a clear definition of "luxury" which to date still seems to be vague and open to interpretation.

In order to have a complete understanding of the rationale of the legislative revisions it is appropriate to review in detail the aforementioned Coty Case and the Court reasoning.

3.2. Coty Case

On December 6, 2017, the judgment of the Court of Justice of the European Union (hereinafter "Court", "European Court" or "Court of Justice") in the Coty case was finally published, and it clarified that a manufacturer which has adopted a selective distribution system can legitimately prohibit distributors that are part of its network from recognizably using third-party companies for online sales (so-called 'marketplaces').

The ruling in question was part of the dispute between the company Coty Germany ("Coty"), which produces luxury cosmetics in Germany and markets them through a selective distribution network, and the company Parfümerie Akzente ("Akzente"), which has been distributing Coty's products for many years as an authorized retailer, both in physical stores and online.

In 2012, after the publication of the old VBER (Reg. 330/2010), Coty decided to alter the conditions applied to the online distribution of its products and introduced a clause providing that authorized retailer were entitled to sell the products on the Internet, on the condition that this kind of sales was conducted by an "electronic shop window" of the very same authorized store. The explicit intention of this clause was to preserve the "luxury character" of the products[3].

The amendments resulted in the impossibility for Coty's distributors to use a different business name and/or enter in contractual relationship with a non-authorized third-party undertaking. Therefore, the selective distribution system, *inter alia*, effectively foreclosed sells on the most famous online marketplaces (e.g., Amazon or eBay).

Parfümerie Akzente refused to sign the amended contract. As a result of Akzente's refusal to sign the changes made to the contract by the disputed clause, Coty asked the national court to prohibit Akzente from distributing its products by means of the "amazon.de" platform.

The German Court of the first instance (*Landgericht Frankfurt am Main*), dismissed the case finding the disputed clause contrary to European Union antitrust law[4]. Coty therefore appealed to the Frankfurt Higher Regional Court (*Oberlandesgericht Frankfurt am Main*) which stayed the proceedings and asked the EU Court for a preliminary ruling on four questions:

> "*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?*
>
> *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*

[3] Coty Case, C-230/16, § 15.

[4] In particular, contrary to Article 101(1) TFEU.

> *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"?*"[5].

The European Court ruled on all questions raised by the German court, giving a clear interpretation of the legitimacy of the ban on the use of marketplaces, as part of a selective distribution system for luxury goods, as instrumental in preserving the brand's prestige image.

In essence, by its first question, the referring court asked whether, under Article 101(1) TFEU, a selective distribution system for luxury goods designed primarily to preserve the luxury image of those goods is compatible with the European antitrust law. The Court explained that Article 101(1) prohibits all agreements which actually restrict competition, but the organisation of a selective distribution network is not prohibited provided that distributors are chosen on the basis of uniform objective qualitative criteria, not applied in a discriminatory way. The system must also guarantee that, to preserve its quality and ensure a proper use the characteristics of the product in question, such a network is necessary and, finally, that the criteria do not go beyond what is necessary (the aforementioned Metro Criteria).

The Court, referring to previous judgments, explained that the quality of luxury goods is made not only of their material characteristics, but also of "*the allure and prestigious image which bestow on them an aura of luxury*", enabling consumers to distinguish them from goods of a similar nature[6]. An impairment to that aura of luxury is likely to affect the actual quality of those goods. Moreover, the Court had taken the view that the establishment of a selective

[5] Coty Case, § 20.

[6] Copad Case, C-59/08, § 24-29.

distribution system also contributes to the reputation of the goods themselves and to the sustaining of their aura of luxury.

Contrary to the claims of Akzente and the German and Luxembourg Governments, the assertion contained in paragraph 46 of the judgment in the Pierre Fabre Case, must be only "*read and interpreted in the light of the context of that judgment*". In that case, the question was whether a prohibition on the online sale of the contracted goods complied with Article 101(1) TFEU, rather than whether such a system in its entirety was compliant and the goods covered by the selective distribution system at issue were not luxury goods, but cosmetic and body hygiene goods.

Consequently, it cannot be inferred that the Court sought to establish a statement of principle according to which the preservation of a luxury image cannot be enough to justify a restriction of competition.

By its second question, the referring court asked, whether and to what extent Article 101(1) TFEU precludes the use of contractual clauses which prohibits authorised distributors (in a selective distribution system indented to preserve the luxury image of the contracted goods) from using, in a discernible manner, third-party platforms for the online sale.

Given that a selective distribution system in this case was legitimate, the Court affirmed that it was up to the referring court to determine whether the Metro Criteria were met. Nevertheless, it was also it was duty of the Court of Justice to provide the referring court guidance and points of interpretation of EU law, mainly referring to previous judgments[7].

The ECJ highlighted that the clause at issue was intended to preserve the luxury image, objective and uniform, and applying indiscriminately to all authorised distributors[8]. In regard to the elements of proportionality, appropriateness, and necessity, the Court affirmed that, since exclusively associating the contracted goods with authorised distributors only is precisely one of the objectives sought when recourse is had to selective distribution system, the limitation is coherent with the specific characteristics of the system. The obligation imposed on authorised distributors to sell the contracted goods online solely through their own online shops, without using a different business name, or of third-party platforms provided the supplier with a guarantee of the maintaining of the aforementioned association.

[7] Judgment of 11 December 1980, "*L'Oréal*", Case C-31/80, § 14.

[8] Coty Case, § 42.

The Court found that the prohibition at issue enabled the supplier to check that luxury goods would have been sold online in an environment corresponding to its predefined qualitative conditions, and whichever distributor were not to comply with such conditions could have been subjects to actions based on the contractual link existing between the parties. On the contrary, the fact that a third-party platform has no contractual link with the provider could effectively impede any action that the former might deem necessary to make the latter comply with the standards.

The possible internet sale of luxury goods via non-authorised platforms "*involves a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character*"[9]. The fact that a good is not marketed on a shop for goods of all kinds, contributes to the creation and preservation of luxury image of the goods among consumers.

The Court of Justice found the clause in question to be perfectly necessary for the objective pursued, since, contrarily to the clause referred to in the Pierre Fabre case, it did not contain an absolute prohibition to sell the contracted goods online. Indeed, the prohibition applied exclusively to sales performed via discernibly operating third-party platforms.

Coherently, given the impossibility for the supplier to require online platforms to comply with the quality criteria imposed on its authorised distributors, the Court found that an authorisation given to 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*"[10].

To sum up, while leaving the answer to the second question to the referring court, in its reasoning the European court sustained that a similar contractual clause (prohibiting, in a selective distribution system for luxury goods, authorised distributors from using, in a discernible manner, third-party platforms for internet sales) should be considered lawful in respect to Article 101(1), on condition that that clause has the objective of preserving the luxury image, is laid down uniformly and not applied in a discriminatory fashion, and is proportionate in the light of the objective pursued.

The third and fourth question regard the interpretation of Article 4(b) and (c) of the at the time

[9] *Ibid*, § 49.
[10] *Ibid*, § 56.

current VBER (Regulation No 330/2010). The referring court asked whether in similar circumstances, the prohibition imposed on the distributors of a selective distribution system for luxury goods of making use, in a discernible manner, of third-party undertakings for internet sales constitutes a restriction of their customers, within the meaning of Article 4(b), or a restriction of passive sales to end users, within the meaning of Article 4(c). Both articles refer to some examples of, as previously described, hardcore restrictions, excluding the application of the exemption laid down in Article 2 of the regulation.

The Court explained that, again contrarily with the one examined in the Pierre Fabre Case, the clause examined in the present case did not prohibit the use of Internet sales but consisted only in a so-called marketplace ban, consequently not implicating a hardcore restriction. Moreover, the Court was of the idea that is did not "*appear possible to circumscribe, within the group of online purchasers, third-party platform customers*"[11].

Moreover, as highlighted by Advocate-General Wahl[12], customers could always have been able to find an online offer of authorised distributors by using search engines, since advertise on third-party platforms and online search engines were still possible in the agreement at stake.

Both third and fourth question were therefore answered negatively by the Court.

To sum up the consequences of the presented case we could say that the European Court confirmed previous cases as Metro and Copad, clarifying the fields in which a selective distribution system could lawfully be provided and its limits in the application. It distinguished the judgment from the Pierre Fabre Case, because Coty had not imposed an absolute online sales ban, Coty's restriction did not go beyond what was necessary to preserve the luxury image of its goods and did not fall within Article 101(1) accepting a similar approach considered but rejected in old cases[13].

3.3. Protection of Luxury Aura

To sum up, in this thesis it has been first examined the whole range of different provision applicable to vertical distribution agreements, with a particular view on the selective

[11] *Ibid*, § 66.

[12] Opinion of Advocate General Wahl delivered on 26 July 2017, Coty Case, Case C-230/16.

[13] WHISH AND BAILEY, *Competition Law (10th edn)*, 4. See also Case T-19/92, "*Groupement d'Achat Édouard Leclerc v Commission*", §178–192 and Case T-88/92, "*Groupement d'Achat Édouard Leclerc v Commission*", §170-184.

distribution system. Such a system, both in an online and in a brick-and-mortar context it's generally preferred by luxury manufacturers to set a quality standardization for distributors to comply with.

Selective distributions system, according to the case law and law provisions examined, can be operated also for other product categories than luxury goods, as acknowledged by the Court of Justice[14] in relation to "high-quality" and "high-technology" products. The Coty judgment clarified that a selective distribution system compliant with Article 101(1) TFEU can, subject to the Metro Criteria being fulfilled, be operated for luxury goods in order to preserve the luxury image of those goods.

The protection of luxury aura is a main concern for any producer of such goods. It has, in fact, been recognized by the European courts that the quality of luxury goods is not just the result of their material characteristics but encompasses also the "aura of luxury". That addiction enables consumers to differentiate branded products from similar ones and an impairment to the aura of luxury would be likely to affect the actual quality of those goods[15].

Combining the European Commission's opinion ("author" of the Guidelines) and the Coty case, it may be asserted that online sales bans would not always be compatible with the competition law, rather they are subject to a case-by-case assessment and may be exempted when the market situation justify them. Luxury trademark interests are of absolute concern while making that very assessment.

In the Guess case[16], the Commission fined the famous company approx. € 40 million for the online sales restriction in the selective distribution agreement with its retailers. Contrary to the Coty case, the online sales restriction contained in the agreement resulted in an absolute ban for the selected retailers, unless explicit authorization from Guess to conduct online sales was obtained. It should also be mentioned that the decision to grant authorization was not based on a list of set quality criteria, since Guess Europe did not have nor released any document containing a written list of quality criteria for websites[17]. Moreover, quality criteria were not even specified in relation to deciding whether or not to grant the authorization to

[14] Metro Case, C26/67.

[15] European Commission, Competition policy brief, *EU competition rules and marketplace bans: Where do we stand after the Coty judgment?*.

[16] European Commission, Case AT.40428, "*Guess*".

[17] *Ibid*, § 62.

retailers to sell online[18].

Being in contrast with the Metro Criteria, that kind of strategy did not comply with the objective a similar ban should have (i.e., ensuring compliance with a set of objective quality criteria within a selective distribution system) and it was only directed to favour Guess' own online shop and sales activities. Therefore, the written authorization requirement constituted a restriction of competition by object within the meaning of Article 101(1) of the TFEU.

Even if Guess were to be considered as a luxury brand, "luxury" image justification implemented in the Coty Case could not have been applied in this case since the ban to sell online was absolute.

Generally speaking, a total ban to sell on third-party platforms without taking into account the characteristics of those platforms shall be viewed as disproportionate approach. At the same time, it should not be classified as a hardcore restriction if the distributor has other options to sell the goods online.

3.3.1. National Jurisdictions

Given the precedents and the opinions expressed by the European bodies, there are also other cases in different National Courts that are worth mentioning.

First of all, the Nike/Netherlands case ("NEON Case"), where, in 2017, Nike European Operations Netherlands B.V. ("NEON") initiated a proceeding against Action Sport SOC. COOP, A.R.L. (Action Sport), an Italian Nike's retailer (mainly selling sportswear and footwear) in relation to violation of the requirements of the selective distribution system by reselling at third party platforms[19].

Action Sport, member of NEON's selective distribution system in the EU, offered Nike products on Amazon contrary to NEON's distribution policy. NEON defined a specific list of authorized retailors, including online ones and Amazon was not included in such a list. The activities of Action Sport led to the termination of the agreement without any claim for damages. During the litigation, NEON requested the declaratory judgement of the court, while

[18] *Ibid*, § 54-56.

[19] ERIC JANSEEN, Antitrust Alliance, *Selective Distribution and The Prohibition on Online Platforms: The Dutch Nike Case*, available at http://antitrust-alliance.org/selective-distribution-and-the-prohibition-on-online-platforms-the-dutch-nike-case/.

Action Sport relied on invalidity of that contractual restriction as being contrary to competition law.

The national court found that NEON's policy did meet the objective qualitative criteria for selecting distributors, which were not applied in a discriminatory nature. Moreover, the selective distribution system was objectively necessary considering the characteristics and nature of the products in question which were recognized as luxury goods.

As a matter of fact, the court found that Nike products shall be viewed as luxury products and NEON's policy was aimed at preserving the trademark image. Accordingly, the obligation not to sell goods via non-authorized online platform was justified by the aim of the selective distribution system.

On a similar matter, it's fundamental to also introduce the Asics/Germany case, were, unlike in the Dutch approach described above, the *per se* prohibition of sales via online marketplaces was not considered as a lawful quality requirement by the German Competition Authority in 2015 (decision ultimately confirmed, in December 2017, by the German Court). The courts found that the business model of an online marketplace as such was not sufficient to harm the product image[20].

Rather than applying a full prohibition of sales via online marketplaces, the manufacturer shall prefer and be able to regulate the sales by authorized retailers by applying less severe measures. The opinion of the court was that the restrictions at stake were not necessary to protect the trademark image, since an increment in the competition on price resulting from marketing the goods on online marketplaces does not necessarily damage the trademark image and reputation towards the clients.

The German approach seems to have preferred an interpretation which gave great importance to the possibilities provided by online marketplace for businesses (in particular small and medium-size ones)[21].

A unique position can be found in France in the case "Caudalie", where, in 2017, a platform

[20] Press release, Bundeskartellamt, *Unlawful restriction of online sales of ASICS running shoes*, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/27_08_2015_ASICS.html.

[21] BOUDET, *German Bundeskartellamt's Decision against Online Sales Restrictions by ASICS Ultimately Confirmed*, available at https://www.covcompetition.com/2018/04/german-bundeskartellamts-decision-against-online-sales-restrictions-by-asics-ultimately-confirmed/

ban was recognized as neither in concordance with nor contrary to competition law by the French Supreme Court. Unlike the Paris Court of Appeal, which condemned the conduct, the Supreme Court rather criticized the "*way the lower court substantiated its judgement*"[22], stating that the former did not give an explanation to why the platform ban amounted to a hardcore restriction. The case must be analysed with a critical eye, since is a pre-Coty one, hence at the time of the ruling there were still uncertainties as to the online sale bans.

Finally, two head cases for a comprehensive analysis of the current situation are the Italian L'Oréal and Landoll cases (2018).

In the first case, L'Oréal claimed that its major distributor IDS International Drugstore Italia violated its selective distribution agreement's quality requirements, *inter alia*, by selling L'Oréal products through its drugstores and on its own websites, by displaying products not in an orderly manner and with excessive discounts[23]. The Italian court ruled that the selective system of L'Oréal was lawful, as the quality requirements were objective and non-discriminatory, citing Coty judgement, as well as Regulation EU 330/2010.

The judgement focused on the issue of aura of luxury only in the context of trademark exhaustion (not of interest for the purposes of this thesis). Nonetheless, it is interesting to take a view at the reasoning of the Court of Milan. The court ruled that to consider a selective distribution system as a legitimate motive to exclude trademark exhaustion it must be demonstrated the luxury characteristic and that there is a concrete risk of harm or prejudice to the prestige of the trademark, not only a violation of the selective distribution agreements' quality standards[24].

What is a concrete prejudice to the luxury image is better explained in the Landoll Case[25] (which also focused on the more familiar issue of online sales ban in selective distribution system), where the Court of Milan ruled that presenting the Landoll products in the same manner as any other generic product sold in the online platform (even of inferior quality) and

[22] Steptoe and Johnson, *Waiting for Coty: French Supreme Court Takes a Cursory Look at Platform Bans*, available at https://www.steptoe.com/en/news-publications/waiting-for-coty-french-supreme-court-takes-a-cursory-look-at-platform-bans.html

[23] Judgment by the Court of Milan, Case no. 38739/2018, *L'Oréal Italia S.p.A. and Helena Rubinstein Italia S.p.A. v. IDS International Drugstore Italia S.p.A.*". On the point, Banterle, "*Two Recent Decisions on Selective Distribution and Infringement of Luxury Trademarks from the Court of Milan*.

[24] Stakheyeva, European Competition Journal, *Competition law in attempt to understand (Luxury) trademarks*, 15.

[25] Judgment of the Court of Milan, Case no. 44211/2018, *Landoll S.r.l. v. Mecs S.r.l.*.

without professional advice on how to use those products were enough to cause a prejudice to the trademarks[26].

The legitimacy of the selective distribution networks was firmly affirmed in both judgements, supporting and referring to Copad and Coty Cases, and in the analysis the Italian court went even further than the Coty case. In the latter it was only considered a potential non-compliance with the quality requirements, and therefore a risk of deterioration of the online presentation of the luxury goods, based on the absence of a contractual agreement between manufacturer and the third-party platform.

To conclude, in all judgements discussed, it is suggested that the role of the luxury nature of the products should be able to allow a more lenient approach from the competition law perspective to certain restrictions and/or exemptions. In some scholars' opinion, following the cases presented,

> "*selective distribution agreement should always serve a basis for protecting the image of the trademark, and hence any sale outside of the system may cause harm to the trademark owners, as well as to the authorized distributors who strictly comply with the contractual obligations. Hence, proving the actual harm to the brand should not be required. It is sufficient to demonstrate that the actions are outside the selective distribution agreement, which is in place to protect the reputation and image of the trademark*"[27].

Yet, the problem of the definition of what a luxury product is and what it defines them is still far from a definitive solution.

3.3.2. The Problem of Definition of Luxury Products

The production of the courts examined has not been abundantly clear in the context of what does constitute "luxury". In Coty the CJEU relied on the aura of luxury to justify the restriction at stake, but it did not give any guidance as to what constitutes "luxury" and the criteria to determine whether a product is covered by the "aura of luxury". The court merely clarified that online sales restriction enables manufactures of luxury goods to ensure that the goods will

[26] STAKHEYEVA, European Competition Journal, *Competition law in attempt to understand (Luxury) trademarks*, 16.

[27] *Ibid*, 16.

be sold online in “*an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors*”[28].

The previous Copad Case stated that luxury goods are “*high class goods*”[29] made not just by the “*result of their material characteristics but also of the allure and prestigious image which bestows on them an aura of luxury*”[30].

The European Commission in the Guess Case refers to Coty judgement but refrains from mentioning “luxury” justification applied by the CJEU. In fact, the Commission “politically correctly” states that the CJEU held that “*a specific contractual clause within a selective distribution agreement which pursues a legitimate objective is lawful under Article 101(1) of the Treaty only if the quality criteria are laid down ‘uniformly’ and ‘not applied in a discriminatory fashion*”[31].

In the NEON Case, the Netherlands court recognized even sports goods as “luxury”, supposedly widening the range of products that could be covered by that definition, while, on the contrary, the German court in the ASICS case did not consider ASICS running shoes as luxury goods and did not provide any guidance also on what constitutes luxury or not. The only reference to “luxury” was early given in 2015 by the German competition authority which stated that the mere fact that a product of a high quality and is sold under a registered trademark does not automatically give it an “aura of luxury”[32].

Reputable scholars highlighted that both Nike and ASICS products could be considered of the same luxury level (at least in a specific sector, e.g., running and tennis). However, it is clear that different jurisdictions and authorities had different opinion in defining what is covered by the aura of luxury and what is not[33]. This seems to demonstrate that “*the concept of luxury is rather subjective or may be even related to the value of the company*”[34].

Extra court luxury definitions have been equally deceptive and there is not a widely accepted definition of what constitutes a luxury brand. For example, the American Marketing

[28] Coty Case, § 47.

[29] Copad Case, § 25.

[30] *Ibid*, § 24.

[31] European Commission, Case AT.40428, “*Guess*”, 130.

[32] BOUDET, *German Bundeskartellamt’s Decision*, 50.

[33] STAKHEYEVA, European Competition Journal, *Competition law in attempt to understand (Luxury) trademarks*, 14.

[34] *Ibid*.

Association's dictionary of terms does not contain a definition of "luxury," "luxury brand," or "luxury marketing"[35]. While it has been claimed that the definition and measurement of luxury has been highly subjective even though luxury is not an inherently subjective construct, it has been hypothesised that definitions should be considered through three key criteria (the definition should be based on a sound conceptual foundation, it must be broadly applicable to luxury brands in general, and it should be capable of being operationalized in a way that allows the construct to be measured)[36].

"*The concept of 'luxury' has become more ambiguous due to the increased accessibility of 'luxury' products in the recent years*"[37] as well as the markets becoming highly digitalized, leading to the emergence of new perception of what constitutes a luxury product. An extreme example of that phenomenon can be found in the unbelievable ascending in popularity of the brand Supreme, born in the '90s, in 2020 was worth more than 2 billion of U.S. dollars[38]. Originally dedicated to shakers appeal and streetwear, it adopted the "scarcity strategy" (e.g., producing very little number of products), by appealing to a cognitive bias, which involves a systematic error in our perceptions leading us to believe that an object has a higher value because it is available in small quantities[39]. Supreme began its first collaborations with popular skateboarders in the 90s and over time, the collaborations grew rapidly reaching some of the world's best-known luxury brands like Louis Vuitton, Nike, Tiffany and Stone Island.

Historically, luxury products were associated with wealth, power and exclusivity, as well with the satisfaction of "non-basic necessities"[40]. According to the Oxford Dictionary, luxury can be defined as "*a state of great comfort or elegance, especially when involving great expense*", which lead to the idea that luxury always come with price, and that is something that is not affordable or possessed by everyone. The modern world and the consumerism seem to have in a certain way overcome that "obsolete definition" since today almost everyone has, to a certain extent, access to luxury[41].

Some rather find that the characteristic qualifying luxury products is the quality, not the

[35] KO, COSTELLO, TAYLOR, *What is a luxury brand? A new definition and review of the literature*, § 2.2.
[36] *Ibid*.
[37] AKTHER, *Redefining the Meaning of Luxury Goods: A Conceptual Paper*, 2.
[38] VANELLI, *Effetto Supreme: la strategia dietro il suo successo?*, available at https://marketing-espresso.com/effetto-supreme-la-strategia-di-marketing-di-successo-per-supreme/.
[39] On the point, CIALDINI, *Le Armi della Persuasione*.
[40] BRUN AND CASTELLI, *The Nature of Luxury: A Consumer Perspective*, 47.
[41] KAPFERER AND BASTIEN, *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*, 408.

price[42], while others believe that definition of luxury is created by the social and economic situation of the country and population, then "*even purchasing a lipstick or a chocolate may be viewed as luxury and used to assess the quality of one's life*" (so called "lipstick effect")[43].

There are different elements that can potentially influence the perception of luxury goods in consumers: country of origin, availability of counterfeit, social perceptions and desire to position oneself in one specific group and Internet and social network[44].

There are countless possibilities of interpretation, being asked one of the most sophisticated artificial intelligences known to the public[45], OpenAI, "*what are luxury products? can you define them?*" answered:

> "*Luxury products are high-end, premium goods that are characterized by their exclusivity, quality, craftsmanship, and prestige. They are often associated with luxury brands, which are known for their reputation, history, and image.*
>
> *[...] Luxury products are often differentiated from other products by their price point, quality, and exclusivity. They are often sold at a higher price point than non-luxury goods and are made with higher-quality materials and craftsmanship [...] sold through exclusive channels, such as luxury boutiques, high-end department stores, and online marketplaces that specialize in luxury goods, [...] often associated with a certain lifestyle and a certain level of prestige and marketed and advertised in a way that emphasizes their exclusivity and status.*
>
> *[...] in some cases, luxury goods can be defined as goods that are not necessary, but are highly desirable, and may be considered a status symbol*".

The reality is that there is a clear ambiguity in definition of luxury, which will be left for the discretion of the authorities/courts to define depending on the circumstances of the case. Luxury manufacturers should, so as to avoid any kind of critical issues, include in their agreement specific reference to the protection of the prestigious and luxurious image of their

[42] PRENDERGAST AND WONG, *Parental Influence on the Purchase of Luxury Brands of Infant Apparel: An Exploratory Study in Hong Kong*, 69.

[43] STAKHEYEVA, European Competition Journal, "*Competition law in attempt to understand (Luxury) trademarks*", 18.

[44] On the point, HUSIC AND CICIC, *Luxury Consumption Factors*; ADAMS, *Luxury Consumers Value Products, Not Buying Experiences*.

[45] On the point, see *Tutto su ChatGPT: che cos'è, come si usa e cosa permette di fare*, available at https://www.wired.it/article/chatgpt-guida-utilizzo/.

products when entering in selective distribution agreements or including certain online sale bans in their policy. Such a small expedient could enable them to invoke their rights against any distributor beaching the obligations, while proving their compliance with the competition law and eventually "direct" the judgment of the courts in a "luxury categorization".

3.4. Conclusions

In this work all possibilities for luxury products manufacturers and distributors, in the context of distribution agreement both in online and brick-and-mortar context, have been evaluated.

It has been demonstrated that protecting the luxury image of a product is in compliance with the antitrust law, as long as some standards and characteristics are respected. Yet, it has been demonstrated that courts continue to have great discretion in respect to what is and what is not "luxury". Therefore, undertakings wishing to "navigate these treacherous waters" should make all necessary arrangements to avoid any known issue.

Given that what it has been presented constitute the actual state of affairs, the question that arises is whether the incremental importance of luxury markets, especially in the online context, will rise the necessity of a different approach to the luxury image of a product.

From the provisional results of the Preliminary Report on the E-commerce Sector Inquiry, adopted on 15 September 2016, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, was constituted by distributors' own online shops, but what is the current situation? Where do we stand after a global pandemic emergency that forced most of the population to limit the contacts and the exchanging of goods in person, in a world that is socially projected to new digital experiences (like having a drink in a Metaverse[46]) and the development of various specialized Luxury Marketplaces, such as Yoox Net-a-Porter[47], Farfetch[48], Matchesfashion[49], Vestiaire Collective[50] or Luxe.Digital[51].

[46] Heineken recent marketing strategy to open a virtual brewery in the Metaverse to experience the characteristic of their new beverage. On the point see *Heineken, prima birra del Metaverso*, available at https://tg24.sky.it/tecnologia/now/2022/04/21/heineken-prima-birra-del-metaverso.

[47] On the point, Luxury Daily News Service, *Yoox launches marketplace in Europe*, available at https://www.luxurydaily.com/yoox-launches-marketplace-in-europe/.

[48] Online luxury fashion marketplace in connection with more than 1,000 boutiques and brands from around the world. Farfetch has a strong presence in Europe, with a number of local sites for different countries.

[49] Online luxury fashion retailer, based in London, that sells clothing, accessories, and beauty products from over 400 international luxury brands.

[50] Luxury resale marketplace specialized in pre-owned luxury fashion.

[51] E-commerce platform that specializes in luxury watches and jewelry.

The luxury market has been growing rapidly in recent years, driven by factors such as increasing global wealth and changes in consumer preferences. In terms of e-commerce, luxury goods have been slow to adapt to online sales compared to other consumer goods. However, luxury brands are now recognizing the potential of e-commerce and are starting to invest more in their online presence. Online luxury sales are expected to account for more than a quarter of global luxury sales by 2025[52].

Some luxury brands have developed their own e-commerce platforms, while others are using online marketplaces to reach a wider audience. However, it's fundamental to understand that brands have a variety of sales channels, not only online marketplaces or their own online store, but also physical stores, and department store sales. It is exactly the use of different channels which allow luxury brands to reach different segments of consumers, and to balance the prestige of the brand with its accessibility.

Luxury e-commerce is also influencing the way luxury goods are marketed and sold, with an emphasis on personalized and experiential online shopping experiences. The rise of e-commerce has led to a shift in consumer behavior, with luxury consumers becoming more digitally savvy and more likely to research and purchase luxury goods online. Luxury brands are increasingly investing in digital marketing and social media campaigns to reach and engage with these consumers. Also, as marketplaces are constantly evolving, new players may appear, such as luxury consignment platforms, rental platforms, and other innovative models.

The world is in a constant and rapidly accelerating transformation, and given the evident reality that luxury is a concept not only defined by quality or empirical evidence, but also tied by a double thread to the interests of a consumerist society easily and quickly influenced, the legal parallel world probably should be careful not to be dragged in the same rapid and uncertain flow.

Is hard to give a definitive answer to whether defining what luxury products are could help framing the application of some legal provisions in a specific context. Luxury definition is a subtle concept, which require a careful and thorough analysis, which should ultimately be left to the evaluation of the competent judge in a case-by-case approach.

In order to ensure consistency and predictability in the application of EU competition law, the

[52] Stockal Market Research, "*Luxury retail shines bright like a diamond*", available at https://www.stockal.com/blogs/luxury-retail-shines-bright-like-a-diamond.

courts may establish a clearer definition of what constitutes a luxury aura. The EU courts, especially the Court of Justice of the European Union (CJEU) have the task to interpret EU law, and to make sure that it is applied in a consistent way across all EU member states. Therefore, the CJEU may develop a consistent case law on the meaning of luxury aura, and the criteria to be taken into account when assessing whether a product has a luxury aura, which would provide more guidance for the national courts and the EU Commission in their application of EU competition law.

At the same time, the EU courts may also constantly take into account the evolution of the luxury market, the changes in consumer preferences, and the emergence of new luxury brands, and adjust their definition accordingly, in order to adapt to the market realities.

It is opinion of this work that when considering the evolution of the luxury market, changes in consumer preferences, and the emergence of new luxury brands, EU courts should approach it with a balance between maintaining legal certainty and adaptability.

The European competent authorities could provide clear and comprehensive guidance on the criteria used to determine whether a product has a luxury aura, including include both "objective" and "subjective" factors, such as price, quality, marketing and advertising, consumer perception, and the reputation of the brand.

They may consider the adoption of a flexible approach, that allows to take into account the specific characteristics of each case, and the specificities of the luxury market, rather than applying a rigid definition. It is true that "changing" the definition of luxury aura may create uncertainty for stakeholders. However, this uncertainty can be reduced by providing clear guidance on the criteria used to determine luxury status, and by being transparent about the reasons for any changes in the definition.

The authorities may also communicate these changes effectively to the market participants and provide time for them to adjust to the new definition, in order to mitigate the potential negative impact of uncertainty.

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